

OFFICIAL CODE  
OF  
GEORGIA  
—  
ANNOTATED



VOLUME 14

Title 16. Crimes and Offenses

Chapters 1-6

2011 Edition



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# **OFFICIAL CODE OF GEORGIA ANNOTATED**

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With Provision for Subsequent Pocket Parts

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*Prepared by*

The Code Revision Commission  
The Office of Legislative Counsel  
*and*  
The Editorial Staff of LexisNexis®



Published Under Authority of the State of Georgia

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## **Volume 14 2011 Edition**

Title 16. Crimes and Offenses  
Chapters 1-6

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Including Acts of the 2011 Session of the General Assembly of Georgia  
and Annotations taken from the Georgia Reports  
and the Georgia Appeals Reports

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## OFFICE OF SECRETARY OF STATE

I, Brian P. Kemp, Secretary of State of the State of Georgia, do hereby certify that

the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as same appear of file and record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 15th day of July, in the year of our Lord Two Thousand and Eleven and of the Independence of the United States of America the Two Hundred and Thirty-Sixth.



B : P. L

Brian P. Kemp, Secretary of State



## Preface

Volumes 14, 14A, and 14B cumulate and replace the 2007 editions of Volumes 14 and 14A of the Official Code of Georgia Annotated, as supplemented by the 2010 Cumulative Supplement. The 2007 Volumes 14 and 14A and their 2010 Supplements may be recycled or, if so desired, retained for historical purposes.

This volume contains all laws specifically codified in Title 16 (Chapters 1-6) by the General Assembly through the 2011 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through April 22, 2011. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated. This volume retains amendment notes and effective date notes for Acts passed during the 2009, 2010, and 2011 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2009 Session of the General Assembly, the user should consult the Georgia Laws.

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## **User's Guide**

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.



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**Editor's notes.** — Judicial decisions,  
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**Law reviews.** — For article discussing  
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## RESEARCH REFERENCES

**Am. Jur. Trials.** — Investigating Par-  
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**ALR.** — Employer's liability for assault, theft, or similar intentional wrong committed by employee at home or business of customer, 13 ALR5th 217.

#### **16-1-1. Short title.**

This title shall be known and may be cited as the "Criminal Code of Georgia." (Code 1933, § 26-101, enacted by Ga. L. 1968, p. 1249, § 1.)

#### **16-1-2. Purposes of title.**

The general purposes of this title are:

- (1) To forbid and prevent conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests;
- (2) To give fair warning of the nature of the conduct forbidden and the sentence authorized upon conviction;
- (3) To define that which constitutes each crime; and
- (4) To prescribe penalties which are proportionate to the seriousness of crimes and which permit recognition of differences in rehabilitation possibilities among individual criminals. (Code 1933, § 26-102, enacted by Ga. L. 1968, p. 1249, § 1.)

### JUDICIAL DECISIONS

**Pregnant woman not guilty of transporting drugs to fetus.** — Pregnant woman could not have reasonably known that she could have been prose-

cuted for delivering or distributing cocaine to her fetus since the fetus was not a "person" within the meaning of the relevant statute; thus, she did not receive the

fair warning mandated by O.C.G.A. § 16-1-2. *State v. Luster*, 204 Ga. App. 156, 419 S.E.2d 32, cert. denied, 204 Ga. App. 922, 419 S.E.2d 32 (1992).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 16A Am. Jur. 2d, Constitutional Law, § 427. 16B Am. Jur. 2d, Constitutional Law, § 972. 21 Am. Jur. 2d, Criminal Law, § 15 et seq.

**C.J.S.** — 22 C.J.S., Criminal Law, §§ 31, 32.

### 16-1-3. Definitions.

As used in this title, the term:

(1) "Affirmative defense" means, with respect to any affirmative defense authorized in this title, unless the state's evidence raises the issue invoking the alleged defense, the defendant must present evidence thereon to raise the issue. The enumeration in this title of some affirmative defenses shall not be construed as excluding the existence of others.

(2) "Agency" means:

(A) When used with respect to the state government, any department, commission, committee, authority, board, or bureau thereof; and

(B) When used with respect to any political subdivision of the state government, any department, commission, committee, authority, board, or bureau thereof.

(3) "Another" means a person or persons other than the accused.

(4) "Conviction" includes a final judgment of conviction entered upon a verdict or finding of guilty of a crime or upon a plea of guilty.

(5) "Felony" means a crime punishable by death, by imprisonment for life, or by imprisonment for more than 12 months.

(6) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any person.

(7) "Forcible misdemeanor" means any misdemeanor which involves the use or threat of physical force or violence against any person.

(8) "Government" means the United States, the state, any political subdivision thereof, or any agency of the foregoing.

(9) "Misdemeanor" and "misdemeanor of a high and aggravated nature" mean any crime other than a felony.

(10) "Owner" means a person who has a right to possession of property which is superior to that of a person who takes, uses, obtains, or withholds it from him and which the person taking, using, obtaining, or withholding is not privileged to infringe.

(11) "Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses, whether that duty extends to all crimes or is limited to specific offenses.

(12) "Person" means an individual, a public or private corporation, an incorporated association, government, government agency, partnership, or unincorporated association.

(13) "Property" means anything of value, including but not limited to real estate, tangible and intangible personal property, contract rights, services, choses in action, and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, and electric or other power.

(14) "Prosecution" means all legal proceedings by which a person's liability for a crime is determined, commencing with the return of the indictment or the filing of the accusation, and including the final disposition of the case upon appeal.

(15) "Public place" means any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household.

(16) "Reasonable belief" means that the person concerned, acting as a reasonable man, believes that the described facts exist.

(17) "State" means the State of Georgia, all land and water in respect to which this state has either exclusive or concurrent jurisdiction, and the airspace above such land and water.

(18) "Without authority" means without legal right or privilege or without permission of a person legally entitled to withhold the right.

(19) "Without his consent" means that a person whose concurrence is required has not, with knowledge of the essential facts, voluntarily yielded to the proposal of the accused or of another. (Laws 1833, Cobb's 1851 Digest, p. 780; Code 1863, § 6; Code 1868, § 5; Code 1873, § 5; Code 1882, § 5; Penal Code 1895, § 2; Penal Code 1910, § 2; Code 1933, § 26-101; Code 1933, § 26-401, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1970, p. 236, § 1; Ga. L. 1973, p. 292, § 3; Ga. L. 1982, p. 3, § 16.)

**Law reviews.** — For article on the effect of nolo contendere plea on conviction, see 13 Ga. L. Rev. 723 (1979). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001). For note discussing the felony murder

rule, and proposing legislation to place limitations on Georgia's felony murder statute, see 9 Ga. St. B.J. 462 (1973).

For comment on *Tant v. State*, 123 Ga.

App. 760, 182 S.E.2d 502 (1971), advocating additional reform of Georgia's system of appellate review of criminal cases, see 9 Ga. St. B.J. 490 (1973).

## JUDICIAL DECISIONS

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### General Consideration

**Construction with more specific sentencing statute.** — It was error to charge as to a minimum period of imprisonment under former Code 1933, § 26-401, where the statute under which defendant was charged with possession of secobarbital provided for both a fine and imprisonment "not to exceed two years" but did not provide a minimum term of imprisonment. *Neal v. State*, 130 Ga. App. 708, 204 S.E.2d 451 (1974) (see O.C.G.A. § 16-1-3).

**Term "another" in O.C.G.A. § 16-6-2(a)** (sodomy) includes the accused person. *Porter v. State*, 168 Ga. App. 703, 309 S.E.2d 919 (1983).

**Term "person."** — On remand from the U.S. Supreme Court, a class action suit filed by legal employees of a Georgia rug manufacturer, alleging state RICO violations based on the widespread hiring of illegal aliens in order to depress the hourly wages of its workers, survived a motion to dismiss for failure to state a claim; the federal appellate court deferred to the Supreme Court of Georgia holding that O.C.G.A. § 16-14-4, when read in conjunction with O.C.G.A. §§ 1-3-3(14) and 16-1-3(12), provided that "any person" could be sued under the Georgia RICO statute, including corporations such as the rug manufacturer. *Williams v. Mohawk Indus.*, 465 F.3d 1277 (11th Cir. 2006), cert. denied, mot. denied, 2007 U.S. LEXIS 2798 (U.S. 2007).

**Fears must be those of a reasonable man**, and not just the defendant's. Thus, where the defense was self-defense, the trial court did not err in excluding testimony, the purpose of which was to describe particular circumstances such as

would excite the defendant's fears. *Daniels v. State*, 158 Ga. App. 476, 282 S.E.2d 118, rev'd on other grounds, 248 Ga. 591, 285 S.E.2d 516 (1981).

**"Conviction".** — Entry of a guilty plea was not a judgment of conviction until sentence was imposed; therefore, a defendant who walked away from the courthouse after plea entry but before sentencing was not guilty of felony escape, but could be convicted only of misdemeanor escape. *Dorsey v. State*, 259 Ga. App. 254, 576 S.E.2d 637 (2003).

Remand for further determination was necessary because it was unclear whether one of defendant's convictions, which was a first offender conviction pursuant to O.C.G.A. § 42-8-60 et seq., was successfully completed, in which case there was no "conviction" as that term was defined under O.C.G.A. § 16-1-3(4) as there would have been no adjudication of guilt, or alternatively, whether the first offender sentence was violated and the trial court thereafter entered an adjudication of guilt and a sentence thereon, in which case it could be counted as one of the three felonies for purposes of recidivist sentencing under O.C.G.A. § 17-10-7(c). *Swan v. State*, 276 Ga. App. 827, 625 S.E.2d 97 (2005).

Prospective petit juror serving a sentence under the First Offender Act, O.C.G.A. § 42-8-60 et seq., had not been "convicted" within the meaning of O.C.G.A. § 15-12-163(b)(5), which allowed either the state or the accused to object to the seating of a juror who had been convicted of a felony; the trial court therefore erred in disqualifying the juror for cause. *Humphreys v. State*, 287 Ga. 63, 694 S.E.2d 316, cert. denied, U.S. , 131 S. Ct. 599, 178 L. Ed. 2d 438 (2010).

**“Forcible felony.”** — Child molestation constitutes a forcible felony for the purpose of establishing the defense of justification pursuant to O.C.G.A. § 16-3-21(a). *Brown v. State*, 268 Ga. 154, 486 S.E.2d 178 (1997).

**Age at the time of the offense.** — Defendant did not show that pursuant to O.C.G.A. § 16-1-3 (1) either the defendant or the state raised the issue as to the defendant's age at the time of the crimes, and thus, neither an allegation nor proof of the defendant's age was necessary to show the defendant's capacity for committing the crimes charged. Construed most strongly in support of the verdicts, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of the crimes of child molestation and aggravated child molestation as charged in the indictment. *Adams v. State*, 288 Ga. 695, 707 S.E.2d 359 (2011).

**Cited in** *Massey v. State*, 226 Ga. 703, 177 S.E.2d 79 (1970); *Moore v. State*, 228 Ga. 662, 187 S.E.2d 277 (1972); *Gordon v. State*, 127 Ga. App. 308, 193 S.E.2d 255 (1972); *Chandle v. State*, 230 Ga. 574, 198 S.E.2d 289 (1973); *Pope v. State*, 129 Ga. App. 209, 199 S.E.2d 368 (1973); *Andrews v. State*, 130 Ga. App. 2, 202 S.E.2d 246 (1973); *Cauley v. State*, 130 Ga. App. 278, 203 S.E.2d 239 (1973); *E.P. v. State*, 130 Ga. App. 512, 203 S.E.2d 757 (1973); *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973); *White v. Henry*, 232 Ga. 64, 205 S.E.2d 206 (1974); *Key v. State*, 131 Ga. App. 126, 205 S.E.2d 510 (1974); *Walker v. State*, 132 Ga. App. 274, 208 S.E.2d 5 (1974); *DeFoor v. State*, 233 Ga. 190, 210 S.E.2d 707 (1974); *Baxter v. State*, 134 Ga. App. 286, 214 S.E.2d 578 (1975); *Hall v. Hopper*, 234 Ga. 625, 216 S.E.2d 839 (1975); *Moore v. State*, 137 Ga. App. 735, 224 S.E.2d 856 (1976); *White v. State*, 138 Ga. App. 470, 226 S.E.2d 296 (1976); *Brown v. State*, 143 Ga. App. 256, 238 S.E.2d 258 (1977); *Singleton v. State*, 143 Ga. App. 387, 238 S.E.2d 743 (1977); *Singleton v. State*, 146 Ga. App. 72, 245 S.E.2d 473 (1978); *Busbee v. Reserve Ins. Co.*, 147 Ga. App. 451, 249 S.E.2d 279 (1978); *Manemann v. State*, 147 Ga. App. 747, 250 S.E.2d 164 (1978); *State v. Raybon*, 242 Ga. 858, 252 S.E.2d 417

(1979); *State v. Moore*, 243 Ga. 594, 255 S.E.2d 709 (1979); *Ratliff v. State*, 150 Ga. App. 695, 258 S.E.2d 324 (1979); *Ramsey v. Powell*, 244 Ga. 745, 262 S.E.2d 61 (1979); *State v. Davis*, 246 Ga. 761, 272 S.E.2d 721 (1980); *Crook v. State*, 156 Ga. App. 756, 275 S.E.2d 794 (1980); *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980); *State v. Shepherd Constr. Co.*, 248 Ga. 1, 281 S.E.2d 151 (1981); *State v. Roulain*, 159 Ga. App. 233, 283 S.E.2d 89 (1981); *Collins v. State*, 160 Ga. App. 680, 288 S.E.2d 43 (1981); *Morgan v. State*, 161 Ga. App. 484, 287 S.E.2d 739 (1982); *Coppola v. State*, 161 Ga. App. 517, 288 S.E.2d 744 (1982); *Wilson v. State*, 250 Ga. 630, 300 S.E.2d 640 (1983); *Hambrick v. State*, 174 Ga. App. 444, 330 S.E.2d 383 (1985); *Brown v. State*, 177 Ga. App. 284, 339 S.E.2d 332 (1985); *Smith v. State*, 190 Ga. App. 246, 378 S.E.2d 493; *Rucker v. State*, 191 Ga. App. 108, 381 S.E.2d 91 (1989); *Griffin v. State*, 199 Ga. App. 646, 405 S.E.2d 877 (1991); *Leslie v. State*, 211 Ga. App. 871, 440 S.E.2d 757 (1994); *Kelley v. State*, 235 Ga. App. 177, 509 S.E.2d 110 (1998); *State v. Lockett*, 259 Ga. App. 179, 576 S.E.2d 582 (2003); *Middleton v. State*, 264 Ga. App. 615, 591 S.E.2d 493 (2003); *Roberts v. State*, 280 Ga. App. 672, 634 S.E.2d 790 (2006); *In the Interest of P.R.*, 282 Ga. App. 480, 638 S.E.2d 898 (2006); *Lee v. State*, 283 Ga. App. 826, 642 S.E.2d 876 (2007); *Leachman v. State*, 286 Ga. App. 708, 649 S.E.2d 886 (2007); *Burnette v. State*, 291 Ga. App. 504, 662 S.E.2d 272 (2008); *Land v. State*, 291 Ga. App. 617, 662 S.E.2d 368 (2008); *Hollis v. State*, 295 Ga. App. 529, 672 S.E.2d 487 (2009); *State v. Canup*, 300 Ga. App. 678, 686 S.E.2d 275 (2009); *Moreland v. State*, 304 Ga. App. 468, 696 S.E.2d 448 (2010).

### Public Place

**What constitutes “public place”.** — What constitutes a “public place” within the meaning of former Code 1933, § 26-401 is a question of fact which must be proved or disproved by evidence in each case. *Rushing v. State*, 133 Ga. App. 434, 211 S.E.2d 389 (1974) (see O.C.G.A. § 16-1-3(15)).

Whether the act giving rise to a charge of public indecency was performed in a “public place” within the meaning of

**Public Place (Cont'd)**

O.C.G.A. § 16-1-3 was a question of fact which the trial court properly left for the jury's resolution. *Collins v. State*, 191 Ga. App. 289, 381 S.E.2d 430 (1989).

Evidence supported defendant's conviction for abandonment of a controlled substance in a public place, in violation of O.C.G.A. § 16-13-3, because when defendant realized that undercover officers were approaching, defendant threw the crack cocaine that defendant was holding at a trash barrel on the abandoned residential lot where defendant was standing; the area was within the definition of "public place" under O.C.G.A. § 16-1-3(15), as it was viewed by persons other than the members of defendant's family or household. *Woods v. State*, 275 Ga. App. 471, 620 S.E.2d 660 (2005).

**Exposure in front of window.** — Evidence that defendant would come home from work, pull off clothes and be exposed in front of the window "[j]ust to get a thrill" was sufficient to support conviction for public indecency although the act was committed in a private residence. *Hester v. State*, 164 Ga. App. 871, 298 S.E.2d 292 (1982).

**Exposure in marital bedroom and adjoining bathroom.** — Where defendant appeared nude in the presence of a teenage female babysitter in the marital bedroom and bathroom at his home, the evidence indicated that defendant by his own behavior converted his bedroom and bath from a private zone to a public place, where his nudity might reasonably be expected to be viewed by people other than members of his family or household, and thereby supports his conviction and sentence for public indecency. *Greene v. State*, 191 Ga. App. 149, 381 S.E.2d 310, cert. denied, 191 Ga. App. 922, 381 S.E.2d 310 (1989).

**Visible from outside apartment.** — In prosecution for public indecency, although an apartment may come within the definition of "public place," in such a case the state must show that defendant was visible from outside the apartment. *McGee v. State*, 165 Ga. App. 423, 299 S.E.2d 573 (1983).

**A shopping center parking lot is a public place.** *Clark v. State*, 169 Ga. App.

535, 313 S.E.2d 748 (1984).

**Defendant's loud and boisterous actions in backyard and driveway** were sufficiently "public" to support a charge of public drunkenness. *Ridley v. State*, 176 Ga. App. 669, 337 S.E.2d 382 (1985).

**Prosecution**

**Filing of accusation.** — Generally, a prosecution in state court commences with the filing by the solicitor of an accusation or Uniform Traffic Citation with the clerk of the court. *State v. Rish*, 222 Ga. App. 729, 476 S.E.2d 50 (1996).

Where the initial filing of a Uniform Traffic Citation (UTC) was not done by the solicitor, or with the solicitor's permission, the dismissal of the charges did not preclude the solicitor from refileing them on a new, formally drawn accusation, or on a UTC. *State v. Rish*, 222 Ga. App. 729, 476 S.E.2d 50 (1996).

Prosecution against defendant for simple battery was timely filed within two years, pursuant to O.C.G.A. § 17-3-1(d), since the accusation was filed within the time period which was deemed the commencement of the matter pursuant to O.C.G.A. § 16-1-3(14); the fact that the supporting affidavit was filed six days after the limitations period ran did not affect the timeliness of the action, pursuant to O.C.G.A. § 17-7-71(a), because that document was for the issuance of an arrest warrant. *Cochran v. State*, 259 Ga. App. 130, 575 S.E.2d 901 (2003).

**Return of indictment.** — In Georgia, a limitation period expires when a suspect is indicted or, more precisely, when the indictment is "returned." *Dean v. State*, 252 Ga. App. 204, 555 S.E.2d 868 (2001).

A trial court did not err in denying a defendant's motion to quash the indictment charging trafficking of cocaine since another county had not yet commenced its prosecution with the return of an indictment; therefore, the county charging defendant was authorized to exercise its jurisdiction by indicting defendant for trafficking in cocaine. *Lawrence v. State*, 289 Ga. App. 698, 658 S.E.2d 144 (2008), cert. denied, 2008 Ga. LEXIS 467, 486, 512 (Ga. 2008).

**Prosecution for misdemeanor.** — The trial court did not err in refusing to

dismiss uniform traffic citations issued within two years of the date the offenses occurred, but later amended by the state, on the ground that the statute of limitation expired; the amended accusations did

not constitute the commencement of a new prosecution and there had been no final disposition of the previously filed accusations. *Prindle v. State*, 240 Ga. App. 461, 523 S.E.2d 44 (1999).

### OPINIONS OF THE ATTORNEY GENERAL

**District attorney does not fall within definition of "peace officer" in former Code 1933, § 26-401.** 1969 Op. Att'y Gen. No. 69-339. (see O.C.G.A. § 16-1-3(11)).

**Coroners are not "peace officers" under paragraph (11).** — Under former Code 1933, § 26-401 (see O.C.G.A. § 17-4-20), a peace officer may arrest a sheriff with or without a warrant; however coroners, as provided in Ch. 16, T. 45, do not fall within aegis of "peace officers" under former Code 1933, § 26-401 (see O.C.G.A. § 16-1-3(11)) and consequently cannot arrest a sheriff in circumstances

where a peace officer may be able to, but a private citizen would not. 1973 Op. Att'y Gen. No. 73-93.

**Military police distinguished from "peace officers."** — Military police, unlike peace officers, are not vested by law with a duty to maintain "public" order. Instead, military police are confined to law and order operations within the military reservation. 1991 Op. Att'y Gen. No. 91-3.

Off-duty military police may not be employed by a chief of police as part-time city police officers. 1991 Op. Att'y Gen. No. 91-3.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 119. 29 Am. Jur. 2d, Evidence, § 195. 30 Am. Jur. 2d, Evidence § 1048. 75 Am. Jur. 2d, Trial, §§ 312, 331.

**Am. Jur. Trials.** — Defending Minor Felony Cases, 13 Am. Jur. Trials 465.

**C.J.S.** — 22 C.J.S., Criminal Law, §§ 53, 54. 22A C.J.S., Criminal Law, §§ 947, 949.

**ALR.** — Validity of statute or ordinance prohibiting or regulating holding of meeting in street, 25 ALR 114.

"Property" as including business or profession, 34 ALR 716.

Character of offense as a felony as affected by discretion of court or jury as regards punishment, 95 ALR 1115.

What amounts to conviction or satisfies requirement as to showing of conviction, within statute making conviction a ground for refusing to grant or for canceling license or special privilege, 113 ALR 1179.

When criminal prosecution deemed pending within saving clause of statute, or principle which prevents application of statute to pending prosecution, 122 ALR 670.

What constitutes former "conviction" within statute enhancing penalty for second or subsequent offense, 5 ALR2d 1080.

Larceny: entrapment or consent, 10 ALR3d 1121.

Burden of proof of defendant's age, in prosecution where attainment of particular age is statutory requisite of guilt, 49 ALR3d 526.

Homicide: burden of proof on defense that killing was accidental, 63 ALR3d 936.

What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place, 96 ALR3d 692.

Right of party litigant to defend or counterclaim on ground that opposing party or his attorney is engaged in unauthorized practice of law, 7 ALR4th 1146.

Who "harbors" or "keeps" dog under animal liability statute, 64 ALR4th 963.

What constitutes "public place" within meaning of state statute or local ordinance prohibiting indecency or commission of sexual act in public place, 95 ALR5th 229.

**16-1-4. When conduct constitutes a crime; power of court to punish contempt or enforce orders, civil judgments, and decrees.**

No conduct constitutes a crime unless it is described as a crime in this title or in another statute of this state. However, this Code section does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order, civil judgment, or decree. (Code 1933, § 26-201, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — Exercise of contempt power generally, § 15-1-4.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues involved, decisions rendered prior to codification of this principle of law by Ga. L. 1968, p. 1249, § 1 are included in the annotations for this Code section.

**Since 1833 we have had only statutory offenses.** Kilpatrick v. State, 72 Ga. App. 669, 34 S.E.2d 719 (1945) (decided under former Code 1933).

**Violation of public law.** — Our law recognizes no crimes save such as consist of violation of a public law, and there are in this state no common-law offenses save such as have been especially recognized by statutory enactment. Moore v. State, 94 Ga. App. 210, 94 S.E.2d 80 (1956) (decided under former Code 1933).

**Defendant was improperly convicted of criminal contempt** as defendant ended defendant's cross-examination when defendant was told that the time was up, and defendant might have desired to ask additional questions; that the trial court felt that some areas had not been adequately covered or covered only at the end was of no consequence; and the order to reorganize a cross-examination was too vague to be enforceable as the manner in which the cross-examination was organized was more properly left to defendant's discretion, and the exercise of that discretion in a manner different from what the trial court would have exercised was not grounds for finding that defendant willfully violated a trial court order. In re Butterfield, 265 Ga. App. 745, 595 S.E.2d 588 (2004).

**Criminal contempt conviction reversed.** — Defendant's criminal contempt conviction was reversed as the trial court relied on another court's ex parte immunity grant in ordering defendant to testify and neither court made a finding that defendant's testimony was "necessary to the public interest" as required by O.C.G.A. § 24-9-28; the state had to grant a valid immunity as broad in scope as the privilege it replaced and to show the applicability of that state immunity to the witness. In re Long, 276 Ga. App. 306, 623 S.E.2d 181 (2005).

**Appeal from conviction not rendered moot.** — The Court of Appeals of Georgia rejected the state's claim that an attorney's appeal from a criminal contempt conviction was moot, based on the possible continuing adverse collateral consequences that the attorney could suffer as a result of that conviction. In re Hatfield, 290 Ga. App. 134, 658 S.E.2d 871 (2008).

Although a judge informed an attorney of the conduct found to be criminally contemptuous, because the judge not only refused to afford that attorney an opportunity to be heard, but also became involved in the controversy, the criminal contempt finding entered against the attorney had to be reversed. In re Hatfield, 290 Ga. App. 134, 658 S.E.2d 871 (2008).

**Cited** in Gunn v. Balkcom, 228 Ga. 802, 188 S.E.2d 500 (1972); Johnson v. State, 135 Ga. App. 360, 217 S.E.2d 618 (1975); Wiggins v. State, 139 Ga. App. 98, 227

S.E.2d 895 (1976); State v. Burroughs, 149 Ga. App. 183, 254 S.E.2d 144 (1979); Boss v. State, 152 Ga. App. 169, 262 S.E.2d 527 (1979); Rushin v. State, 154 Ga. App. 41,

267 S.E.2d 473 (1980); Billingsley v. State, 183 Ga. App. 850, 360 S.E.2d 451 (1987); Cotton v. State, 263 Ga. App. 843, 589 S.E.2d 610 (2003).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 1, 11 et seq.

**C.J.S.** — 22 C.J.S., Criminal Law, §§ 3, 29, 30.

**ALR.** — Degree of proof necessary in contempt proceedings, 49 ALR 975.

What courts or officers have power to punish for contempt, 54 ALR 318; 73 ALR 1185.

Assault as contempt of court, 55 ALR 1230.

Assaulting, threatening, or intimidating witness as contempt of court, 52 ALR2d 1297.

Who may institute civil contempt proceedings, 61 ALR2d 1083.

Acquittal of criminal charges other than contempt as precluding contempt proceedings relating to same transaction, 88 ALR3d 1089.

Contempt finding as precluding substantive criminal charges relating to same transaction, 26 ALR4th 950.

Oral communications insulting to particular state judge, made to third party out of judge's physical presence, as criminal contempt, 30 ALR4th 155.

Failure to rise in state courtroom as constituting criminal contempt, 38 ALR4th 563.

## 16-1-5. Presumption of innocence; standard of proof for conviction.

Every person is presumed innocent until proved guilty. No person shall be convicted of a crime unless each element of such crime is proved beyond a reasonable doubt. (Code 1933, § 26-501, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For comment on Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977), see 12 Ga. L. Rev. 361 (1978).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION PROOF BEYOND REASONABLE DOUBT

##### General Consideration

**Editor's notes.** — In light of the similarity of the issues involved, decisions rendered prior to codification of this principle of law by Ga. L. 1968, p. 1249, § 1 are included in the annotations for this Code section.

**Doctrine of continuity is inapplicable in criminal cases.** — Presumption of continuance, that a state of things proved to have once existed is presumed to have

continued to exist until a change or some adequate cause of change appears, is not applicable to criminal cases because in criminal cases the presumption of innocence is inviolate. Sokolic v. State, 228 Ga. 788, 187 S.E.2d 822 (1972).

**"Presumption of innocence" is not synonymous with "reasonable doubt of guilt."** — The presumption refers to a substantive right, which is in the nature of evidence, and the phrase "reasonable

**General Consideration (Cont'd)**

doubt" applies to a mental condition where there is an absence of the degree of proof necessary to produce mental conviction. Ealey v. State, 141 Ga. App. 94, 232 S.E.2d 620 (1977).

**Defendant has right to remain silent in view of presumption of innocence.** Sokolic v. State, 228 Ga. 788, 187 S.E.2d 822 (1972).

**Guilt must affirmatively appear by evidence.** — One accused of crime has right to stand mute and unless it affirmatively appears by evidence that one is guilty, one cannot be legally so held. Sokolic v. State, 228 Ga. 788, 187 S.E.2d 822 (1972).

**Under certain proved facts, presumption of guilt may arise.** — While presumptions arise, under certain proved facts, that a criminal charge against accused is well-founded, such presumption can never arise except upon proved facts. Sokolic v. State, 228 Ga. 788, 187 S.E.2d 822 (1972).

**Medical malpractice action following crime.** — Because a patient had not been convicted of murder, no court had entered a judgment finding the patient sane at the time of the crime, and the evidence did not establish, as a matter of law, that the patient was sane when the patient killed the patient's mother, the patient was presumed innocent under O.C.G.A. § 16-1-5 and was not a "wrongdoer" whose status as such would be a bar to any of the patient's medical malpractice claims against a psychiatrist, and consequently, summary judgment on that issue or any issue relating to the patient's contributory negligence for causing the patient's mother's death was not authorized by the evidence since a jury issue existed as to whether the patient had the requisite mental capacity to commit murder. Bruscato v. O'Brien, 307 Ga. App. 452, 705 S.E.2d 275 (2010).

**Failure to charge as to presumption of innocence requires new trial.** — Failure of trial judge in criminal case to charge jury to effect that defendant enters upon trial with a presumption of innocence in defendant's favor, and that this presumption remains with defendant, in

the nature of evidence, until rebutted by proof satisfying jury of defendant's guilt to exclusion of reasonable doubt, is error requiring grant of new trial. Schuh v. State, 150 Ga. App. 700, 258 S.E.2d 328 (1979).

**Charge that presumption remains until guilt established beyond reasonable doubt.** — It was not error to charge that defendant entered into murder trial with presumption of innocence in defendant's favor, and that presumption would remain with defendant throughout trial and until defendant's guilt was established by evidence beyond all reasonable doubt. Anderson v. State, 196 Ga. 468, 26 S.E.2d 755 (1943).

**"Unless and until" included in charge.** — A charge taken almost verbatim from O.C.G.A. § 16-1-5 and concluding with the statement that no person shall be convicted of any crime "unless and until" each element of the crime is proved beyond a reasonable doubt was not defective. Roberts v. State, 267 Ga. 669, 482 S.E.2d 245 (1997).

**Failure to charge that presumption covers incidents occurring before crime charged.** — It afforded no reason for granting new trial that in charging on presumption of innocence court did not also instruct jury that this presumption covered incidents in which evidence showed that defendant had participated shortly before moment of homicide. Anderson v. State, 196 Ga. 468, 26 S.E.2d 755 (1943) (decided under former Code 1933; murder statute, § 26-1004).

**Omission to charge that presumption of innocence remains until overcome by proof.** — In absence of appropriate request for more specific instruction, excerpt from charge of court, in which jury were told that defendant was presumed to be innocent, and that burden was upon state to establish defendant's guilt to a moral and reasonable certainty and beyond a reasonable certainty and beyond a reasonable doubt, was not subject to exception merely because judge omitted to state to jury that presumption of innocence remained with defendant until overcome by proof. Payne v. State, 233 Ga. 294, 210 S.E.2d 775 (1974).

**Jury instruction on presence at scene.** — The presumption of innocence is in the nature of evidence and this evidentiary presumption is sufficient to support a proper written request for a jury instruction on mere presence at the scene. *Lowe v. State*, 241 Ga. App. 335, 526 S.E.2d 634 (1999).

**Directed verdicts.** — If prima facie case against accused is made out, though defendant offers no evidence, court has no legal power to direct verdict, or to express opinion of defendant's guilt. *Johnson v. State*, 69 Ga. App. 440, 26 S.E.2d 121 (1943) (decided under former Code 1933).

**At sentencing phase of trial there is no presumption of innocence.** — During sentencing phase of defendant's trial, the defendant, having already been convicted of crimes, benefits from no presumption of innocence. Defendant stands before sentencing jury as a convicted felon. *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, cert. denied, 454 U.S. 882, 102 S. Ct. 366, 70 L. Ed. 2d 192 (1981), overruled on other grounds, *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442 (1982).

**On appeals from findings of guilt, presumption of innocence no longer prevails;** the fact finders have determined the credibility of witnesses, and have been convinced beyond a reasonable doubt, and appellate courts review evidence only to determine if there is any evidence sufficient to authorize fact finder to return verdict of guilty. *Stallworth v. State*, 150 Ga. App. 766, 258 S.E.2d 611 (1979).

**Cited in** *Spencer v. State*, 231 Ga. 705, 203 S.E.2d 856 (1974); *Ford v. State*, 232 Ga. 511, 207 S.E.2d 494 (1974); *Woods v. State*, 233 Ga. 347, 211 S.E.2d 300 (1974); *Royal v. State*, 134 Ga. App. 203, 213 S.E.2d 561 (1975); *Franklin v. State*, 136 Ga. App. 47, 220 S.E.2d 60 (1975); *Berryhill v. State*, 235 Ga. 549, 221 S.E.2d 185 (1975); *Parker v. State*, 137 Ga. App. 6, 223 S.E.2d 6 (1975); *Carter v. State*, 137 Ga. App. 824, 225 S.E.2d 73 (1976); *Wiggins v. State*, 139 Ga. App. 98, 227 S.E.2d 895 (1976); *Dasher v. State*, 140 Ga. App. 517, 231 S.E.2d 510 (1976); *Futch v. State*, 145 Ga. App. 485, 243 S.E.2d 621 (1978); *Davis v. State*, 147 Ga. App. 107, 248 S.E.2d 181 (1978); *Ault v.*

State, 148 Ga. App. 761, 252 S.E.2d 668 (1979); *Moreland v. State*, 154 Ga. App. 375, 268 S.E.2d 425 (1980); *Wallace v. State*, 246 Ga. 738, 273 S.E.2d 143 (1980); *Cole v. State*, 156 Ga. App. 288, 274 S.E.2d 685 (1980); *Phillips v. State*, 162 Ga. App. 471, 291 S.E.2d 776 (1982); *Bowman v. State*, 186 Ga. App. 544, 368 S.E.2d 143 (1988); *Kersey v. State*, 243 Ga. App. 689, 534 S.E.2d 428 (2000).

### Proof Beyond Reasonable Doubt

**Reasonable doubt means** such doubt as a reasonable man would have after hearing all testimony in the case, including statement of defendant. *Faulkner v. State*, 43 Ga. App. 763, 160 S.E. 117 (1931) (decided under former Penal Code 1910, § 1010).

### Definition of phrase unnecessary.

— It is not necessary to attempt any definition of the phrase "reasonable doubt"; the words are self-explanatory, and simplicity would be rendered confusing, and meaning obscure, by any elaboration. *Cason v. State*, 60 Ga. App. 626, 4 S.E.2d 713 (1939) (decided under former Code 1933 and organic law); *Brooks v. State*, 63 Ga. App. 575, 11 S.E.2d 688 (1940).

An otherwise correct charge in a criminal case on reasonable doubt is not reversible error because the term reasonable doubt is not defined. *Brock v. State*, 91 Ga. App. 141, 85 S.E.2d 177 (1954) (decided under former Code 1933).

It is not error in absence of a request, to fail to attempt a definition of the words "reasonable doubt." *McDowell v. State*, 78 Ga. App. 116, 50 S.E.2d 633 (1948) (decided under former Code 1933 and organic law).

Court did not err in failing to give to jury a definition of reasonable doubt, where there was no written request for such definition; it was sufficient to charge that jury must be satisfied by evidence beyond a reasonable doubt of defendant's guilt. *Fountain v. State*, 71 Ga. App. 191, 30 S.E.2d 359 (1944) (decided under former Code 1933).

**"Reasonable doubt" need not be defined absent request.** — "Reasonable doubt" has often been held to be a self-explanatory term, readily under-

**Proof Beyond Reasonable Doubt (Cont'd)**

standable by the average juror, for which no further definition need be given in absence of request. Payne v. State, 233 Ga. 294, 210 S.E.2d 775 (1974).

**Moral and reasonable certainty.** — The trial court's charge to the jury that "moral and reasonable certainty is all that can be required in a legal investigation" did not effectively permit the jury to convict defendant on a standard of proof which is less than the standard of "beyond a reasonable doubt". Marion v. State, 263 Ga. 358, 434 S.E.2d 463 (1993).

**Phrase "to extent required by law" rather than "beyond reasonable doubt."** — Where jury was repeatedly instructed throughout trial court's charge that state had to prove each and every element of its case against defendant beyond a reasonable doubt, jury instruction that prosecution had to disprove defendant's claim of right "to extent required by law" instead of "beyond a reasonable doubt," did not constitute reversible error by trial court. Jackson v. State, 157 Ga. App. 581, 278 S.E.2d 156 (1981).

**Language "reasonable doubt" or "without any reservations" in closing argument.** — Statement in closing argument that "unless you can honestly say without any reservations or qualifications that the state has proven the defendant guilty beyond a reasonable doubt, then you must acquit" was closer to the applicable law than the statement, "unless you can honestly say, 'yes, the defendant did it,' without any reservations or any qualifications, then you must acquit." Thus, the trial court properly prohibited defense counsel from making the latter statement when the court allowed defense counsel to make the former statement. Allen v. State, 292 Ga. App. 133, 663 S.E.2d 370 (2008), aff'd, 286 Ga. 273, 687 S.E.2d 417 (2009).

**Relevant question in criminal prosecution** is whether after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of crime beyond a reasonable doubt. Rachel v. State, 247 Ga. 130, 274 S.E.2d 475 (1981).

**Effect of conflicting testimony.** — While there may be conflicts in testimony

of witnesses at trial, a rational trier of fact, in certain cases, may still reasonably find from evidence adduced at trial proof of defendant's guilt beyond a reasonable doubt. Hammonds v. State, 157 Ga. App. 393, 277 S.E.2d 762 (1981).

**It is error to fail to charge on quantum of proof necessary to establish guilt beyond a reasonable doubt.** Brock v. State, 91 Ga. App. 141, 85 S.E.2d 177 (1954).

**Jury instructions.** — The charge as a whole accurately conveyed the concept of reasonable doubt to the jury. Ruff v. State, 212 Ga. App. 245, 441 S.E.2d 534 (1994).

**Court need not instruct on reasonable doubt as to each proposition of case.** — According to Georgia practice, it is not the duty of the court to carve up case into different propositions and instruct jury specifically on each as to reasonable doubt, but to submit case as a whole, upon all evidence, and instruct upon subject of doubt, in appropriate terms, upon whole case. Geer v. State, 184 Ga. 805, 193 S.E. 776 (1937).

Where in criminal trial judge fully and fairly charged jury concerning law of reasonable doubt, the judge was not bound to give requested instruction, in effect, that if jury had a reasonable doubt as to existence of some particular and specially enumerated fact, or what should be the proper inference therefrom, it would be their duty to give the accused the benefit of such doubt. Pierce v. State, 66 Ga. App. 737, 19 S.E.2d 192 (1942).

**Charge that reasonable doubt is actual doubt** that one is conscious of is not erroneous. Hancock v. State, 196 Ga. 351, 26 S.E.2d 760 (1943).

**Phrase "doubt for which you can give reason."** — In charge of court on subject of reasonable doubt, it was not error to include the phrase, "a doubt for which you can give a reason." Bryant v. State, 197 Ga. 641, 30 S.E.2d 259 (1944).

**Charge that reasonable doubt is doubt with a reason,** not a vague, artificial, or fictitious doubt is not erroneous in that it restricts meaning of reasonable doubt to instances in which juror finds affirmative reason. Jackson v. State, 59 Ga. App. 344, 200 S.E. 808 (1939).

**Defendant need only raise reasonable doubt in minds of jury.** — Defen-

dant is required only to raise in minds of jury a reasonable doubt as to defendant's guilt, even though state has by evidence first proved its case beyond a reasonable doubt; there is no requirement that defendant rebut case thus made by state to reasonable satisfaction of jury. Patterson v. State, 181 Ga. 698, 184 S.E. 309 (1936).

**Introduction that jurors should "acquit defendant"** if their minds were wavering, unsettled, or unsatisfied was not misleading or unconstitutional. Tyson v. State, 217 Ga. App. 428, 457 S.E.2d 690 (1995).

**Charge that defendant must rebut case made by state.** — Charge "if ... defendant has to your reasonable satisfaction rebutted case as made by state, it would be your duty to find defendant not guilty ..." placed burden on defendant to rebut evidence produced by state, in proof of homicide, to reasonable satisfaction of

jury, whereas defendant was only required to create in minds of jury reasonable doubt as to truth of charge against defendant, and this constituted grounds for new trial. Patterson v. State, 181 Ga. 698, 184 S.E. 309 (1936).

**Evidence sufficient to support guilt beyond a reasonable doubt.** — Sufficient evidence was presented to sustain defendant's conviction for selling cocaine because unrefuted testimony from an undercover agent identifying the defendant as the seller of the cocaine purchased in a controlled buy conducted by the agent was corroborated by an audio tape and the testimony of other officers at the scene. Moreover, the defendant failed to present any evidence on appeal that the state failed to prove guilt beyond a reasonable doubt. Thompson v. State, 289 Ga. App. 387, 657 S.E.2d 296 (2008).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 16B Am. Jur. 2d, Constitutional Law, § 1016. 29 Am. Jur. 2d, Evidence, §§ 185 et seq., 227 et seq.

**C.J.S.** — 22A C.J.S., Criminal Law, §§ 958, 959. 23 C.J.S., Criminal Law, § 1502.

**ALR.** — Propriety of instructions as to the significance of evidence concerning the defendant's good character as an element bearing upon the question of reasonable doubt, 10 ALR 8; 68 ALR 1068.

Degree of proof necessary in contempt proceedings, 49 ALR 975.

Instruction applying rule of reasonable doubt specifically to particular matter or defense as curing instruction placing burden of proof upon defendant in that regard, 120 ALR 591.

Rule of reasonable doubt as applicable to reasonable doubt on part of individual juror, 137 ALR 394.

Use of term "actual doubt" in instruction on reasonable doubt, 147 ALR 1046.

Presumption of innocence as evidence, 152 ALR 626.

Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 ALR3d 948.

Burden of proof as to lack of license in criminal prosecution for carrying or possession of weapon without license, 69 ALR3d 1054.

Admissibility of evidence of subsequent criminal offenses as affected by proximity as to time and place, 92 ALR3d 545.

## 16-1-6. Conviction for lesser included offenses.

An accused may be convicted of a crime included in a crime charged in the indictment or accusation. A crime is so included when:

(1) It is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged; or

(2) It differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public

interest or a lesser kind of culpability suffices to establish its commission. (Code 1933, § 26-505, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For annual survey on criminal law and procedure, 42 Mercer L. Rev. 141 (1990).

For note discussing organized crime in Georgia with respect to the application of state gambling laws, and suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### ARMED ROBBERY

#### ASSAULT

#### CONTROLLED SUBSTANCES

#### KIDNAPPING

#### MURDER

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#### CHILD MOLESTATION

#### OTHER OFFENSES INVOLVING CHILDREN

#### OTHER PROPERTY OFFENSES

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#### MISCELLANEOUS CRIMES

### General Consideration

**Statutes controlling double jeopardy questions.** — This title extends proscription of double jeopardy beyond that provided for in United States and Georgia Constitutions. Therefore, questions of double jeopardy in Georgia must be determined under proscriptions of former Code 1933 §§ 26-505 through 26-507. *State v. Warren*, 133 Ga. App. 793, 213 S.E.2d 53 (1975) (see O.C.G.A. §§ 16-1-6 through 16-1-8).

Former Code 1933 §§ 26-505 through 26-507 provide expanded statutory test for determining double jeopardy questions, thereby rendering inapplicable previous Georgia decisions applying only minimum constitutional standards of double jeopardy. *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978) (see O.C.G.A. §§ 16-1-6 through 16-1-8).

Questions of double jeopardy in Georgia must be determined under the expanded statutory proscriptions found in O.C.G.A. §§ 16-1-6 through 16-1-8, which place limitations upon multiple prosecutions, convictions, and punishments for the

same criminal conduct. *Stone v. State*, 166 Ga. App. 245, 304 S.E.2d 94 (1983).

**Statutes controlling double jeopardy questions.** Where a defendant engaged in two separate courses of conduct, the attempt to sell marijuana to an undercover police officer and the possession of 12 pounds of marijuana at defendant's home, double jeopardy did not attach to the second prosecution, as these acts occurred at different times and locations with distinct quantities of contraband, even though defendant might have at some earlier time possessed all the marijuana in defendant's home. *Kinchen v. State*, 265 Ga. App. 474, 594 S.E.2d 686 (2004).

**Successive state and municipal prosecutions.** — In creating expanded statutory protection against being twice placed in jeopardy for same offense, the legislature intended former Code 1933, §§ 26-505 through 26-507 to affect only successive prosecutions for state crimes and not successive state and municipal prosecutions. *State v. Burroughs*, 244 Ga. 288, 260 S.E.2d 5 (1979) (see O.C.G.A. §§ 16-1-6 through 16-1-8).

**Criminal indictments are not deemed amendable to conform to the evidence.** State v. Hightower, 252 Ga. 220, 312 S.E.2d 610 (1984).

**Conviction in different county.** — A prosecution for a lesser included offense, which includes the underlying felony in a felony murder case, after a conviction for the greater offense in a different county violates O.C.G.A. § 16-1-6(a), Ga. Const. 1983, Art. I, Sec. I, Par. XVIII, and the Fifth and Fourteenth Amendments to the United States Constitution. Perkins v. State, 273 Ga. 491, 542 S.E.2d 92 (2001).

**Distinction between two aspects of double jeopardy.** — Former Code 1933 §§ 26-505 through 26-507 distinguish between two aspects of double jeopardy: first, limitations upon multiple prosecutions for crimes arising from same conduct (referred to as procedural bar of double jeopardy); and, second, limitations upon multiple convictions or punishments that may be imposed for such crimes (referred to as substantive bar of double jeopardy). Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978) (see O.C.G.A. §§ 16-1-6 through 16-1-8).

**Forfeiture proceedings not a bar to prosecution.** — Double jeopardy did not attach to bar prosecution of defendant on state drug charges following federal civil forfeiture proceedings because defendant's failure to contest the forfeiture meant defendant was not placed in jeopardy in those proceedings and, also, Georgia constitutional and statutory provisions did not bar the prosecution because they apply only to criminal proceedings, not civil proceedings. Waye v. State, 219 Ga. App. 22, 464 S.E.2d 19 (1995).

**Applicability to crimes.** — Inclusion provisions of O.C.G.A. § 16-1-6 do not apply to aggravating circumstances but to crimes. Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981); Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82 (2002).

**O.C.G.A. § 16-1-6 makes no attempt to detail all instances where one offense**

is not included within another. Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981).

**O.C.G.A. §§ 16-1-6 and 16-1-7 establish alternative rules** for determining when one crime is included in another as a matter of fact or as a matter of law. Harmon v. State, 235 Ga. 329, 219 S.E.2d 441 (1975); Williams v. State, 156 Ga. App. 481, 274 S.E.2d 826 (1980).

Under O.C.G.A. § 16-1-6(1), offenses merge as a matter of fact if one of them is established by proof of the same or less than all the facts required to prove the other; under Georgia law, multiple punishment is prohibited if one offense is included in the other as a matter of law or fact. Phillips v. State, 259 Ga. App. 331, 577 S.E.2d 25 (2003).

**Former Code 1933, § 26-505(1)** set out rules for determining included crimes as a matter of fact. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978) (see O.C.G.A. § 16-1-6(1)).

**Former Code 1933, § 26-505(2)** set out rules for determining included crimes as a matter of law. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978) (see O.C.G.A. § 16-1-6(2)).

**Multiple conviction prohibited where crimes charged are same in law or fact.** — Although defendant may be prosecuted for all crimes committed, defendant may not be convicted of more than one crime if crimes charged are same in law or fact. Gunter v. State, 155 Ga. App. 176, 270 S.E.2d 224 (1980).

A crime is an included crime and multiple punishment is barred if it is the same as a matter of fact or as a matter of law. Williams v. State, 156 Ga. App. 481, 274 S.E.2d 826 (1980).

**When the facts supporting two counts are the same.** — When the state uses up all the evidence that the defendant committed one crime in establishing another crime, the former crime is included in the latter as a matter of fact under O.C.G.A. § 16-1-6. Haynes v. State, 249 Ga. 119, 288 S.E.2d 185 (1982), overruled on other grounds by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006); Phillips v. State, 162 Ga. App. 199, 290 S.E.2d 142 (1982); Jones v. State, 185

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Ga. App. 595, 365 S.E.2d 153 (1988); Martin v. State, 189 Ga. App. 483, 376 S.E.2d 888, cert. denied, 189 Ga. App. 911, 376 S.E.2d 888 (1989); Montes v. State, 262 Ga. 473, 421 S.E.2d 710 (1992).

If the state uses up all the evidence that the defendant committed one crime in establishing another crime, the former crime is included in the latter as a matter of law, and the defendant may not be sentenced for both. Chadwick v. State, 236 Ga. App. 199, 511 S.E.2d 286 (1999).

**Elements of lesser included offense.** — A crime will constitute a lesser included offense as a matter of law when, *inter alia*, it differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person or public interest or a lesser kind of culpability suffices to establish its commission. Brewton v. State, 216 Ga. App. 346, 454 S.E.2d 558 (1995), rev'd on other grounds, 266 Ga. 160, 465 S.E.2d 668 (1996).

**Supreme Court of Georgia utilizes alternative test.** — Supreme Court of Georgia utilizes more lenient alternative test, rather than narrower conjunctive standard prevailing in federal courts. A crime is included within another if, as a matter of fact or, alternatively, as a matter of law, conditions stipulated by former Code 1933, § 26-505 are satisfied. The conjunctive test requires that conditions be satisfied both as a matter of fact and as a matter of law before one crime will be held to be included within another. Ramsey v. State, 145 Ga. App. 60, 243 S.E.2d 555, rev'd on other grounds, 241 Ga. 426, 246 S.E.2d 190 (1978) (see O.C.G.A. § 16-1-6).

**One crime is not included within another if each affects a different person.** Harshaw v. State, 134 Ga. App. 581, 215 S.E.2d 337 (1975).

Most obvious example of noninclusion is when crime is charged in separate count of indictment as having been committed upon another person. Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981).

**When incidents are factually and legally distinct.** — When two separate incidents are involved, each established by proof of different facts and distinct as a

matter of law, the possibility of inclusion is obviated. Ramsey v. State, 145 Ga. App. 60, 243 S.E.2d 555, rev'd on other grounds, 241 Ga. 426, 246 S.E.2d 190 (1978).

**Required evidence test adopted.** — In determining when one crime is included in another under O.C.G.A. §§ 16-1-6(1) and 16-1-7(a), the actual evidence test has been overruled and replaced with the Blockburger required evidence test, as this is consistent with the statutory framework of O.C.G.A. § 16-1-6(1), which speaks of required elements. Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006).

**Using up evidence that defendant committed one crime in establishing another.** — If the state uses up all of the evidence that the defendant committed one crime in establishing another crime, the former crime is included in the latter as a matter of fact. Dawson v. State, 203 Ga. App. 146, 416 S.E.2d 125, cert. denied, 203 Ga. App. 905, 416 S.E.2d 125 (1992).

Actual evidence test meant that if the state used up all the evidence that the defendant committed one crime in establishing another crime, the former crime was included in the latter as a matter of fact under O.C.G.A. § 16-1-6. Ruffin v. State, 252 Ga. App. 289, 556 S.E.2d 191 (2001).

Question of whether there was a factual merger of crimes is determined by looking to the actual evidence introduced at trial to determine whether a crime is established by proof of the same or fewer than all the facts required to establish the commission of another crime within the meaning of O.C.G.A. § 16-1-6; if the state uses up all the evidence that the defendant committed one crime in establishing another crime, the former crime is included in the latter as a matter of fact under O.C.G.A. § 16-1-6. Brewster v. State, 261 Ga. App. 795, 584 S.E.2d 66 (2003).

**Retrial of greater offense after conviction of lesser.** — When the state sought to prosecute the defendant on two offenses in a single prosecution, one of which is included in the other, and the defendant receives a mistrial on the greater offense, the remaining conviction

of the lesser offense does not bar retrial of the greater offense. *Bell v. State*, 249 Ga. 644, 292 S.E.2d 402 (1982).

**Conviction of lesser included misdemeanor not ground for new trial.** — It is not ground for new trial that on felony indictment defendant may be convicted of lesser included crime which is itself only a misdemeanor. *Ennis v. State*, 130 Ga. App. 716, 204 S.E.2d 519 (1974).

**No issue of fact as to whether one crime included in another.** — Court did not err in failing to instruct the jury to decide which one of the offenses charged in the indictment or of the lesser included offense to find defendant guilty of. There was no issue of fact as to whether one crime was included in another and the court was not required to charge on O.C.G.A. § 16-1-6. *Leslie v. State*, 211 Ga. App. 871, 440 S.E.2d 757 (1994).

**To warrant conviction of lesser offense** on indictment or information charging greater offense, it is essential that allegations describing greater offense contain all essential averments relating to lesser offense or that greater offense necessarily include all essential ingredients of lesser. *Williams v. State*, 144 Ga. App. 130, 240 S.E.2d 890 (1977); *Tuggle v. State*, 145 Ga. App. 603, 244 S.E.2d 131 (1978).

**Rule of inclusion.** — Even if a lesser offense is not included in a charged offense as a general matter because the two offenses have different elements, the lesser offense may be an included offense in a particular case if the facts alleged in the indictment and the evidence presented at trial to establish the charged offense are sufficient to establish the lesser offense as well. *Messick v. State*, 209 Ga. App. 459, 433 S.E.2d 595 (1993).

**Effect of conviction on nonincluded charge.** — After a jury convicted a defendant on an aggravated battery charge, but acquitted the defendant on charges of obstruction, simple battery, and aggravated assault and could not reach a verdict on a second charge of aggravated assault, the jury's inability to reach a verdict on the second aggravated assault charge, a lesser included offense, did not invalidate the jury verdict on the aggravated battery charge. *Collier v. State*, 195 Ga. App. 380,

393 S.E.2d 509 (1990).

**Sequential assaults held to be two offenses**, the first a completed crime when the second was perpetrated. *Talley v. State*, 164 Ga. App. 150, 296 S.E.2d 173 (1982), aff'd, 251 Ga. 42, 302 S.E.2d 355 (1983).

**Conviction of both crime charged and lesser included offense.** — Defendant may be prosecuted for each crime arising from same conduct, but may not be convicted of more than one crime if one crime is included in the other. *Addison v. State*, 239 Ga. 622, 238 S.E.2d 411 (1977).

Under O.C.G.A. §§ 16-1-6 and 16-1-7, a defendant may be prosecuted for two crimes based on the same conduct, but defendant may not be convicted of more than one crime if one crime is included in the other. *Padgett v. State*, 205 Ga. App. 576, 423 S.E.2d 411 (1992).

**Defendant on notice of lesser included crimes.** — As a matter of law a defendant is on notice of lesser crimes which are included in the crime charged, and the defendant's due process rights were therefore not violated where remand for an adjudication of delinquency was made, based on a lesser included offense, after vacation of a conviction on the more serious offense. *In re A.F.*, 236 Ga. App. 60, 510 S.E.2d 910 (1999).

Trial court did not err by granting the state's request to charge the jury on robbery by sudden snatching, and the defendant's due process rights were not violated as: (1) the indictment alleging armed robbery gave the defendant sufficient notice; (2) the essential elements of both armed robbery and robbery by sudden snatching were contained within the indictment; (3) robbery by sudden snatching was a lesser included offense of armed robbery as a matter of law; and (4) the defendant conceded that the trial evidence supported such a charge. *Millender v. State*, 286 Ga. App. 331, 648 S.E.2d 777 (2007), cert. denied, No. S07C1717, 2008 Ga. LEXIS 80 (Ga. 2008).

**Sentences for offenses not considered.** — Statutes pertaining to lesser included offenses and multiple prosecutions for the same conduct do not purport to make any offense a greater offense, either as a matter of law or fact, solely because

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violation thereof mandates or otherwise results in the imposition of a greater sentence, or to make any offense a lesser included offense merely because a lesser sentence was statutorily authorized for the statute's violation. *Hancock v. State*, 210 Ga. App. 528, 437 S.E.2d 610 (1993).

**Cited** in *Wells v. State*, 127 Ga. App. 109, 192 S.E.2d 567 (1972); *Fallings v. State*, 232 Ga. 798, 209 S.E.2d 151 (1974); *Williamson v. State*, 134 Ga. App. 583, 215 S.E.2d 518 (1975); *Kramer v. Hopper*, 234 Ga. 395, 216 S.E.2d 119 (1975); *D.C.A. v. State*, 135 Ga. App. 234, 217 S.E.2d 470 (1975); *Tarpkin v. State*, 236 Ga. 67, 222 S.E.2d 364 (1976); *Thomas v. State*, 237 Ga. 690, 229 S.E.2d 458 (1976); *Torley v. State*, 141 Ga. App. 366, 233 S.E.2d 476 (1977); *Perkins v. State*, 143 Ga. App. 124, 237 S.E.2d 658 (1977); *Butler v. State*, 239 Ga. 591, 238 S.E.2d 387 (1977); *Corson v. State*, 144 Ga. App. 559, 241 S.E.2d 454 (1978); *Lowe v. State*, 240 Ga. 767, 242 S.E.2d 582 (1978); *State v. Gilder*, 145 Ga. App. 731, 245 S.E.2d 3 (1978); *Brock v. State*, 146 Ga. App. 78, 245 S.E.2d 442 (1978); *Coaxum v. State*, 146 Ga. App. 370, 246 S.E.2d 403 (1978); *State v. Burroughs*, 149 Ga. App. 183, 254 S.E.2d 144 (1979); *Groves v. State*, 152 Ga. App. 606, 263 S.E.2d 501 (1979); *Duke v. State*, 153 Ga. App. 204, 264 S.E.2d 721 (1980); *Doucet v. State*, 153 Ga. App. 775, 266 S.E.2d 554 (1980); *Griffeth v. State*, 154 Ga. App. 643, 269 S.E.2d 501 (1980); *Powell v. State*, 154 Ga. App. 674, 270 S.E.2d 6 (1980); *High v. State*, 247 Ga. 289, 276 S.E.2d 5 (1981); *Taylor v. State*, 157 Ga. App. 212, 276 S.E.2d 691 (1981); *Bissell v. State*, 157 Ga. App. 711, 278 S.E.2d 415 (1981); *Peavy v. State*, 159 Ga. App. 280, 283 S.E.2d 346 (1981); *Head v. State*, 248 Ga. App. 767, 285 S.E.2d 735 (1981); *Jones v. State*, 161 Ga. App. 620, 288 S.E.2d 795 (1982); *Dalton v. State*, 162 Ga. App. 7, 289 S.E.2d 801 (1982); *Williams v. State*, 162 Ga. App. 350, 291 S.E.2d 425 (1982); *Dalton v. State*, 249 Ga. 720, 292 S.E.2d 834 (1982); *Smith v. State*, 163 Ga. App. 531, 295 S.E.2d 208 (1982); *Collins v. State*, 164 Ga. App. 482, 297 S.E.2d 503 (1982); *Dickson v. State*, 167 Ga. App. 685, 307 S.E.2d 267 (1983); *Potts v. Zant*, 575 F.

Supp. 374 (N.D. Ga. 1983); *Caldwell v. State*, 171 Ga. App. 680, 320 S.E.2d 888 (1984); *Weaver v. State*, 176 Ga. App. 639, 337 S.E.2d 420 (1985); *Clarington v. State*, 178 Ga. App. 663, 344 S.E.2d 485 (1986); *Rank v. State*, 179 Ga. App. 28, 345 S.E.2d 75 (1986); *McClure v. State*, 179 Ga. App. 245, 345 S.E.2d 922 (1986); *Preston v. State*, 257 Ga. 42, 354 S.E.2d 135 (1987); *Sablon v. State*, 182 Ga. App. 128, 355 S.E.2d 88 (1987); *Mathis v. State*, 184 Ga. App. 455, 361 S.E.2d 856 (1987); *Edwards v. State*, 258 Ga. 12, 364 S.E.2d 869 (1988); *Moore v. State*, 190 Ga. App. 278, 378 S.E.2d 880 (1989); *Iglesias v. State*, 191 Ga. App. 403, 381 S.E.2d 604 (1989); *State v. Evans*, 192 Ga. App. 216, 384 S.E.2d 404 (1989); *Shelton v. State*, 196 Ga. App. 163, 395 S.E.2d 618 (1990); *Redding v. State*, 196 Ga. App. 751, 397 S.E.2d 34 (1990); *Kennedy v. State*, 199 Ga. App. 803, 406 S.E.2d 136 (1991); *Head v. State*, 262 Ga. 795, 426 S.E.2d 547 (1993); *Woody v. State*, 212 Ga. App. 186, 441 S.E.2d 505 (1994); *King v. State*, 214 Ga. App. 311, 447 S.E.2d 645 (1994); *Golden v. State*, 233 Ga. App. 703, 505 S.E.2d 242 (1998); *Powles v. State*, 248 Ga. App. 4, 545 S.E.2d 153 (2001); *Dorsey v. State*, 251 Ga. App. 640, 554 S.E.2d 278 (2001); *Climpson v. State*, 253 Ga. App. 485, 559 S.E.2d 495 (2002); *Williams v. State*, 255 Ga. App. 775, 566 S.E.2d 477 (2002); *Lewis v. State*, 261 Ga. App. 273, 582 S.E.2d 222 (2003); *Kinchen v. State*, 265 Ga. App. 474, 594 S.E.2d 686 (2004); *Wilkerison v. State*, 267 Ga. App. 585, 600 S.E.2d 677 (2004); *Melton v. State*, 282 Ga. App. 685, 639 S.E.2d 411 (2006); *Guyton v. State*, 281 Ga. 789, 642 S.E.2d 67 (2007); *Arnold v. State*, 293 Ga. App. 395, 667 S.E.2d 167 (2008); *Wells v. State*, 294 Ga. App. 277, 668 S.E.2d 881 (2008); *Epps v. State*, 297 Ga. App. 66, 676 S.E.2d 791 (2009); *Gonzales v. State*, 298 Ga. App. 821, 681 S.E.2d 248 (2009); *Strickland v. State*, 300 Ga. App. 898, 686 S.E.2d 486 (2009); *Stepp v. State*, 286 Ga. 556, 690 S.E.2d 161 (2010).

**Armed Robbery**

**Aggravated assault and armed robbery as separate crimes.** — Aggravated assault and armed robbery differ in more ways than that a less serious injury or

risk of injury or a lesser kind of culpability, applies to one crime than the other. Thus, aggravated assault is not included in armed robbery as a matter of law. *Harvey v. State*, 233 Ga. 41, 209 S.E.2d 587 (1974).

Aggravated assault and armed robbery may not be different crimes as a matter of fact. *Lambert v. State*, 157 Ga. App. 275, 277 S.E.2d 66 (1981).

Aggravated assault and armed robbery are different crimes as a matter of law. *Lambert v. State*, 157 Ga. App. 275, 277 S.E.2d 66 (1981).

Aggravated assault was not included within armed robbery as a matter of fact. *Evans v. State*, 173 Ga. App. 655, 327 S.E.2d 784 (1985).

Conviction for aggravated assault did not merge with conviction for armed robbery where the evidence showed that the defendant had completed the armed robbery at the time defendant assaulted the security guard. *Loumakis v. State*, 179 Ga. App. 294, 346 S.E.2d 373 (1986).

Offenses of aggravated assault and robbery did not merge as a matter of law, where although the occurrences happened within a short span of time, the robbery had been completed at the time defendant fired a gun and involved different actions and intents. *Phelps v. State*, 194 Ga. App. 493, 390 S.E.2d 899 (1990).

Aggravated assaults did not merge with the robbery of two victims, where the robberies were completed, both victims having been deprived of their property, when they were marched off for another criminal purpose and the aggravated assaults on each victim occurred. *Glass v. State*, 199 Ga. App. 530, 405 S.E.2d 522 (1991).

In a trial for armed robbery and aggravated assault, the evidence showed that defendant forced the victim at knifepoint to open the safe and that after taking the money from the safe, defendant cut the victim during the victim's attempt to escape. Since the act which constituted the offense of armed robbery was proved without any reference to the act which constituted the aggravated assault, no merger occurred. *Holmes v. State*, 205 Ga. App. 168, 421 S.E.2d 311 (1992).

Trial court did not err by failing to

merge the defendants' convictions on counts one through five into one conviction for armed robbery because the aggravated assaults and armed robbery (none of which could have been proven by the same or less than all the facts required to prove another) occurred later and the facts required to prove those offenses were separate from the burglary. *Dunbar v. State*, 273 Ga. App. 29, 614 S.E.2d 472 (2005).

Evidence that the victim was beaten over the head with a pistol showed a completed aggravated assault prior to the armed robbery which was also committed with a pistol; in other words, the pistol was used to effect bodily harm as well as to effect a theft. Since separate facts were used to prove each crime, the trial court did not err by refusing to merge the offenses under O.C.G.A. § 16-1-6. *Bunkley v. State*, 278 Ga. App. 450, 629 S.E.2d 112 (2006).

As the armed robberies and aggravated assaults the defendant was charged with were committed against different victims, the crimes did not merge as a matter of law or fact. *Verdree v. State*, 299 Ga. App. 673, 683 S.E.2d 632 (2009).

**Facts used to convict of armed robbery and aggravated assault.** — Where facts adduced to support armed robbery charge were same facts used to support aggravated assault charge, aggravated assault charge must be considered an included offense with armed robbery charge pursuant to former Code 1933, § 26-505. *Hizine v. State*, 148 Ga. App. 375, 251 S.E.2d 393 (1978) (see O.C.G.A. § 16-1-6).

**Aggravated assault with intent to rob and armed robbery.** — Because all of the facts used to prove the offense of aggravated assault with intent to rob were used up in proving the armed robbery, merger was required. *Mercer v. State*, 289 Ga. App. 606, 658 S.E.2d 173 (2008).

**Separate convictions for armed robbery and aggravated assault were barred**, and conviction for the latter offense would have to be vacated, where the only aggravated assault shown by the evidence was that by which the commission of the armed robbery was effectuated. *Young v. State*, 177 Ga. App. 756, 341 S.E.2d 286 (1986).

**Armed Robbery (Cont'd)**

Conviction for aggravated assault should have been vacated pursuant to the doctrine of merger since the only aggravated assault shown by the evidence was that by which the commission of armed robbery was effectuated. There having been no additional, gratuitous violence employed against the victim, it followed that the evidentiary basis for the aggravated assault conviction was "used up" in proving the armed robbery. Kelly v. State, 188 Ga. App. 362, 373 S.E.2d 63 (1988); Head v. State, 202 Ga. App. 209, 413 S.E.2d 533 (1991).

Conviction for aggravated assault should have been vacated pursuant to the doctrine of merger since the only aggravated assault shown by the evidence was that by which the commission of armed robbery was effectuated. There having been no additional, gratuitous violence employed against the victim, it followed that the evidentiary basis for the aggravated assault conviction was "used up" in proving the armed robbery. Kelly v. State, 188 Ga. App. 362, 373 S.E.2d 63 (1988); Head v. State, 202 Ga. App. 209, 413 S.E.2d 533 (1991).

**Armed robbery and motor vehicle theft.** — After the defendant took two checks from the victim at knife point and, later, after defendant tied up the victim and left the victim in the bedroom, took the victim's keys and drove off in the victim's car, the motor vehicle theft was not a lesser included offense of the armed robbery. Fonseca v. State, 212 Ga. App. 463, 441 S.E.2d 912 (1994).

**Burglary and armed robbery.** — There is no prohibition against a defendant's being convicted of both burglary and a completed criminal offense, such as armed robbery, after gaining entry into the dwelling, as each offense has distinct elements. Brown v. State, 199 Ga. App. 773, 406 S.E.2d 248 (1991).

**Assault and robbery.** — When facts adduced to support the two counts are different, assault is not included within robbery. Harvey v. State, 233 Ga. 41, 209 S.E.2d 587 (1974); Dunbar v. State, 163 Ga. App. 243, 292 S.E.2d 897 (1982).

**Armed robbery and kidnapping.** — Kidnapping was completed when defen-

dant seized the women and forcibly moved them from one location in the store to another, and then defendant committed the armed robbery; accordingly, convictions for both offenses did not amount to two punishments for the same conduct, nor was one offense included in the other as a matter of fact. Phillips v. State, 259 Ga. App. 331, 577 S.E.2d 25 (2003).

**Conviction for attempt to commit armed robbery did not merge with conviction for armed robbery** since, although both offenses occurred at the same place and at the same time and under the same circumstances, the object of the offenses was different and the victims were different. Loumakis v. State, 179 Ga. App. 294, 346 S.E.2d 373 (1986).

**Armed robbery and malice murder.** — In considering whether two crimes merged as a matter of fact, the courts look to whether the crimes were established by proof of the same or less than all the facts required to establish the commission of another crime; since convictions for armed robbery and malice murder were both supported by the evidence, they did not merge as a matter of fact. Baines v. State, 276 Ga. 117, 575 S.E.2d 495 (2003).

**Armed robbery and robbery by intimidation.** — Defendant's indictment for armed robbery put defendant on notice that conviction of the lesser included offense of robbery by intimidation was possible. Mills v. State, 244 Ga. App. 28, 535 S.E.2d 1 (2000).

**Armed robbery and theft by taking.** — Since the same evidence that was used to prove the armed robbery charges against defendant was also used to prove the theft by taking charges and the property in question was taken from the victims' possession in the same incident in a store and constituted a single crime, the theft by taking offenses were lesser included offenses of the armed robbery offenses as a matter of fact pursuant to O.C.G.A. § 16-1-6(1) and should have merged into those convictions for sentencing purposes. Phanamixay v. State, 260 Ga. App. 177, 581 S.E.2d 286 (2003).

**Sentencing.** — Since the evidence the state used to convict defendant of aggravated assault with intent to rob and possession of a firearm during the commis-

sion of that crime was also used to convict defendant of armed robbery, defendant could not be sentenced for all of the offenses, and, accordingly, the first two offenses merged into the armed robbery offense for sentencing purposes. *Cutkelvin v. State*, 258 Ga. App. 691, 574 S.E.2d 883 (2002).

### **Assault**

**Aggravated assault properly not merged with theft by taking.** — Trial court properly refused to merge an aggravated assault count with a theft by taking of a motor vehicle count and did not err in sentencing the defendant for both offenses because by choking the victim in a manner likely to have caused serious bodily injury, the defendant committed aggravated assault, and by taking the victim's car and driving away, the defendant committed the theft. As such, it was obvious that the offenses involved, although taking place at the same general time and location, were separate offenses in that each was established by proof of different facts and each offense was distinct as a matter of law; thus, obviating any possibility of one's inclusion in the other. *Hall v. State*, 292 Ga. App. 544, 664 S.E.2d 882 (2008), cert. denied, No. S08C1841, 2008 Ga. LEXIS 926 (Ga. 2008).

**Robbery by force and aggravated assault** on a person over the age of 65 years have different elements and prohibit different conduct, and neither is included in the other as a matter of law. *Manuel v. State*, 245 Ga. App. 565, 538 S.E.2d 472 (2000).

**Criminal trespass and aggravated assault.** — Criminal trespass is not a lesser included offense of aggravated assault as a matter of law, and, where the indictment for aggravated assault alleged that defendant committed an assault by shooting a deadly weapon "at, toward and in the direction of" the victim, the state was not required to prove that defendant interfered with the victim's property, and criminal trespass was the victim's property, and criminal trespass was not an included offense as a matter of fact. *Robinson v. State*, 217 Ga. App. 832, 459 S.E.2d 588 (1995).

**Aggravated assault did not merge with damage to property.** — Because charges alleging aggravated assault did not amount to lesser-included offenses as a matter of fact of a charge of first-degree criminal damage to property, and the property offense was not a lesser-included offense of any aggravated assault offense, merger of the offenses was unwarranted. *Louis v. State*, 290 Ga. App. 106, 658 S.E.2d 897 (2008).

**Reckless conduct and aggravated assault.** — Reckless conduct may become a lesser included offense of aggravated assault, not necessarily by the adding or subtracting of elements, but merely the substitution of another element for that of any formed general intent to commit the greater offense thereby resulting, in essence, in a finding of a lesser degree of culpability within the meaning of O.C.G.A. § 16-1-6. *Brewton v. State*, 216 Ga. App. 346, 454 S.E.2d 558 (1995), rev'd on other grounds, 266 Ga. 160, 465 S.E.2d 668 (1996); *Idowu v. State*, 233 Ga. App. 418, 504 S.E.2d 474 (1998).

**Aggravated assault merged into aggravated battery.** — Because the indictment alleged only one act, the shooting of the victim, and because the evidence showed only that defendant's actions were the result of a single act of firing a series of shots in quick succession at the victim, the convictions for aggravated assault merged into the aggravated battery. *Brown v. State*, 246 Ga. App. 60, 539 S.E.2d 545 (2000).

Trial court erred in failing to merge a defendant's offenses of aggravated battery under O.C.G.A. § 16-5-24(a) and aggravated assault under O.C.G.A. § 16-5-21(a), for sentencing purposes, because the assault was a lesser included offense of the battery offense under O.C.G.A. § 16-1-6(1), given the defendant's single attack on the victim with a golf club. *Allen v. State*, 302 Ga. App. 190, 690 S.E.2d 492 (2010).

**Simple battery as lesser included offense of aggravated assault.** — Where jury was authorized to decide defendant's fist and hands were not used as deadly weapons as required for aggravated assault, there was no error in charging on simple battery, which was here a

**Assault (Cont'd)**

lesser included offense of aggravated assault. Guevara v. State, 151 Ga. App. 444, 260 S.E.2d 491 (1979).

Evidence that defendant did not use a pistol in a deadly fashion in striking the victim supported a conviction of simple battery as a lesser included offense of aggravated assault Fulton v. State, 232 Ga. App. 898, 503 S.E.2d 54 (1998).

Defendant failed to show error in refusing to merge offenses because defendant failed to show that aggravated assault was established by the same facts used to prove simple battery; evidence that defendant: (1) entered a store wearing a mask; (2) opened the cash drawer; (3) tried to wrangle a key to the drawer from the employee's hand; (4) demanded money; (5) banged on the register; and (6) appeared to have had a gun supported the aggravated assault conviction, but none of this evidence was needed to prove simple battery, which was established by evidence of defendant's bruising blows to the employee's arm. Lawson v. State, 275 Ga. App. 334, 620 S.E.2d 600 (2005).

**Aggravated assault on a police officer merged with obstruction of a police officer.** — Trial court erred in failing to merge the defendant's convictions for four counts of obstruction of a police officer into the convictions for four counts of aggravated assault on a police officer because each count of the crime of obstruction was established by proof of the same or less than all the facts required to establish each count of the crime of aggravated assault; the state conceded that the trial court erred in failing to merge the convictions for obstruction into the convictions for aggravated assault on a police officer. Dobbs v. State, 302 Ga. App. 628, 691 S.E.2d 387 (2010).

**Terroristic threats and aggravated assault with deadly weapon.** — The offense of terroristic threats was included in the offense of aggravated assault with a deadly weapon as a matter of fact since from the evidence the jury would have been authorized to find either that defendant used a gun to place the victim in reasonable apprehension of immediately receiving a violent injury or that defen-

dant threatened to commit a crime of violence with the purpose of terrorizing the victim. Messick v. State, 209 Ga. App. 459, 433 S.E.2d 595 (1993).

**Controlled Substances**

**Illegal possession not included in illegal sale as matter of law.** — As a matter of law, crime of illegal possession of heroin is not included in crime of illegal sale of heroin for purposes of double jeopardy and multiple prosecution. Wilson v. Hopper, 234 Ga. 859, 218 S.E.2d 573 (1975).

**Illegal possession of controlled substance may be included in illegal sale.** — If evidence required to convict of illegal sale of controlled substance is the only evidence showing possession, illegal possession is included in crime of illegal sale as a matter of fact. Harmon v. State, 235 Ga. 329, 219 S.E.2d 441 (1975).

**Multiple accusations and indictments not barred.** — Because no evidence showed that the information concerning the defendant was known to the proper prosecuting officer in Gwinnett County, and because no basis otherwise existed for a charge of conspiracy to traffic based on what officers recovered in the search of the defendant's home, the appeals court refused to state that the defendant could have been convicted of conspiracy to traffic methamphetamine in Gwinnett County, or that Gwinnett County should have charged the defendant with this crime; hence, under these circumstances, the Dawson County indictment was not barred under O.C.G.A. §§ 16-1-6(b)(1) and 16-1-7(b). Bradford v. State, 283 Ga. App. 75, 640 S.E.2d 630 (2006).

**Controlled substances.** — Defendant may be prosecuted, convicted, and separately sentenced for the simultaneous possession of each of the controlled substances listed in Schedule II of the Controlled Substances Act. Tabb v. State, 250 Ga. 317, 297 S.E.2d 227 (1982).

Offense of unlawfully selling a noncontrolled substance while representing the substance to be a controlled substance (O.C.G.A. § 16-13-30.1) is not included in the offense of conspiracy to sell or distribute cocaine (O.C.G.A.

§ 16-13-30). Smith v. State, 202 Ga. App. 664, 415 S.E.2d 481 (1992).

**Possession of cocaine included in trafficking offense.** — Offenses of possession of cocaine and possession of cocaine with intent to distribute were lesser included offenses, as a matter of fact, of the trafficking offense since proof of the two possession offenses was established by “the same or less than all the facts” required to establish the distribution offense; thus, it was error to convict the defendant of all three offenses. Hancock v. State, 210 Ga. App. 528, 437 S.E.2d 610 (1993).

**Possession of marijuana not included in crime of manufacturing.** — Possession of marijuana is not a necessary element of the crime of knowingly manufacturing marijuana by cultivating or planting, and so misdemeanor possession is not a lesser offense included in the crime of manufacturing as a matter of law. Galbreath v. State, 213 Ga. App. 80, 443 S.E.2d 664 (1994); Hunt v. State, 222 Ga. App. 66, 473 S.E.2d 157 (1996).

**Possession of marijuana and possession with intent to distribute.** — Offense of possession of marijuana was included in the offense of possession of marijuana with intent to distribute, where the possession charge could be established by proof of a less culpable mental state (general criminal intent) than was required to establish the commission of possession with intent to distribute (specific criminal intent to distribute). Talley v. State, 200 Ga. App. 442, 408 S.E.2d 463 (1991).

**Charge on lesser included offense of possession with intent to distribute.** — Because defendant was indicted for possession of more than 28 grams of methamphetamine, a violation of O.C.G.A. § 16-13-31, defendant had sufficient notice that the lesser included offense of possession with intent to distribute, a violation of O.C.G.A. § 16-13-30(b), might be submitted to the jury if the evidence warranted it; consequently, by charging the lesser offense in accordance with O.C.G.A. § 16-1-6, the trial court did not permit the jury to convict defendant in a manner not alleged in the indictment in violation of defendant's due process rights. Rupnik v.

State, 273 Ga. App. 34, 614 S.E.2d 153 (2005).

**Possession of drug-related objects conviction merged as a matter of fact into defendant's felony conviction for possession of cocaine.** Reddick v. State, 249 Ga. App. 678, 549 S.E.2d 151 (2001), cert. denied, 2001 Ga. LEXIS 802 (Oct. 1, 2001).

**Solicitation is not a lesser included offense of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e), as the facts necessary to prove each offense are different.** Dimas v. State, 276 Ga. App. 245, 622 S.E.2d 914 (2005).

**No separate quantity used to prove trafficking charge distinct from possession charge.** — Because both the trafficking and manufacturing charges against defendants arose from methamphetamine found in a cooler, no other quantity of methamphetamine was presented at trial, and there was no separate quantity of methamphetamine used to prove the trafficking charge, defendants were entitled to resentencing because the convictions merged and the trial court erred in sentencing for both offenses. Goldsby v. State, 273 Ga. App. 523, 615 S.E.2d 592 (2005).

### Kidnapping

**Offenses of kidnapping and aggravated assault with intent to rape were not included in each other in law or in fact.** Strozier v. State, 171 Ga. App. 703, 320 S.E.2d 764 (1984); Isaacs v. State, 213 Ga. App. 379, 444 S.E.2d 409 (1994).

**Aggravated assault as included offense of kidnapping with bodily injury.** — Because elements of crime of aggravated assault must have been proved in order to sustain conviction for crime of kidnapping with bodily injury, aggravated assault is an included offense of crime of kidnapping with bodily injury. Brown v. State, 247 Ga. 298, 275 S.E.2d 52, cert. denied, 454 U.S. 882, 102 S. Ct. 366, 70 L. Ed. 2d 192 (1981).

**Aggravated assault and kidnapping.** — Aggravated assault, with intent to rob as the factor in aggravation, is not a lesser included offense of kidnapping with bodily injury. Brown v. State, 232 Ga. App. 787, 504 S.E.2d 452 (1998).

When one offense is established by the

**Kidnapping (Cont'd)**

same but less than all of the facts required to establish another offense, the first merges into the second as a matter of fact; aggravated assault is a lesser included offense of, and merges with, the crime of kidnapping with bodily injury, and a trial court erred by failing to merge defendant's aggravated assault conviction into defendant's kidnapping with bodily injury conviction. *Bailey v. State*, 269 Ga. App. 262, 603 S.E.2d 786 (2004).

Trial court did not err in denying defendant's motion to correct an illegal sentence, pursuant to O.C.G.A. §§ 16-1-6 and 16-1-7, as defendant's convictions for aggravated assault and kidnapping, in violation of O.C.G.A. §§ 16-5-21 and 16-5-40(a), respectively, did not merge as a matter of law, as only aggravated assault and kidnapping with bodily injury merged as a matter of law; further, the crimes did not merge as a matter of fact, as they were based on separate and distinct facts, and due to the timing of defendant's actions during the incident, the separate convictions were proper. *Walker v. State*, 275 Ga. App. 862, 622 S.E.2d 64 (2005).

Kidnapping, aggravated assault, and rape were separate offenses, completed individually, and did not merge as a matter of fact; thus, the trial court did not err in refusing to merge the kidnapping counts into the aggravated assault and rape counts for purposes of sentencing. *Dasher v. State*, 281 Ga. App. 326, 636 S.E.2d 83 (2006).

Because there was independent evidence to support each of the offenses as indicted, a defendant's aggravated assault conviction did not merge as a matter of fact with either the aggravated battery or kidnapping with bodily injury convictions. *Pitts v. State*, 287 Ga. App. 540, 652 S.E.2d 181 (2007).

**Kidnapping and aggravated sodomy.** — Kidnapping and aggravated sodomy are not included in offenses as a matter of law and, even though they may be included as a matter of fact, where the same evidence was not used to prove both

crimes, the trial court did not err by refusing to find a merger. *Hardy v. State*, 210 Ga. App. 811, 437 S.E.2d 790 (1993).

**Armed robbery and kidnapping.** — Offenses of armed robbery and kidnapping with bodily injury did not merge as a matter of fact or law, where the robbery and kidnapping were completed before the victim was shot in the leg, and the evidence of neither offense was necessary to prove the other. *Solomon v. State*, 195 Ga. App. 882, 395 S.E.2d 335 (1990).

**Kidnapping with bodily injury and aggravated battery.** — State established all the necessary elements of kidnapping with bodily injury upon showing that defendant grabbed victim's arm, forced the victim to the rear of the store, and then struck the victim in the face. The offense of aggravated battery was shown by the evidence of defendant's subsequent banging of victim's head against a concrete floor and choking of the victim. *Robinson v. State*, 210 Ga. App. 175, 435 S.E.2d 466 (1993).

**Kidnapping with bodily injury and battery.** — In a prosecution for kidnapping with bodily injury and battery, use of the same evidence to prove that defendant perpetrated battery as proof of the offense of kidnapping with bodily injury required reversal of defendant's conviction and sentence for battery. *Holmes v. State*, 229 Ga. App. 671, 494 S.E.2d 560 (1998).

**Prosecution for kidnapping and escape.** — See *Bailey v. State*, 146 Ga. App. 774, 247 S.E.2d 588 (1978).

**Kidnapping and false imprisonment.** — After the defendant had been convicted of kidnapping with bodily injury, subsequent charges of false imprisonment, arising out of the same set of facts, were barred by former jeopardy under the "required evidence test" because false imprisonment was a lesser included offense of kidnapping with bodily injury. *Sallie v. State*, 216 Ga. App. 502, 455 S.E.2d 315 (1995).

**Prosecution for felony murder upon conviction for kidnapping.** — Once the state tried and convicted petitioner for kidnapping, it would be barred from prosecuting the petitioner for felony murder only if underlying felony upon

which that prosecution was based was that same kidnapping. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir.), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. Ed. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

**Malice murder and kidnapping** are not same offense for double jeopardy purposes even though they involve same transaction and considerably overlap each other factually. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir.), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. Ed. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

**Evidence of murder as a basis for separate conviction of kidnapping.** — Evidence of murder of a given victim can be used as basis for separate conviction of murder count and also as basis for conviction of kidnapping with bodily injury to same victim. Brown v. State, 247 Ga. 298, 275 S.E.2d 52, cert. denied, 454 U.S. 882, 102 S. Ct. 366, 70 L. Ed. 2d 192 (1981).

**Murder and kidnapping with bodily injury** are not included crimes as a matter of law. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978).

Murder and kidnapping with bodily injury not included as a matter of fact under former Code 1933, § 26-505(1) since these crimes have distinct elements. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978) (see O.C.G.A. § 16-1-6(1)).

When the defendant was convicted for murder and kidnapping with bodily injury of the same victim, the bodily injury alleged was the killing of the victim. As a matter of fact, as well as a matter of law, the murder and kidnapping with bodily injury were not included offenses so as to bar the defendant from being prosecuted and subsequently convicted of both crimes. Neither crime could have been established by proof of the same or less than all of facts required to establish commission of crime charged. The murder required finding of malice aforesought,

but the kidnapping required no such finding. The kidnapping required a finding of unlawful abduction, while such a finding is not necessary for conviction for murder. Brown v. State, 247 Ga. 298, 275 S.E.2d 52, cert. denied, 454 U.S. 882, 102 S. Ct. 366, 70 L. Ed. 2d 192 (1981).

**Kidnapping, rape, and sodomy.** — When the evidence used to establish the offense of kidnapping with bodily injury was the asportation of the victim and the bite marks, bumps, and bruises suffered by the victim when the victim was pushed inside the apartment and prevented from leaving and the offenses of rape and sodomy were proved by testimony concerning subsequent events, the facts used to prove the crimes of rape and sodomy were different from those used to show the essential elements of kidnapping with bodily injury; therefore, the offenses did not merge. Peterson v. State, 212 Ga. App. 31, 441 S.E.2d 267 (1994).

**Rape and kidnapping with bodily injury.** — Double jeopardy attached where the state sought to prosecute defendant for rape and sodomy in one county based upon the same facts, upon the same actual evidence, which was used to convict defendant for kidnapping with bodily injury in another county. State v. Sallie, 206 Ga. App. 732, 427 S.E.2d 11 (1992).

Because the proof establishing the crime of rape did not use up the proof establishing the crime of kidnapping with bodily injury, the crimes did not merge; accordingly, the trial court did not err by refusing to merge two of defendant's kidnapping with bodily injury convictions with two of defendant's rape convictions. Collins v. State, 267 Ga. App. 784, 600 S.E.2d 802 (2004).

**Kidnapping with bodily harm and rape.** — In a criminal trial, the offenses of kidnapping with bodily harm and rape were not merged where under the facts neither offense was included in the other as a matter of fact nor as a matter of law. Turner v. State, 194 Ga. App. 878, 392 S.E.2d 256 (1990).

**Kidnapping and rape not included.** — Since neither the crime of kidnapping nor rape were included in the other as a matter of fact, the court did not err by sentencing defendant for both offenses.

**Kidnapping (Cont'd)**

Dawson v. State, 203 Ga. App. 146, 416 S.E.2d 125, cert. denied, 203 Ga. App. 905, 416 S.E.2d 125 (1992).

**Kidnapping is not included in crime of robbery** as a matter of law. Chambley v. State, 163 Ga. App. 502, 295 S.E.2d 166 (1982).

**Robbery by force and kidnapping with bodily injury.** — After the victim testified that defendants grabbed the victim outside of the restaurant, forced the victim into and through the restaurant and the victim did not willingly accompany the defendants, and that the robbery was effectuated once defendants were inside the restaurant, the offenses of robbery by force and kidnapping with bodily injury were not merged as a matter of fact. Powell v. State, 210 Ga. App. 409, 437 S.E.2d 598 (1993).

**Murder**

**Aggravated assault with intent to commit murder and with a deadly weapon** may be charged as lesser included offenses of murder. Hall v. State, 163 Ga. App. 515, 295 S.E.2d 194 (1982).

**Aggravated assault and attempt to commit murder.** — Aggravated assault conviction merged into a criminal attempt to commit murder conviction, where both counts were based on allegations that defendant had stabbed the victim with a knife. Kelley v. State, 201 Ga. App. 343, 411 S.E.2d 276 (1991).

**Aggravated assault and malice murder.** — Where evidence used to prove that defendant perpetrated the aggravated assault of decedent — that defendant fired a deadly weapon and wounded the victim — was used to establish that defendant had committed malice murder, convictions for both aggravated assault and murder violated double jeopardy. Montes v. State, 262 Ga. 473, 421 S.E.2d 710 (1992).

Codefendant's conviction for aggravated assault had to be vacated because that conviction merged as a matter of fact into the conviction for malice murder since the medical examiner who performed the autopsy of the victim testified that the cause of death was "gunshot wounds," did not

identify any injury as the fatal shot, acknowledged the examiner could not testify as to the order in which the bullets entered the victim's body, and stated no single wound would have instantly stopped the victim; in the absence of evidence that one wound was fatal and was preceded by a "deliberate interval" in the series of shots fired and by the infliction of non-fatal wounds, there was no evidence to support the infliction of an aggravated assault separate and apart from the malice murder. Coleman v. State, 286 Ga. 291, 687 S.E.2d 427 (2009).

**Aggravated assault merged with malice murder.** — When the evidence did not support a conviction for aggravated assault that was independent of acts that caused the victim's death, conviction of the defendant for aggravated assault merged with the defendant's conviction for malice murder. Fetty v. State, 268 Ga. 365, 489 S.E.2d 813 (1997).

Although the evidence was sufficient to find defendant guilty of malice murder, because the aggravated assault was not independent of the act that caused the victim's death, the aggravated assault charge was included in the murder conviction. Evans v. State, 275 Ga. 672, 571 S.E.2d 780 (2002).

Defendant's conviction and sentence for aggravated assault was vacated as the malice murder and the aggravated assault charges merged as a matter of fact, because the same evidence to prove aggravated assault as indicted, stabbing the victim with a knife, was used to prove malice murder. Williams v. State, 279 Ga. 154, 611 S.E.2d 19 (2005).

Convictions against the defendant for both malice murder and aggravated assault were error under O.C.G.A. § 16-1-7(a)(1) as the aggravated assault was included within the malice murder conviction under O.C.G.A. § 16-1-6(1) because the same conduct established the commission of both offenses. Bell v. State, 284 Ga. 790, 671 S.E.2d 815 (2009).

**Armed robbery is not a lesser included offense of malice murder** as a matter of law. Addison v. State, 239 Ga. 622, 238 S.E.2d 411 (1977); Chafin v. State, 246 Ga. 709, 273 S.E.2d 147 (1980). (But see Burke v. State, 234 Ga. 512, 216 S.E.2d 812 (1975)).

When the evidence showed the defendant was one of three perpetrators contemplating both murder and armed robbery when the perpetrators embarked on the criminal venture, defendant was a knowing participant in both crimes, and a pistol subsequently found in defendant's possession was property taken from the victim which formed the basis for the armed robbery charge, the armed robbery was not a lesser included offense of malice murder. Lemay v. State, 264 Ga. 263, 443 S.E.2d 274 (1994).

**Armed robbery as included offense of malice murder.** — When the defendant is charged with armed robbery of a murder victim, proof of the armed robbery is essential to support the defendant's conviction of malice murder and is an included offense. Burke v. State, 234 Ga. 512, 216 S.E.2d 812 (1975).

**Burglary and murder not lesser included offenses of each other.** — Charges of burglary based on defendant's intent to commit aggravated assault on the occupant of the entered dwelling and murder for death of the occupant during burglary were neither legally incompatible nor lesser included offenses of each other. Williams v. State, 250 Ga. 553, 300 S.E.2d 301 (1983), cert. denied, 462 U.S. 1124, 103 S. Ct. 3097, 77 L. Ed. 2d 1356 (1983).

When the defendant is found guilty of felony murder, the underlying felony is a lesser included offense. Blankenship v. State, 247 Ga. 590, 277 S.E.2d 505 (1981), overruled on other grounds, Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82 (2002).

Additional felony murder charge predicated on burglary cannot be construed as a lesser-included offense of felony murder predicated on aggravated assault or of malice murder under O.C.G.A. § 16-1-6. Sallie v. State, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

**Felony firearm possession and felony murder.** — Conviction of possession of a firearm by a convicted felon merged with the conviction of felony murder, as the underlying felony was possession of a firearm by a convicted felon, such that

defendant's conviction and sentence on the possession charge were vacated. Garrett v. State, 263 Ga. 131, 429 S.E.2d 515 (1993).

Conviction for possession of a firearm by a convicted felon required vacating, as that crime was specified as underlying the felony murder charge in the indictment and in the court's instructions to the jury. Dennis v. State, 263 Ga. 257, 430 S.E.2d 742 (1993).

**Underlying felony is a lesser included offense of felony murder** under O.C.G.A. § 16-1-6 and conviction of both offenses is proscribed under provisions of O.C.G.A. § 16-1-7. Woods v. State, 233 Ga. 495, 212 S.E.2d 322 (1975); Atkins v. Hopper, 234 Ga. 330, 216 S.E.2d 89 (1975); Jowers v. State, 259 Ga. 401, 382 S.E.2d 595 (1989).

As felony murder is defined under Georgia law, the underlying felony is a lesser included offense of felony murder and thus the same offense for double jeopardy purposes. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir.), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. Ed. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

**Robbery by force and malice murder** were separate crimes which did not merge as a matter of law. Hill v. State, 274 Ga. 591, 555 S.E.2d 696 (2001).

**Armed robbery and felony murder.** — When proof of the armed robbery is essential to the conviction for felony murder, the armed robbery is a lesser included offense in the felony murder. Sanborn v. State, 251 Ga. 169, 304 S.E.2d 377 (1983).

**Felony murder not lesser included offense.** — Since the defendant used a pistol in two different ways to inflict separate and distinct wounds on the victim, and the acts giving rise to the two crimes were separated by intervening events, the crime of aggravated assault was not established by the same but by less than all the facts required to establish the crime of felony murder, and the trial court did not err in refusing to merge the aggravated assault conviction. Garrett v. State, 263 Ga. 131, 429 S.E.2d 515 (1993).

In a prosecution on separate counts of malice murder, armed robbery, and kid-

**Murder (Cont'd)**

napping, the trial court did not err in failing to charge the jury on felony murder as a lesser included offense. *Henry v. State*, 265 Ga. 732, 462 S.E.2d 737 (1995).

**Murder is not a lesser included offense** under crime of possession of firearm during commission of felony. *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442, cert. denied, 459 U.S. 1092, 103 S. Ct. 580, 74 L. Ed. 2d 940 (1982).

**Voluntary manslaughter is a lesser included offense of felony murder.** *Young v. State*, 141 Ga. App. 261, 233 S.E.2d 221 (1977).

Voluntary manslaughter is a lesser included offense of felony murder, because an act done in passion involves a less culpable mental state than that of real or imputed malice which is the foundation of the felony murder rule. Therefore, where facts warrant it, a charge on voluntary manslaughter may indeed be given in a felony murder trial. *Malone v. State*, 238 Ga. 251, 232 S.E.2d 907 (1977).

**Indictment sufficient to notify defendant of felony murder.** — Defendant indicted in two counts, one for malice murder and the other for the armed robbery of the deceased at the same time, is on notice that defendant may be found guilty of felony murder, armed robbery being the felony. But a defendant indicted only for malice murder cannot be convicted of felony murder unless the defendant has been put on notice of the felony by the facts alleged to show how the murder was committed. *McCravy v. State*, 252 Ga. 521, 314 S.E.2d 662 (1984).

**An accused may be convicted of an offense included in the underlying felony charged in a felony-murder indictment;** if the evidence would authorize a finding that the accused committed an offense included in the underlying felony charged in a felony murder indictment, and if that included offense was a misdemeanor, then a guilty verdict as to felony-grade involuntary manslaughter would be authorized. *Motes v. State*, 192 Ga. App. 302, 384 S.E.2d 463 (1989).

**Aggravated battery merged with malice murder.** — Defendant's convictions for both aggravated battery and mal-

ice murder were prohibited by O.C.G.A. § 16-1-6(2) because the victim's death was caused by the same actions that caused the victim's murder; because the only difference between the offenses was that the former required a lesser injury, defendant could not be convicted of both. *Ledford v. State*, No. S10P1859, 2011 Ga. LEXIS 267 (Mar. 25, 2011).

**Rape**

**Crime of adultery is not a lesser offense included in crime of rape**, because in order to prove adultery, additional fact of marriage must be shown. *Lamar v. State*, 243 Ga. 401, 254 S.E.2d 353, appeal dismissed, 444 U.S. 803, 100 S. Ct. 23, 62 L. Ed. 2d 16 (1979).

**When evidence of aggravated assault was unnecessary to prove rape** both crimes were properly submitted. *Hughes v. State*, 239 Ga. 393, 236 S.E.2d 829 (1977).

Where there was evidence presented that more than one assault took place prior to and during a rape, the jury was authorized to conclude that at least one of the assaults was gratuitous and unconnected with the rape offense; the defendant could be convicted of both rape and aggravated assault. *Sylvester v. State*, 168 Ga. App. 718, 310 S.E.2d 284 (1983).

**Conviction of aggravated assault.** — When, after completing the act of forcible intercourse (rape), defendant drew a gun again, pulled back the hammer, and threatened to shoot both victims if they did not obey defendant's further commands, this second drawing of the deadly weapon was subsequent to, and separate from, the completed offense of rape against the first victim; thus, the evidence regarding the use of force during the incident was not "used up" in the offense of rape, and defendant could properly be convicted of aggravated assault. *Ellis v. State*, 181 Ga. App. 826, 354 S.E.2d 15 (1987).

When aggravated assaults constituted gratuitous physical violence which was distinguished from the forced sex acts, and occurred in different locations in the house and to different parts of the victim's body than the sex crimes, there was no factual merger of the offenses of aggra-

vated assault and of rape and aggravated sodomy. *Taylor v. State*, 202 Ga. App. 671, 415 S.E.2d 483 (1992).

**Incest may be an included offense of statutory rape under appropriate facts.** *McCrane v. State*, 157 Ga. App. 110, 276 S.E.2d 263 (1981), overruled on other grounds by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006).

**Statutory rape and incest not included offenses.** — Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 in failing to argue at trial and on appeal that the inmate's statutory rape and incest convictions should have merged into the inmate's rape conviction as a matter of fact since all of the crimes arose out of the same incident, as the crimes of statutory rape and incest were not established by proof of the same or less than all the facts required to establish the crime of rape; the inmate's convictions of statutory rape under O.C.G.A. § 16-6-3 and incest under O.C.G.A. § 16-6-22 were not included pursuant to O.C.G.A. § 16-1-6(1) in the rape conviction under O.C.G.A. § 16-6-1, as statutory rape, which required evidence as to the victim's age and that the victim was not the inmate's spouse, and incest, which required proof of the victim's relation to the inmate, had elements not required for rape. *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006).

**Rape and assault with intent to rape.** — Offense of rape includes the lesser offense of assault with intent to rape. *Padgett v. State*, 205 Ga. App. 576, 423 S.E.2d 411 (1992).

**Simple assault did not merge with assault with intent to rape.** — There was no merger of offenses as a result of defendant's conviction of simple assault and aggravated assault with the intent to rape, where there was sufficient evidence of two separate assaults, the simple assault having been a sequential reaction to the victim's resistance to the charged sexual assault. *Watson v. State*, 178 Ga. App. 778, 344 S.E.2d 667 (1986).

**Simple battery as included offense of rape.** — Simple battery merged into the defendant's rape conviction as a matter of fact, since the same impermissible

touching—the hitting and slapping which constituted simple battery—also supplied the element of force necessary for conviction of rape, thereby requiring reversal of the simple battery conviction. *Johnson v. State*, 195 Ga. App. 723, 394 S.E.2d 586 (1990).

**Acquittal of offense charged precludes adjudication as to lesser included offense.** — When the defendant cannot be guilty of charge of rape without also being guilty of the burglary of which the defendant has been tried and acquitted, as an essential element of burglary is an intent to commit a felony, specified in the indictment as rape, the defendant cannot be put in jeopardy for purpose of again adjudicating an issue which has already been determined in the defendant's favor. *State v. Lamb*, 147 Ga. App. 435, 249 S.E.2d 150 (1978).

### Child Molestation

**Aggravated child molestation and rape.** — Entering separate convictions and sentences for aggravated child molestation and rape was error where the evidence established that the injuries sustained by the victim as a result of the rape were the same injuries as those alleged as the basis for the charge of aggravated child molestation. *Caldwell v. State*, 263 Ga. 560, 436 S.E.2d 488 (1993).

Where the forcible rape was both the act and the cause-in-fact of the injuries that formed the basis for the aggravated child molestation, the proof of one necessarily proved the other and, while it was proper to prosecute defendant for both rape and aggravated child molestation, defendant should have been convicted and sentenced only for the rape. *Donaldson v. State*, 244 Ga. App. 89, 534 S.E.2d 839 (2000).

Because defendant's aggravated child molestation and rape convictions were based on separate and distinct sexual acts and different conduct, those convictions could not have been included offenses under O.C.G.A. §§ 16-1-6 and 16-1-7; accordingly, defendant's pro se motion to vacate the sentence as void was properly denied. *Reed v. State*, 297 Ga. App. 850, 678 S.E.2d 560 (2009).

**Aggravated assault to commit rape did not merge with cruelty to chil-**

**Child Molestation (Cont'd)**

**dren and sexual battery.** — Juvenile court was authorized to adjudicate juvenile delinquent for aggravated battery with intent to rape upon evidence showing that the juvenile removed the victim's t-shirt and bra against her will; cruelty to children offense was supported by evidence showing that the victim after the fact was scared, crying, shaking, and subject to hives causing her to withdraw from school; and the sexual battery offense was supported by evidence that the juvenile touched the victim's breasts and vaginal area after striking her in the face, forcing her onto her back on the sofa. *In re J.C.*, 255 Ga. App. 471, 566 S.E.2d 39 (2002).

**Aggravated sodomy did not merge into the offense of child molestation**, where one of the offenses was established by proof of the same or less than all the facts required to prove the other. *LeGallienne v. State*, 180 Ga. App. 108, 348 S.E.2d 471 (1986).

Evidence demonstrated that defendant's convictions of aggravated sodomy and aggravated child molestation were supported by separate facts because the victim testified to several separate sexual acts; thus, the evidence authorized the jury to find that more than one instance of sodomy and molestation occurred, permitting a conviction for each offense based on separate occasions, the crimes did not merge, and the trial court was correct in sentencing defendant on each count. *Henry v. State*, 274 Ga. App. 139, 616 S.E.2d 883 (2005).

**Child molestation and aggravated sexual battery** did not merge where the child molestation conviction was supported by evidence that the defendant fondled the victim's breasts and the exterior of her vagina on numerous occasions, and the aggravated sexual battery conviction was based on evidence that defendant penetrated the victim's vagina with defendant's finger. *Seidenfaden v. State*, 249 Ga. App. 314, 547 S.E.2d 578 (2001).

Trial court did not err in refusing to merge defendant's offenses of child molestation and aggravated sexual battery, as defendant's conviction of aggravated sexual battery was supported by evidence

that defendant penetrated the victim's vagina with defendant's fingers, and defendant's conviction of child molestation was supported by evidence that he also touched her down in between the victim's legs; thus, the convictions were supported by separate facts, and there was no merger. *Childers v. State*, 257 Ga. App. 377, 571 S.E.2d 420 (2002).

Trial court did not err in sentencing defendant on defendant's convictions for aggravated sexual battery and child molestation by not merging the aggravated sexual battery offense into the child molestation offense involving the same victim; the state proved that the offenses involved separate acts, and, thus, merger of those offenses would not have been appropriate. *Aaron v. State*, 275 Ga. App. 269, 620 S.E.2d 499 (2005).

Because a defendant's convictions for aggravated sexual battery and child molestation were both based on the defendant's touching of the victim's genital area in connection with the penetration of her vagina with a finger, the offenses merged under O.C.G.A. § 16-1-6(1). *Davenport v. State*, 277 Ga. App. 758, 627 S.E.2d 133 (2006).

Trial court properly refused to merge, for sentencing purposes, defendant's convictions for aggravated sexual battery and child molestation since the charged offense of aggravated sexual battery required proof of penetration, whereas the charged offense of child molestation did not. As a result, the separate acts were neither factually nor legally contained in the other respective count and, therefore, the offenses did not merge. *Daniel v. State*, 292 Ga. App. 560, 665 S.E.2d 696 (2008), cert. denied, 2008 Ga. LEXIS 891 (Ga. 2008).

**Child molestation and aggravated child molestation.** — Trial court did not err in entering separate sentences for the offenses of aggravated child molestation and child molestation, where the indictment charged defendant with separate and different sexual acts, and the act which constituted the offense of aggravated child molestation was proved without any reference to the acts which constituted the offenses of child molestation. *Sweet v. State*, 196 Ga. App. 451, 396 S.E.2d 82 (1990).

Two crimes of aggravated child molestation and child molestation did not merge when different evidence could be used to prove each offense separately. *Brewer v. State*, 2001 Ga. App. LEXIS 913 (Aug. 2, 2001) (Unpublished).

**Child molestation and rape.** — Conviction of child molestation did not merge into the offense of rape, where the evidence showed that the jury was authorized to find that defendant fondled the victim and, in an entirely separate incident later that evening, raped the victim. *Jimmerson v. State*, 190 Ga. App. 759, 380 S.E.2d 65, cert. denied, 190 Ga. App. 898, 380 S.E.2d 65 (1989).

**Child molestation and aggravated sodomy.** — O.C.G.A. § 16-6-4(a) (child molestation) was not a lesser included offense of O.C.G.A. § 16-6-2 (aggravated sodomy), either as a matter of law under O.C.G.A. § 16-1-6(2) or O.C.G.A. § 16-1-7(a), or as a matter of fact. *Hill v. State*, 183 Ga. App. 654, 360 S.E.2d 4 (1987).

Child molestation in connection with the fondling of the victim's vagina did not merge with aggravated sodomy charges based on two acts of oral sex, where the acts of sodomy were not used to establish the child molestation charge. *Pressley v. State*, 197 Ga. App. 270, 398 S.E.2d 268 (1990).

Child molestation and aggravated sodomy are legally distinct, and when the indictment for each offense is based on separate and distinct acts, the offenses do not merge. *Howard v. State*, 200 Ga. App. 188, 407 S.E.2d 769, cert. denied, 200 Ga. App. 896, 407 S.E.2d 769 (1991).

When the victim's testimony and other physical evidence clearly showed two incidents of sodomy, one occurring prior to the rape and one afterward, the appellant's contention that the counts of aggravated child molestation and aggravated sodomy were based on a single sexual act and should be merged was invalid. *Garland v. State*, 213 Ga. App. 583, 445 S.E.2d 567 (1994).

**Child molestation and other sexual assaults.** — Because the evidence of defendant's sexual assault of the child victim over a period of a year was sufficient to find defendant guilty of rape, two counts

of aggravated child molestation, sodomy, and the charge of aggravated sexual battery, the two counts of aggravated child molestation did not merge as a matter of fact under O.C.G.A. § 16-1-6(1). *Keown v. State*, 275 Ga. App. 166, 620 S.E.2d 428 (2005).

In a criminal trial on multiple counts of sexual offenses committed against a child victim, there was no error in the trial court's decision not to merge all of the convictions into a cruelty to children count, as the record was replete with multiple acts of sexual abuse and the evidence accordingly did not require merger because the state did not use evidence that the defendant committed one crime in proving another. *Daniels v. State*, 278 Ga. App. 332, 629 S.E.2d 36 (2006).

**Child molestation as lesser included offense of statutory rape.** — Trial court did not err in instructing the jury that it could return a verdict on child molestation, where defendant had been indicted for statutory rape and the evidence showed that child molestation was a lesser included offense of statutory rape as a matter of fact. *Burgess v. State*, 189 Ga. App. 790, 377 S.E.2d 543 (1989), aff'd, 194 Ga. App. 179, 390 S.E.2d 92 (1990).

Trial court erred when it convicted defendant of child molestation because the facts which were used to prove child molestation were the same facts which proved statutory rape, and the court should have merged the child molestation conviction with the statutory rape conviction. *Dorsey v. State*, 265 Ga. App. 404, 593 S.E.2d 945 (2004).

**Cruelty to children and rape.** — When the evidence used to establish the offense of cruelty to children was grabbing and pulling the victim's hair and holding the victim's throat, and the offense of rape, including the element of force, was amply proven by the subsequent events including the defendant's threats to kill the victim before and during intercourse, the jury was authorized to conclude that two separate and distinct offenses were committed. *Love v. State*, 190 Ga. App. 264, 378 S.E.2d 893 (1989), overruled on other grounds by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006).

Lesser offense of cruelty to children did

**Child Molestation (Cont'd)**

not merge into the greater offenses of rape and aggravated child molestation, where the facts that the victim was threatened and terrorized, that the victim screamed in pain, and that the victim continued to experience pain and discomfort and would suffer forever from the venereal diseases contracted from defendant were not needed to prove the elements of rape and aggravated child molestation. Ranalli v. State, 197 Ga. App. 360, 398 S.E.2d 420 (1990).

**Charges of rape, statutory rape, incest, aggravated child molestation, sodomy, and cruelty to children.** — Charges of rape, statutory rape, incest, aggravated child molestation, sodomy, and cruelty to children did not merge into the single count of cruelty to children where the evidence showed that defendant repeatedly sexually assaulted and sodomized the victim, defendant's 13-year old adopted daughter, over a nine-month period. Edmonson v. State, 219 Ga. App. 323, 464 S.E.2d 839 (1995), overruled on other grounds, Collins v. State, 229 Ga. App. 658, 495 S.E.2d 59 (1997).

**Sexual battery can be a lesser included offense of child molestation** in particular cases where the facts alleged in the indictment for child molestation also include all of the elements of sexual battery. Strickland v. State, 223 Ga. App. 772, 479 S.E.2d 125 (1996).

Even though the facts in an indictment for child molestation were sufficient to charge the lesser offense of sexual battery, where the evidence presented demanded a finding of child molestation or nothing, the trial court did not err by refusing to charge on sexual battery. Strickland v. State, 223 Ga. App. 772, 479 S.E.2d 125 (1996).

Sexual battery does not differ from child molestation in the manners set forth in O.C.G.A. § 16-1-6(2). Teasley v. State, 207 Ga. App. 719, 429 S.E.2d 127 (1993), overruled on other grounds, Strickland v. State, 223 Ga. App. 772, 479 S.E.2d 125 (1996).

Indictment taken together with the evidence indicated that sexual battery was not a lesser included offense of child mo-

lestation in case as a matter of fact, and there was no error in the trial court's refusal to charge the jury on the law of sexual battery for such a charge was not authorized by the law or the evidence. Teasley v. State, 207 Ga. App. 719, 429 S.E.2d 127 (1993), overruled on other grounds, Strickland v. State, 223 Ga. App. 772, 479 S.E.2d 125 (1996).

**Sodomy count merged into child molestation**, where the offense of sodomy as alleged was included as a matter of fact in the offense of child molestation as alleged. Horne v. State, 192 Ga. App. 528, 385 S.E.2d 704 (1989), cert. denied, 494 U.S. 1006, 110 S. Ct. 1302, 108 L. Ed. 2d 749 (1990).

**Sodomy is a lesser included offense of aggravated sodomy.** Stover v. State, 256 Ga. 515, 350 S.E.2d 577 (1986).

**Statutory rape included in crime of aggravated child molestation.** — Crime of statutory rape was included, as a matter of fact, in the crime of aggravated child molestation since both convictions were in fact based upon the same single act. Andrews v. State, 200 Ga. App. 47, 406 S.E.2d 801 (1991).

There was no error for sentencing defendant for both offenses for which defendant was convicted, where defendant was indicted for statutory rape and for molesting the victim by fondling her breasts. No elements of each offense are necessarily elements of the other, thus the crimes for which he was convicted arose from two separate acts as a matter of fact. Bryant v. State, 204 Ga. App. 856, 420 S.E.2d 801 (1992); Baker v. State, 211 Ga. App. 515, 439 S.E.2d 668 (1993).

While an indictment did not charge the defendant with statutory rape, O.C.G.A. § 16-6-3, the allegations of the indictment notified the defendant that statutory rape could have been considered a lesser included offense of the indicted crime of child molestation; since the defendant admitted that the defendant tried to place his penis in the victim's vagina, and since the victim testified that "it hurt," a jury instruction on statutory rape as a lesser included offense of child molestation was proper. Stulb v. State, 279 Ga. App. 547, 631 S.E.2d 765 (2006).

**Attempted statutory rape and child molestation.** — Trial court did not err in

merging an attempted statutory rape charge into a child molestation charge as the state was required to prove the commission of an immoral or indecent act (removing the victim's and defendant's clothing), the victim's age was less than 16, and defendant's intent to arouse or satisfy defendant's own or the child's sexual desires; thus, the state used up the evidence that defendant committed attempted statutory rape in establishing that defendant committed child molestation. *Leaptrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Trial court did not err in merging an attempted statutory rape charge into a child molestation charge, instead of merging the child molestation counts into the attempted statutory rape count, as the evidence establishing that defendant fondled the victim's breasts was not used up in proving that defendant removed their clothing and attempted penetration; accordingly, three child molestation charges were not subject to merger with the attempted statutory rape count. *Leaptrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

**Charge on public indecency as lesser included offense of child molestation.** — Although the trial court should have charged the jury on public indecency as a lesser included offense to the charge of child molestation, any error was harmless as it was highly probable that the failure to give the public indecency charge did not contribute to the child molestation verdicts; furthermore, the trial court did not err in refusing to charge the jury on simple assault as the indictment did not allege acts which could support a conviction for simple assault as a matter of law. *Damare v. State*, 257 Ga. App. 508, 571 S.E.2d 507 (2002).

### Other Offenses Involving Children

**Battery lesser included offense of cruelty to children.** — Where the evidence was sufficient to establish that defendant repeatedly struck defendant's nine-year-old child on the back, buttocks, and legs with defendant's hand, leaving several visible, handprint-shaped bruises, battery was a lesser included offense of cruelty to children. *Bennett v. State*, 244

Ga. App. 149, 534 S.E.2d 881 (2000).

**No merger of aggravated battery and cruelty to children.** — Aggravated battery and cruelty to children each requires proof of at least one additional element which the other does not, and the two crimes are not so closely related that multiple convictions are prohibited under O.C.G.A. §§ 16-1-6 and 16-1-7; accordingly, even if the same conduct establishes the commission of both aggravated battery and cruelty to children, the two crimes do not merge, and thus a defendant was properly convicted of both crimes (overruling *Jones v. State*, 276 Ga. App. 762 (624 SE2d 291) (2005); *Etchinson v. State*, 245 Ga. App. 449 (538 SE2d 87) (2000); and *Harmon v. State*, 208 Ga. App. 271 (430 SE2d 399) (1993)). *Waits v. State*, 282 Ga. 1, 644 S.E.2d 127 (2007).

**Cruelty to children may be lesser included offense in aggravated assault with deadly weapon.** — Cruelty to children, which requires only "maliciously [causing] the child cruel or excessive physical ... pain," can be lesser included crime under indictment for aggravated assault with a deadly weapon. *Williams v. State*, 144 Ga. App. 130, 240 S.E.2d 890 (1977); *Cranford v. State*, 186 Ga. App. 862, 369 S.E.2d 50 (1988).

**Cruelty to children and use of fighting words.** — Evidence authorized a jury charge on the offense of "fighting words," where defendant schoolteacher was indicted for battery and cruelty to children, and the proof tracked the indictment which set forth words defendant said to a student which would fall within the parameter of those forbidden by the "fighting words" statute. *Shuler v. State*, 195 Ga. App. 849, 395 S.E.2d 26 (1990).

**Cruelty to children and felony murder.** — Because the evidence established that the child victim had been subjected to multiple assaults to the head, limbs, and torso, which were in distinct stages of healing, and which occurred at various times, the predicate child cruelty offense count did not merge as a matter of fact into felony murder, and the trial court was authorized to enter a judgment of conviction and sentence on that count. *Delacruz v. State*, 280 Ga. 392, 627 S.E.2d 579 (2006).

### Other Offenses Involving Children (Cont'd)

**Cruelty to children and malice murder.** — Although both malice murder and cruelty to children required a malicious intent, O.C.G.A. §§ 16-5-1(a) and 16-5-70(b), the fact that such intent supported an element in each crime did not warrant merging of the sentences when other mutually exclusive elements of the crimes remained, and the other elements of the two offenses had to be compared; malice murder, but not cruelty to children, required proof that defendant caused the death of another human being, § 16-5-1(a), and cruelty to children, but not malice murder, required proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain, § 16-5-70(b). Each crime required proof of at least one additional element which the other did not and the crimes of malice murder and cruelty to children were not so closely related that multiple convictions were prohibited under other provisions of O.C.G.A. §§ 16-1-6 and 16-1-7; accordingly, even if the same conduct established the commission of both malice murder and cruelty to children, the two crimes did not merge. Linson v. State, 287 Ga. 881, 700 S.E.2d 394 (2010).

**Use of fighting words not included in offense of cruelty to children.** — Offense of use of fighting words is not included in the offense of cruelty to children as a matter of law. Shuler v. State, 195 Ga. App. 849, 395 S.E.2d 26 (1990).

**Interference with custody** was not a lesser included offense of kidnapping, as a matter of law or fact, where the indictment did not allege that the mother of the child was the victim of any crime. Stroud v. State, 200 Ga. App. 387, 408 S.E.2d 175 (1991).

**Cruelty to children and battery.** — Although the trial court should have given the defendant's requested charge on battery, O.C.G.A. § 16-5-23.1, since the evidence authorized a finding that the defendant intentionally caused substantial physical harm and visible bodily harm to the victims by beating the victims with a bat and a belt, the failure to give the

battery charge was harmless error in light of the overwhelming evidence of the commission of the greater offense, cruelty to children, O.C.G.A. § 16-5-70; the indictment alleged that the defendant unlawfully and maliciously caused the victims cruel and excessive physical and mental pain by striking the victims about the body with a belt and wooden bat. Dinkler v. State, 305 Ga. App. 444, 699 S.E.2d 541 (2010).

### Other Property Offenses

**Burglary and robbery.** — Statutory definition of burglary and robbery makes it clear that legislature intended to prohibit two designated kinds of general conduct, and that the two crimes, which were codified in separate chapters, are not established by same proof of all facts, thus neither crime is a lesser, or included, offense of the other as a matter of law or fact. Moore v. State, 140 Ga. App. 824, 232 S.E.2d 264 (1976).

**Burglary and financial transaction card theft.** — Defendant was properly convicted of both burglary and financial transaction card theft after gaining entry into the dwelling as each offense had distinct elements. McConnell v. State, 263 Ga. App. 686, 589 S.E.2d 271 (2003).

**Burglary conviction and entering an automobile with intent to commit a theft conviction did not merge** as the state was required to show unlawful entry into a warehouse to convict defendant of burglary, but not to obtain a conviction for entry of automobile with intent to commit a theft; the burglary offense was completed when defendant entered the warehouse without authority and with the intent to commit the theft of the computers; the automobile offense occurred when defendant entered the victim's car with the intent to take the computers. Morris v. State, 274 Ga. App. 41, 616 S.E.2d 829 (2005).

**State may convict and punish accused for burglary and unlawful possession of firearm** by a previously convicted felon, when the firearm was taken in the burglary. The offenses charged were separate and distinct and there was no merger; evidence used to establish the burglary was not again used to establish

the later crime of possession of a weapon by a convicted felon. *Bogan v. State*, 177 Ga. App. 614, 340 S.E.2d 256 (1986).

**Criminal trespass and criminal damage to property** are identical crimes except for the amount of damage required for conviction and the former is a lesser included offense of the latter. *Merrell v. State*, 162 Ga. App. 886, 293 S.E.2d 474 (1982).

Because it was undisputed that the victim failed to testify regarding the value of the damage to the subject property, an adjudication for the offense of second-degree criminal damage to property entered against a juvenile was vacated; however, given evidence that the juvenile intentionally damaged the property of another without consent, and the damage was \$500 or less, an adjudication could be entered on a charge of criminal trespass, which did not violate the juvenile's due process right to be notified of the charges. *In the Interest of J.T.*, 285 Ga. App. 465, 646 S.E.2d 523 (2007).

**Criminal damage as lesser included offense of arson.** — Criminal damage to property in the second degree is a lesser included offense of arson in the first degree. One who commits first-degree arson has also committed criminal damage to property when the property in question belongs to another, but while the latter crime is established by the same conduct as the former, it requires proof of a "less culpable mental state" under the Criminal Code. *Bryant v. State*, 188 Ga. App. 505, 373 S.E.2d 289 (1988).

Trial court properly merged a conviction of criminal damage to property in the second degree, in violation of O.C.G.A. § 16-7-23(a)(1), into a conviction for arson in the second degree, in violation of O.C.G.A. § 16-7-61, as the arson was not a lesser included offense of the criminal damage offense pursuant to O.C.G.A. § 16-1-6(1); arson required the higher mentally culpable state of knowingly, rather than the criminal damage scienter requirement of intentionally, and arson required that the damage to the property have been caused by fire or explosive. *Youmans v. State*, 270 Ga. App. 832, 608 S.E.2d 300 (2004).

**Theft by receiving not lesser included offense of burglary** as matter of

fact or law. *State v. Bolton*, 144 Ga. App. 797, 242 S.E.2d 378 (1978).

**Theft by taking as included offense of theft by receiving.** — When proof of recent unexplained possession of stolen property was sufficient in itself to prove theft by taking but was only one element necessary to prove theft by receiving, theft by taking must be considered an included offense in theft by receiving. *Callahan v. State*, 148 Ga. App. 555, 251 S.E.2d 790 (1978).

**Theft by taking as lesser included offense of robbery.** — Defendant's claim of error in the failure to instruct the jury on theft by taking was rejected as defendant failed to request an instruction on theft by taking as a lesser included offense of robbery. *Young v. State*, 280 Ga. 65, 623 S.E.2d 491 (2005).

**Theft by taking a motor vehicle and theft by taking purse.** — Trial court erred by failing to merge a theft by taking of a motor vehicle count with a theft by taking a purse count as the state conceded that the record was unclear as to whether the theft of the vehicle and the theft of the purse constituted two separate acts, and the evidence appeared to show that the victim's purse was stolen as a result of being inside the car when the car was stolen by the defendant. *Hall v. State*, 292 Ga. App. 544, 664 S.E.2d 882 (2008), cert. denied, No. S08C1841, 2008 Ga. LEXIS 926 (Ga. 2008).

**Plow and tractor were stolen at same time from same place.** — In prosecution for theft, where evidence showed that tractor and plow were stolen at same time and from same place and victim, provisions of former Code 1933, § 26-506 concerning multiple prosecutions for same conduct, prohibited multiple conviction, since theft of plow was included within larceny of tractor. *Brogdon v. State*, 138 Ga. App. 900, 228 S.E.2d 5 (1976) (see O.C.G.A. § 16-1-7(a)(1)).

**Criminal trespass and burglary.** — In prosecution for child molestation and burglary, defendant was not entitled to an instruction on criminal trespass where defendant's claim of alibi did not reasonably raise the inference that defendant entered the home with a less culpable state of mind than the felonious intent of a

**Other Property Offenses (Cont'd)**

burglar as charged in the indictment. Brewer v. State, 219 Ga. App. 16, 463 S.E.2d 906 (1995).

**Attempted arson and criminal trespass.** — Where the indictment which charged defendant with attempted arson in the first degree alleged that defendant poured gasoline on the front porch of a house and threatened to burn the house, and neither the indictment nor O.C.G.A. § 16-7-60 applied to defendant's act of pouring gasoline on a rug which was on the porch, the facts as alleged in the indictment were insufficient to establish criminal trespass regarding the rug; and, therefore, the trial court properly declined to instruct the jury on criminal trespass as a lesser included offense of attempted arson. Dodson v. State, 257 Ga. App. 344, 571 S.E.2d 403 (2002).

**Criminal damage to property and criminal trespass.** — Trial court did not err when it reduced a charge of criminal damage to property in the second degree to criminal trespass when the state failed to prove damages in excess of \$500, instead of granting defendant's motion for acquittal on the charge. The evidence showed that defendant broke the windshield and at least one other window on defendant's wife's car during an argument and therefore was sufficient to sustain defendant's conviction for criminal trespass. Hill v. State, 259 Ga. App. 363, 577 S.E.2d 61 (2003).

**Vehicular Offenses**

**Driving with a suspended or revoked license** was a lesser included offense of operating a motor vehicle after revocation of one's license as an habitual violator, where defendant had been stopped by the police while operating an automobile on an interstate highway at a time when the Georgia driver's license was revoked due to the driver having been declared a habitual violator. Parks v. State, 180 Ga. App. 31, 348 S.E.2d 481 (1986).

After a defendant was convicted of driving with a suspended license in violation of O.C.G.A. § 40-5-121, and was later indicted for a violation of O.C.G.A.

§ 40-5-58 based upon defendant's operation of a motor vehicle after the defendant had been notified of having been declared a habitual violator, the trial court erred in denying the defendant's double-jeopardy plea. Whaley v. State, 260 Ga. 384, 393 S.E.2d 681 (1990).

**Convictions under both O.C.G.A. §§ 40-5-58(c) and 40-6-395(b)(5)(A) were proper** under O.C.G.A. § 16-1-6, as the elements of both charged offenses required different proof; under O.C.G.A. § 40-5-58(c), the state proved that defendant was declared an habitual violator, was properly notified of such status, and that defendant operated a vehicle without having obtained a valid driver's license, while under O.C.G.A. § 40-6-395(b)(5)(A), proof that the driver committed a misdemeanor while fleeing or attempting to elude, that the driver was trying to escape arrest for a felony offense other than road violations, and that the driver committed one of the statutorily enumerated acts was required. Buggay v. State, 263 Ga. App. 520, 588 S.E.2d 244 (2003).

**Proof of motor vehicle theft included proof of aggravated assault.** — When there is no evidence of violence or physical assault upon the victim during the commission of the crimes alleged, proof of the crime of armed robbery included crime of aggravated assault as a matter of fact and likewise, proof of the crime of motor vehicle theft was included in armed robbery the convictions and sentences for aggravated assault and motor vehicle theft must be vacated. Jones v. State, 238 Ga. 51, 230 S.E.2d 865 (1976).

**When motor vehicle theft is lesser included offense of armed robbery.** — When theft of automobile was part of armed robbery as a matter of fact, crime of motor vehicle theft became a lesser included offense of armed robbery, and separate conviction for motor vehicle theft cannot stand. Painter v. State, 237 Ga. 30, 226 S.E.2d 578 (1976).

**Driving under the influence** was lesser included offense of first degree vehicular homicide, and conviction of both offenses was proscribed. Duncan v. State, 183 Ga. App. 368, 358 S.E.2d 910 (1987).

Convictions for driving under the influence of alcohol and reckless driving

merged into a vehicular homicide conviction and were vacated. *Harris v. State*, 272 Ga. App. 366, 612 S.E.2d 557 (2005).

Because DUI was a predicate offense set out in the indictment against the defendant only as an element of the offense of vehicular homicide, in violation of O.C.G.A. § 40-6-393(a), and not as a separate crime for which defendant risked separate criminal liability, a trial court did not err by denying the defendant's plea in bar because, as a felony offense, prosecution on the vehicular homicide counts were commenced within four years after the commission of the crime as required by O.C.G.A. § 17-3-1(c); the expiration of the limitations period for the driving under the influence counts did not preclude a prosecution for vehicular homicide. *Leachman v. State*, 286 Ga. App. 708, 649 S.E.2d 886 (2007), cert. denied, 2007 Ga. LEXIS 768 (Ga. 2007).

**Public drunkenness and driving under the influence.** — Public drunkenness is not, as a matter of fact or law, a lesser included offense of driving under the influence of alcohol to the extent it is less safe to drive. *State v. Tweedell*, 209 Ga. App. 13, 432 S.E.2d 619 (1993).

**Improper lane change, driving without headlights, and driving under the influence of alcohol (DUI) convictions** did not merge because the facts alleged in the accusation with regard to the DUI charge were not also sufficient to establish the lesser offenses of improper lane change and driving without headlights. *Parker v. State*, 249 Ga. App. 530, 549 S.E.2d 154 (2001).

**Operating motor vehicle without insurance** is not a lesser included offense of false swearing. *Bowen v. State*, 173 Ga. App. 361, 326 S.E.2d 525 (1985).

**Reckless conduct** was not a lesser included crime of driving under the influence as a matter of fact since the accusation included no allegation of harm or danger to another person and there was no proof of such at trial. *Whiteley v. State*, 188 Ga. App. 129, 372 S.E.2d 296 (1988).

Trial court erred in failing to merge defendant's convictions for reckless driving, speeding, and reckless conduct since defendant's conviction for reckless conduct was proved by fewer than all of the

facts used to prove defendant's guilt of reckless driving, and the speeding charge, as alleged, was an element of both reckless driving and reckless conduct. *Carrell v. State*, 261 Ga. App. 485, 583 S.E.2d 167 (2003).

**Reckless driving was not a lesser included offense**, as a matter of law or fact, of driving under the influence under O.C.G.A. § 16-1-6, as the facts in the State of Georgia's indictment of defendant were insufficient to support a reckless driving charge under O.C.G.A. § 40-6-390(a), and as a matter of law, the crimes were equally serious. *Shockley v. State*, 256 Ga. App. 892, 570 S.E.2d 67 (2002).

Defendant's conviction and sentence for speeding were vacated where the speeding offenses factually merged into the reckless driving offense for which defendant was also convicted because the same conduct, speeding, was used to prove both crimes. *Fraser v. State*, 263 Ga. App. 764, 589 S.E.2d 329 (2003).

Trial court's failure to merge defendant's convictions for driving recklessly and committing second degree vehicular homicide, in violation of O.C.G.A. §§ 40-6-390 and 40-6-393, respectively, was not error for sentencing purposes, as the reckless driving offense was not the underlying offense of the homicide, but rather, improper lane change was, in violation of O.C.G.A. § 40-6-123(a); further, pursuant to O.C.G.A. § 16-1-6, there was no factual merger because the crimes were committed sequentially and separately. *Cutter v. State*, 275 Ga. App. 888, 622 S.E.2d 96 (2005).

**Reckless driving was a lesser included offense to aggravated assault.** — Defendant was entitled to a new trial on the charge of aggravated assault upon a police officer in violation of O.C.G.A. § 16-5-21 because the trial court should have given the defendant's requested charge on reckless driving in violation of O.C.G.A. § 40-6-390(a) as a lesser included offense since there was evidence that the defendant did not intend to injure a police officer but that the defendant's decision to drive off suddenly with the officer in close proximity to the defendant's truck was nonetheless an act of

**Vehicular Offenses (Cont'd)**

criminal negligence, which would have supported a conviction for reckless driving. *Young v. State*, 294 Ga. App. 227, 669 S.E.2d 407 (2008).

**Reckless driving and serious injury by vehicle.** — Trial court did not err by failing to merge a reckless-driving charge into a serious-injury-by-vehicle charge because the two crimes were entirely separate and distinct, requiring a showing of different elements and based on the defendant's drunk driving of a four-wheeler ATV with a 10-year-old passenger, who was brain-damaged when the defendant clipped a tractor and flipped the ATV; the state used the evidence of the clipping of the tractor scoop, which caused the rollover and injury to the child, as the elements of the serious-injury-by-vehicle offense, which was separate from and sequential to the reckless-driving offense, which was premised on the defendant's intoxication. *Croft v. State*, 278 Ga. App. 107, 628 S.E.2d 144 (2006).

**Serious injury by vehicle and vehicular homicide.** — Five convictions for serious injury by vehicle and a conviction for vehicular homicide did not merge; although the convictions stemmed from one incident of driving under the influence, there were separate victims for each offense. *Harris v. State*, 272 Ga. App. 366, 612 S.E.2d 557 (2005).

**Double jeopardy issues.** — Because a uniform traffic citation was deliberately withheld from filing, and the state did not authorize or participate in the prosecution of the case, the probate court lacked authority to accept defendant's plea to the proposed charge and impose a fine, making its resulting judgment void; hence, the trial court did not err in denying defendant's plea in bar based on double jeopardy, since the probate court's void judgment could not serve as the basis for barring the subsequent indictment and prosecution of defendant in the superior court. *Roberts v. State*, 280 Ga. App. 672, 634 S.E.2d 790 (2006).

**Miscellaneous Crimes**

**Aggravated stalking did not merge with burglary count.** — Trial court did

not err by not merging a defendant's aggravated stalking count into a burglary count based upon the defendant's contention that under the actual evidence test, the same factual evidence was used to prove both crimes; as to prove the burglary count, the state had to prove that the defendant entered the victim's residence without authority and with the intent to commit aggravated stalking, and to prove the aggravated stalking count, the state had to prove that the defendant surveilled and contacted the victim in violation of a condition of probation for the purpose of harassing and intimidating the victim. As such, the burglary statute required that the state show entry into the residence, which was not required by the aggravated stalking statute, and, on the other hand, the aggravated stalking statute required that the state prove that the defendant actually contacted the victim, which was not required by the burglary statute that only required that the defendant contact the victim when the defendant entered the residence. *Williams v. State*, 293 Ga. App. 193, 666 S.E.2d 703 (2008).

**Gambling and operating a gambling house are entirely different.** — Gambling is one thing and operating a gambling house is a kindred but entirely different thing; different evidence is required to convict of these separate offenses. No absurdity or repugnancy is created by acquittal of gambling and conviction of operating a gambling house. *McGahee v. State*, 133 Ga. App. 964, 213 S.E.2d 91 (1975).

**Issuing bad checks and forgery.** — Offense of issuing bad checks is not a lesser included offense of forgery, and, in a prosecution for forgery, the trial court's failure to give a charge on issuing bad checks was not error. *Adams v. State*, 217 Ga. App. 759, 458 S.E.2d 918 (1995).

**Negotiating a fictitious check and forgery.** — Offense of negotiating a fictitious check is a lesser included offense of forgery, and, in a prosecution for forgery, the trial court's failure to give a charge on negotiating fictitious checks constituted reversible error. *Adams v. State*, 217 Ga. App. 759, 458 S.E.2d 918 (1995).

**Theft by taking and forgery.** — After defendant pled guilty to theft by taking for

writing fraudulent checks, defendant's subsequent prosecution for forgery for uttering and delivering the checks was not barred under O.C.G.A. § 16-1-6 or § 16-1-7(a) because the two crimes were not lesser included offenses of the other. *Cade v. State*, 262 Ga. App. 206, 585 S.E.2d 172 (2003).

**Forgery and false writing.** — When the defendant was convicted of first-degree forgery under O.C.G.A. § 16-9-1 and false writing under O.C.G.A. § 16-10-20 for obtaining expungement order by presenting a Georgia Crimes Information Center certificate that had been altered to state that the defendant had no criminal record, counts were not included in each other under O.C.G.A. §§ 16-1-6 and 16-1-7; false writing charge did not require proof that the writing purported to be made by authority of one who in fact gave no such authority, and forgery charge did not require proof that the writing was made or used in a matter within the jurisdiction of the district attorney's office. *Jones v. State*, 290 Ga. App. 490, 659 S.E.2d 875 (2008).

**Possession of firearm not merged into accompanying felony.** — Offense of possession of a firearm during the commission of a felony does not merge into the accompanying felony, i.e., armed robbery, so that the defendant can be convicted of both without statutory or constitutional prohibition. *Brown v. State*, 199 Ga. App. 773, 406 S.E.2d 248 (1991).

Trial court did not err in failing to merge an aggravated assault charge and firearm possession charges with an aggravated battery charge because the crimes did not merge legally or factually since each of the crimes required proof of a fact that the other crimes did not. *Gant v. State*, 291 Ga. App. 823, 662 S.E.2d 895 (2008).

**Multiple firearms possession.** — Trial court properly refused to merge the two arms-possession counts for sentencing purposes because those charges were based on defendants' possession of two guns during the burglary; the acts were separate crimes involving multiple defendants, separate crimes for which each defendant bore individual responsibility as either a principal or an accessory.

*Dunbar v. State*, 273 Ga. App. 29, 614 S.E.2d 472 (2005).

**Simple battery as included in battery.** — Trial court erred by sentencing appellant on all three counts, two counts of simple battery, O.C.G.A. § 16-5-23(a)(1) (intentionally making physical contact of an insulting and provoking nature) and (a)(2) (intentionally causing physical harm), and the offense of battery, O.C.G.A. § 16-5-23.1 (intentionally causing visible bodily harm), in the accusation, rather than merging the two counts of simple battery with the battery, given that the evidence at trial established that each crime was established by proof of the same facts, except that the battery charge required proof that the defendant caused visible bodily harm. *Hussey v. State*, 206 Ga. App. 122, 424 S.E.2d 374 (1992).

**Simple battery is not a lesser included offense of felony obstruction** because it is a separate and independent offense wherein the intent is to make physical contact or cause physical harm. *Pearson v. State*, 224 Ga. App. 467, 480 S.E.2d 911 (1997).

**Simple battery merged with robbery.** — Because the single continuous act of simple battery, O.C.G.A. § 16-5-23(a)(1), was the evidence required to show the "force" used to accomplish a robbery, O.C.G.A. § 16-8-40(a)(1), the defendant's battery convictions merged with the robbery conviction; the "use of force" charged in connection with the robbery was "hitting," which was the same type of force used in the continuous battery. *Bonner v. State*, No. A10A1670, 2011 Ga. App. LEXIS 298 (Mar. 28, 2011).

**Simple battery convictions merged.** — Defendant's simple batteries convictions merged as a matter of fact because the three batteries were part of a continuous criminal act; the indictment charged the defendant with simple battery by "grabbing" the victim, "holding him down," and "hitting" the victim, respectively. *Bonner v. State*, No. A10A1670, 2011 Ga. App. LEXIS 298 (Mar. 28, 2011).

**Harassing telephone calls and terroristic threats.** — Depending on the facts, harassing telephone calls may be an included offense of terroristic threats.

**Miscellaneous Crimes (Cont'd)**

Todd v. State, 230 Ga. App. 849, 498 S.E.2d 142 (1998).

Because defendant's defense to the charge of terroristic threats was that defendant never made any threats or intimidating remarks at all, the trial court did not err in refusing to give defendant's request for an instruction on the offense of harassing telephone calls. Todd v. State, 230 Ga. App. 849, 498 S.E.2d 142 (1998).

In a prosecution on three counts of aggravated stalking, the defendant was not entitled a jury charge on the lesser included offense of harassing telephone calls, based on the fact that under the evidence presented, the defendant was either guilty of the indicted offenses or was guilty of no offense whatsoever. Patterson v. State, 284 Ga. App. 780, 645 S.E.2d 38 (2007).

**Shoplifting.** — When the evidence was uncontradicted that the value of two watches exceeded \$300 each, a jury charge on misdemeanor shoplifting was not warranted and the defendant was properly convicted of felony shoplifting based on the retail value of the goods. Reeves v. State, 261 Ga. App. 466, 582 S.E.2d 590 (2003).

**Violation of oath by a public officer is a lesser included offense of bribery.** Nave v. State, 171 Ga. App. 165, 318 S.E.2d 753 (1984); Nave v. Helms, 845 F.2d 963 (11th Cir. 1988).

**False swearing and malicious confinement.** — Defendant's convictions for false swearing under O.C.G.A. § 16-10-71, proven by evidence that defendant made false statements in an affi-

davit seeking an involuntary commitment order for the victim, and malicious confinement under O.C.G.A. § 16-5-43, supported by proof apart from the execution of the false affidavit, did not merge as a matter of fact. Washington v. State, 271 Ga. App. 764, 610 S.E.2d 692 (2005).

**Felony escape and misdemeanor escape.** — Entry of a guilty plea was not a judgment of conviction until sentence was imposed; therefore, a defendant who walked away from the courthouse after plea entry but before sentencing was not guilty of felony escape, but could be convicted only of misdemeanor escape. Dorsey v. State, 259 Ga. App. 254, 576 S.E.2d 637 (2003).

**Mutiny in a penal institution and aggravated assault** require proof of different elements and, therefore, the former offense cannot be a lesser included offense of the latter. Bierria v. State, 232 Ga. App. 622, 502 S.E.2d 542 (1998).

**Sentence for uncharged conspiracy offense not void.** — An indictment that accused a defendant and a codefendant of acting together as parties to the crime to commit the offense of possession of cocaine with intent to distribute accused the defendant in a manner that included a conspiracy offense. As the evidence was sufficient to allow the jury to conclude that the defendant conspired with the codefendant to possess the cocaine without actually reaching the point of possession, the defendant's sentence for a conviction of the lesser-included offense of conspiracy to possess cocaine with intent to distribute was not void, even though that offense was not charged in the indictment. King v. State, 295 Ga. App. 865, 673 S.E.2d 329 (2009).

**OPINIONS OF THE ATTORNEY GENERAL**

**Separate prosecutions for municipal and state law violations.** — An accused arrested for separate non-included offenses arising out of a single transaction, which violate municipal ordinances and state law respectively, may be prosecuted first in the recorder's

court for the municipal ordinance violations, and then transferred to the superior court to be prosecuted for the separate state violations, without violating statutory or constitutional double jeopardy prohibitions. 1986 Op. Att'y Gen. No. U86-32.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 305 et seq. 41 Am. Jur. 2d, Indictments and Informations, §§ 108, 296.

**C.J.S.** — 42 C.J.S., Indictments and Informations, § 290 et seq.

**ALR.** — Conviction or acquittal of larceny as bar to prosecution for burglary, 19 ALR 626.

Pendency in one county of charge of larceny as bar to subsequent charge in another county of offense which involves both felonious breaking and felonious taking of same property, 19 ALR 636.

Duty to charge as to reasonable doubt as between different degrees of crime or included offenses, 20 ALR 1258.

Forgery of names of several individuals to the same instrument as more than one offense, 33 ALR 562.

Acquittal or conviction of one offense in connection with operation of automobile as bar to prosecution for another, 44 ALR 564; 172 ALR 1053.

Acquittal or conviction of assault and battery as bar to prosecution for rape, or assault with intent to commit rape, based on same transaction, 78 ALR 1213.

Conviction of lesser offense, against which statute of limitations has run, where statute has not run against offense with which defendant is charged, 47 ALR2d 887.

Application of felony-murder doctrine where the felony relied upon is an includable offense with the homicide, 40 ALR3d 1341.

When should jury's deliberation proceed from charged offense to lesser-included offense, 26 ALR5th 603.

Propriety of lesser-included-offense charge to jury in federal prosecution for crime involving property rights, 105 ALR Fed. 669.

Propriety of lesser-included-offense charge in federal prosecution of narcotics defendant, 106 ALR Fed. 236.

### 16-1-7. Multiple prosecutions for same conduct.

(a) When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if:

(1) One crime is included in the other; or

(2) The crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

(b) If the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution except as provided in subsection (c) of this Code section.

(c) When two or more crimes are charged as required by subsection (b) of this Code section, the court in the interest of justice may order that one or more of such charges be tried separately. (Code 1933, § 26-506, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1982, p. 3, § 16.)

**Cross references.** — Multiple jeopardy, U.S. Const., amend. 5 and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII. Fraud generally, § 16-9-50 et seq.

**Law reviews.** — For survey article citing developments in Georgia criminal law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 95 (1981). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For annual survey on criminal law and procedure, see 42 Mercer L. Rev. 141 (1990).

For note discussing organized crime in Georgia with respect to the application of state gambling laws, and suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970).

For comment, "Grady v. Corbin: An Unsuccessful Effort to Define Same Offense," see 25 Ga. L. Rev. 143 (1990).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### INCLUDED CRIMES

1. IN GENERAL
2. CRIMES AGAINST THE PERSON
3. CRIMES AGAINST PROPERTY
4. APPLICATION TO OTHER CRIMES

##### JOINT PROSECUTION OF OFFENSES

1. IN GENERAL
2. CRIMES AGAINST THE PERSON
3. CRIMES AGAINST PROPERTY
4. APPLICATION TO OTHER CRIMES

##### SEVERANCE

1. IN GENERAL
2. APPLICATION
3. SENTENCING

### General Consideration

**Statute proscribes multiple convictions and successive prosecutions for same conduct.** Brock v. State, 146 Ga. App. 78, 245 S.E.2d 442 (1978) (see O.C.G.A. § 16-1-7).

O.C.G.A. § 16-1-7 constitutes Georgia's statutory bar to successive prosecutions, the procedural aspect of double jeopardy. Mann v. State, 160 Ga. App. 527, 287 S.E.2d 325 (1981).

The state is required to prosecute all offenses arising out of the same course of conduct at the same time in a single prosecution. Where the state attempts to charge the defendant with all offenses arising out of a vehicular accident involving a death, but the trial judge, finding no allegations in the indictment permitting proof of an exception to the statute of limitations, permits no evidence as to the counts other than the one charging murder, and the state proceeds with a prosecution as to the murder count, any other counts as to vehicular homicide, reckless driving, driving under the influence, and

driving off the center lane are barred by procedural double jeopardy. State v. Stowe, 167 Ga. App. 65, 306 S.E.2d 663 (1983).

O.C.G.A. § 16-1-7(a) precludes conviction or punishment for more than one crime if one is included in the other as a matter of law or fact. Teal v. State, 203 Ga. App. 440, 417 S.E.2d 666, cert. denied, 203 Ga. App. 908, 417 S.E.2d 666 (1992).

Under O.C.G.A. §§ 16-1-6 and 16-1-7, a defendant may be prosecuted for two crimes based on the same conduct, but defendant may not be convicted of more than one crime if one crime is included in the other. Padgett v. State, 205 Ga. App. 576, 423 S.E.2d 411 (1992).

Although the heading of O.C.G.A. § 16-1-7 relates to multiple prosecutions for the same conduct, it actually proscribes multiple convictions and successive prosecutions for the same conduct. State v. Kennedy, 216 Ga. App. 405, 454 S.E.2d 600 (1995).

An accused may be prosecuted for both rape and child molestation based on the same conduct, but he may not be convicted

of both *Mackey v. State*, 235 Ga. App. 209, 509 S.E.2d 68 (1998).

When defendant was charged with child molestation, incest, interstate interference with custody, and statutory rape, all concerning the same victim, except for one count naming the parents as victims, and defendant pled guilty to interstate interference with custody and statutory rape, with the state requesting a nolle prosequi order on the remaining counts, it was not error to convict defendant of statutory rape and enter a nolle prosequi order as to child molestation and incest on the theory that all charges arose from the same events, because defendant was only convicted of statutory rape and interstate interference with custody, and nothing showed that defendant was improperly convicted of lesser included crimes based on the same conduct under O.C.G.A. § 16-1-7(a)(1). *Hernandez v. State*, 276 Ga. App. 57, 622 S.E.2d 594 (2005).

**Purpose of statute.** — First policy underlying double jeopardy bar is to prevent harassment of accused by successive prosecutions. *Marchman v. State*, 234 Ga. 40, 215 S.E.2d 467 (1975).

Statute was designed to protect accused against the harassment of multiple prosecutions arising from same conduct. *Waites v. State*, 238 Ga. 683, 235 S.E.2d 4 (1977).

**Effect of conviction.** — Defendant can be convicted on only one of multiple pending indictments; the remaining indictments are to be dismissed following trial on one of the cases on the merits. *Geckles v. State*, 177 Ga. App. 70, 338 S.E.2d 473 (1985).

When a jury convicted a defendant on an aggravated battery charge, but acquitted defendant on charges of obstruction, simple battery, and aggravated assault and could not reach a verdict on a second charge of aggravated assault, the jury's inability to reach a verdict on the second aggravated assault charge, a lesser included offense, did not invalidate the jury verdict on the aggravated battery charge. *Collier v. State*, 195 Ga. App. 380, 393 S.E.2d 509 (1990).

**Double jeopardy questions controlled by O.C.G.A. §§ 16-1-6, 16-1-7, and 16-1-8.** — Former 1968 Criminal

Code (see O.C.G.A. T. 16) extends proscription of double jeopardy beyond that provided for in United States and Georgia Constitutions. Therefore, questions of double jeopardy in Georgia must be determined under the proscriptions of former Code 1933, §§ 26-505 through 26-507 (see O.C.G.A. §§ 16-1-6 through 16-1-8). *State v. Warren*, 133 Ga. App. 793, 213 S.E.2d 53 (1975).

Former 1968 Criminal Code extends double jeopardy proscription beyond that provided for in United States and Georgia Constitutions. *Marchman v. State*, 234 Ga. 40, 215 S.E.2d 467 (1975) (see O.C.G.A. T. 16).

Former Code 1933, §§ 26-505 through 26-507 provide expanded statutory test for determining double jeopardy questions, thereby rendering inapplicable previous Georgia decisions applying only minimum constitutional standards of double jeopardy. *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978) (see O.C.G.A. §§ 16-1-6 through 16-1-8).

Questions of double jeopardy in Georgia must be determined under the expanded statutory proscriptions found in O.C.G.A. §§ 16-1-6 through 16-1-8 which place limitations upon multiple prosecutions, convictions, and punishments for the same criminal conduct. *Stone v. State*, 166 Ga. App. 245, 304 S.E.2d 94 (1983).

After a defendant engaged in two separate courses of conduct, the attempt to sell marijuana to an undercover police officer and the possession of 12 pounds of marijuana at defendant's home, double jeopardy did not attach to the second prosecution as these acts occurred at different times and locations, with distinct quantities of contraband, even though the defendant might have at some earlier time possessed all the marijuana in defendant's home; thus, the defendant's argument on substantive double jeopardy was rejected. *Kinchen v. State*, 265 Ga. App. 474, 594 S.E.2d 686 (2004).

**Jeopardy did not attach because there was no adjudication of guilt.** — Because the defendant's alleged mistake of fact regarding a charge of possession of a firearm by a convicted felon required consideration of facts extrinsic to the ac-

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cusation to be decided by a jury, the trial court erred in dismissing the charge, *sua sponte*; moreover, as such dismissal was not an adjudication of guilt, the state could appeal from the same without violating the defendant's double jeopardy rights. *State v. Henderson*, 283 Ga. App. 111, 640 S.E.2d 686 (2006).

**Former Code 1933, §§ 26-505 through 26-507 distinguish between two aspects of double jeopardy:** first, limitations upon multiple prosecutions for crimes arising from same conduct (referred to as procedural bar of double jeopardy); and, second, limitations upon multiple convictions or punishments that may be imposed for such crimes (referred to as substantive bar of double jeopardy). *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978) (see O.C.G.A. §§ 16-1-6 through 16-1-8).

**Procedural aspect of double jeopardy rule.** — Procedural aspect of the double jeopardy rule prohibits multiple prosecutions arising from the same conduct. *Teal v. State*, 203 Ga. App. 440, 417 S.E.2d 666, cert. denied, 203 Ga. App. 908, 417 S.E.2d 666 (1992).

Trial court properly granted the defendant's plea in bar and plea of former jeopardy in a burglary prosecution as the state improperly terminated the first trial by dismissing the indictment after jeopardy attached without the defendant's consent, and the second burglary prosecution, although alleging a different date, residence, and accomplice, was based on the same material facts as the first indictment. *State v. Jackson*, 290 Ga. App. 250, 659 S.E.2d 679 (2008).

**Statute affords protection broader than defense of double jeopardy.** — Former Code 1933, § 26-506 gave accused some protection from repeated prosecutions in those situations when the defense of double jeopardy was not available and yet accused should not be worn down by multiple prosecutions arising from the same conduct. *Johnson v. State*, 130 Ga. App. 134, 202 S.E.2d 525 (1973) (see O.C.G.A. § 16-1-7).

**Abandonment of statutory double jeopardy protections meant constitu-**

**tional protections only remained.** — Defendant raised the state constitutional provision and O.C.G.A. §§ 16-1-7 and 16-1-8 in the defendant's plea of former jeopardy; however, the defendant expressly abandoned the statutory grounds at the hearing. By choosing that procedure, defendant actually relied upon the minimum constitutional protections against double jeopardy and chose to forego the additional protections provided by Georgia statutory law; thus, the trial court erred in applying Georgia statutory law in the instant case. *Garrett v. State*, 306 Ga. App. 429, 702 S.E.2d 470 (2010).

**Statute superseded by more specific carjacking statute.** — O.C.G.A. 16-5-44.1(d) supersedes O.C.G.A. § 16-1-7 in carjacking cases. *Campbell v. State*, 223 Ga. App. 484, 477 S.E.2d 905 (1996).

**Attachment of jeopardy.** — Defendant is placed in jeopardy when, in a court of competent jurisdiction with a sufficient indictment, defendant has been arraigned, has pled, and a jury has been impaneled and sworn. *Geckles v. State*, 177 Ga. App. 70, 338 S.E.2d 473 (1985).

O.C.G.A. § 16-1-7(b) presupposes that defendant has been subjected to a previous prosecution and a prosecution encompasses more than mere return of an indictment. *State v. Daniels*, 206 Ga. App. 443, 425 S.E.2d 366 (1992).

**Pendency of a former indictment for same offense** does not provide a ground for a plea of double jeopardy because even if an accused has been arraigned and has entered a plea, the accused is not placed in jeopardy until a jury is impaneled and sworn. *Teal v. State*, 203 Ga. App. 440, 417 S.E.2d 666, cert. denied, 203 Ga. App. 908, 417 S.E.2d 666 (1992).

**Multiple accusations and indictments not barred.** — O.C.G.A. § 16-1-7(b) is a bar to multiple prosecutions, and does not forbid multiple accusations or multiple indictments. *Cochran v. State*, 176 Ga. App. 58, 335 S.E.2d 165 (1985).

To constitute a "previous prosecution" within the meaning of O.C.G.A. §§ 16-1-7(b) and 16-1-8(b), the defendant previously must have been "placed in jeopardy" as to at least one of the offenses arising out of the same conduct as the

offense for which the state is subsequently attempting to prosecute defendant. *State v. Smith*, 185 Ga. App. 694, 365 S.E.2d 846 (1988).

Plea of guilty to an indictment or complaint with its entry on the record and acceptance by the trial judge constitutes jeopardy for purposes of O.C.G.A. §§ 16-1-7(b) and 16-1-8(b). *State v. Smith*, 185 Ga. App. 694, 365 S.E.2d 846 (1988).

Because the crimes alleged in the accusation and indictment involved different victims, locations, and times, and hence did not arise from the same conduct, the trial court did not err in denying the defendant's motion to dismiss the charges in the indictment on double jeopardy grounds based on the defendant's prior plea to the charges in the accusation. *Davis v. State*, 287 Ga. App. 535, 652 S.E.2d 177 (2007).

**Multiple convictions and punishments for one crime improper.** — Because no evidence showed that the information concerning the defendant was known to the proper prosecuting officer in Gwinnett County, and because no basis otherwise existed for a charge of conspiracy to traffic based on what officers recovered in the search of the defendant's home, the appeals court refused to state that the defendant could have been convicted of conspiracy to traffic methamphetamine in Gwinnett County, or that Gwinnett County should have charged the defendant with this crime; hence, under these circumstances, the Dawson County indictment was not barred under O.C.G.A. §§ 16-1-6(b)(1) and 16-1-7(b). *Bradford v. State*, 283 Ga. App. 75, 640 S.E.2d 630 (2006).

Appeals court agreed that because there was only one homicide victim, only one life sentence, and not three, could be imposed, because such improperly subjected the defendant to multiple convictions and punishments for one crime. *Turner v. State*, 281 Ga. 487, 640 S.E.2d 25 (2007).

**Substantive bar against double jeopardy not waived by guilty plea.** — Right to be free of multiple convictions for the same conduct has been referred to as the substantive bar against double jeopardy, and it is not waived either by the defendant's entry of a guilty plea or by

defendant's failure to assert it in the trial court. *Redding v. State*, 188 Ga. App. 805, 374 S.E.2d 339 (1988).

**Waiver of procedural and substantive bar against double jeopardy.** — Although the procedural bar against double jeopardy found in O.C.G.A. § 16-1-8 can be waived by failure to assert it in writing prior to trial, the failure to file a written plea of former jeopardy prior to trial will not defeat an accused's right to be free of multiple convictions, under O.C.G.A. § 16-1-7, for the criminal act. *McClure v. State*, 179 Ga. App. 245, 345 S.E.2d 922 (1986).

When the defendant had already pled guilty, been sentenced, and completed sentence for certain crimes, an effort to reindict the defendant based on a violation of a plea agreement that the defendant would not seek public office was properly dismissed on the grounds of double jeopardy; the defendant's agreement to submit to such prosecution by waiving bar to prosecution, regardless of the failure to mention double jeopardy, was ineffectual. *State v. Barrett*, 215 Ga. App. 401, 451 S.E.2d 82 (1994), rev'd on other grounds, 265 Ga. 489, 458 S.E.2d 620 (1995).

**Successive municipal and state court prosecutions.** — Georgia's double jeopardy statute is inapplicable to successive municipal and state court prosecutions. *State v. Burroughs*, 244 Ga. 288, 260 S.E.2d 5 (1979); *Parker v. State*, 170 Ga. App. 333, 317 S.E.2d 209 (1984); *Dickinson v. State*, 191 Ga. App. 467, 382 S.E.2d 187 (1989); *Puckett v. State*, 239 Ga. App. 582, 521 S.E.2d 634 (1999).

O.C.G.A. § 16-1-7(a) does not preclude successive state and municipal prosecutions, only successive prosecutions for state crimes. *Fuller v. State*, 169 Ga. App. 468, 313 S.E.2d 745 (1984).

Subsequent prosecution of defendant for robbery after defendant pled guilty in traffic court to fleeing to elude did not violate O.C.G.A. § 16-1-7 since there was no evidence that the traffic court solicitor knew about the robbery indictment when defendant's guilty plea was entered. *Blackwell v. State*, 230 Ga. App. 611, 496 S.E.2d 922 (1998).

When a defendant pled guilty to an alcohol possession charge in state court,

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O.C.G.A. § 16-1-7(b) did not bar a subsequent prosecution in superior court of felony molestation and sexual battery charges allegedly arising out of the same conduct; the defendant did not show that the officer who handled the state court action knew of the other alleged crimes. Barlowe v. State, 286 Ga. App. 133, 648 S.E.2d 471 (2007).

**Plea on local ordinance did not impact state prosecution.** — Order barring the defendant's prosecution for aggravated assault and aggravated battery on double jeopardy grounds based on the defendant's prior guilty plea to violating a disorderly conduct ordinance, a charge arising from the same fight, was error because the defendant failed to set forth the elements of the ordinance, and failed to properly plead and prove the ordinance; Georgia courts are not allowed to take judicial notice of local ordinances, but, rather, the ordinances must be alleged and proved by production of the original or of a properly certified copy. Further, because the defendant failed to prove below that the charges could have been brought within the jurisdiction of a single court and that the proper prosecuting attorney knew of the recorder's court proceedings, the trial court was not authorized to grant the plea in bar under O.C.G.A. § 16-1-7(b). State v. Jeffries, 298 Ga. App. 141, 679 S.E.2d 368 (2009).

**Offenses not arising from same transaction.** — When the defendant was convicted of driving under the influence in municipal court and then prosecuted for vehicular homicide and driving under the influence in superior court, the latter prosecution was not barred by principles of double jeopardy since the offenses did not arise from the same transaction and, because the offenses were completed at different times and in different locations, there was no single court with jurisdiction over all the crimes. Lefler v. State, 210 Ga. App. 609, 436 S.E.2d 777 (1993).

After the defendant was arrested for various traffic-related offenses following an accident and the officer investigating the accident found evidence of controlled substance violations, a separate prosecu-

tion of the traffic offenses after prosecution for the controlled substance offenses was not barred by double jeopardy since the offenses involved different acts and occurred on different dates and in different locations. State v. Steien, 214 Ga. App. 345, 447 S.E.2d 701 (1994).

Prosecution for forgery was not barred by O.C.G.A. § 16-1-7 where the forgery involved different parties, circumstances, locations, and times, and did not arise from the same transaction as other traffic and forgery charges. State v. Hulsey, 216 Ga. App. 670, 455 S.E.2d 398 (1995).

Following a mistrial in the trial of defendant for theft by taking, double jeopardy did bar defendant's reindictment on the original charge and an additional count of theft by receiving stolen property because the evidence showed the commission of separate crimes by separate individuals. Wilson v. State, 229 Ga. App. 455, 494 S.E.2d 267 (1997).

Offense of cruelty to children did not arise from the same transaction as the offenses of possession of marijuana or simple battery and, therefore, prosecution for the former offense was not barred because defendant had been charged with the other offenses. State v. Cornette, 229 Ga. App. 487, 494 S.E.2d 289 (1997).

**Prosecution on state and federal charges of murder and kidnapping held proper.** — Since the facts necessary to prove the federal charges of kidnapping and interstate travel with intent to commit murder for extortion are different from the facts necessary to prove the Georgia charges of murder and aggravated assault, there was no violation of either Georgia's statutes barring multiple prosecutions or the constitutional prohibition against double jeopardy, when the defendants were prosecuted in federal and state courts for all of the above offenses. Satterfield v. State, 256 Ga. 593, 351 S.E.2d 625 (1987).

**Multiple underlying felonies in felony murder case.** — Appropriate manner for charging felony murder in instances when more than one underlying felony is alleged is to indict for one count of felony murder, and enumerate the multiple underlying felonies. State v. McBride, 261 Ga. 60, 401 S.E.2d 484 (1991).

If there are multiple underlying felonies, the state is not required to elect between those felonies when charging the defendant with felony murder. *State v. McBride*, 261 Ga. 60, 401 S.E.2d 484 (1991).

**Malice murder conviction vacates felony murder charge.** — By operation of O.C.G.A. § 16-1-7, the trial court's proper entry of a judgment of conviction upon the jury's finding defendant guilty of malice murder vacated a felony murder charge. *Tiller v. State*, 267 Ga. 888, 485 S.E.2d 720 (1997).

When a defendant had been convicted of malice murder, felony murder, armed robbery, and other crimes, the trial court did not err by failing to merge the armed robbery counts into the felony murder count predicated on the underlying felony of armed robbery as the felony murder count was vacated by operation of O.C.G.A. § 16-1-7, and the defendant could be sentenced for the felony conviction so long as the felony was not included in the murder as a matter of fact or law; here, the armed robbery was not included in the malice murder charge as a matter of fact or law; evidence showing the defendant's intent to rob the victim was not used in proving the murder, and evidence that the defendant shot the victim was not used to prove the armed robbery. *Davis v. State*, 281 Ga. 871, 644 S.E.2d 113 (2007).

**Felony prosecution not barred by prior plea of guilty to traffic offense.** — Defendant's entry of a plea of guilty to a traffic code violation did not bar prosecution for felony charges arising out of defendant's stop for the traffic violation, where it would have been unreasonable to impute the knowledge of one prosecuting officer to another, since two entirely separate prosecuting officers were involved and defense counsel had deliberately set out to exploit the situation by seeking expeditious disposition of the traffic violation. *Powe v. State*, 181 Ga. App. 429, 352 S.E.2d 783 (1986).

Defendant's payment of a fine for a seat belt violation without entering a plea was not a "former prosecution" that barred defendant's later prosecution for vehicular homicide and other charges arising out of the same conduct, since the fine was ac-

cepted in error and without the permission or knowledge of the prosecutor's office or the court. *Brown v. State*, 251 Ga. App. 569, 554 S.E.2d 760 (2001).

**Forfeiture proceedings not a bar to prosecution.** — Double jeopardy did not attach to bar prosecution of defendant on state drug charges following federal civil forfeiture proceedings because defendant's failure to contest the forfeiture meant defendant was not placed in jeopardy in those proceedings and, also, Georgia constitutional and statutory provisions did not bar the prosecution because they apply only to criminal proceedings, not civil proceedings. *Waye v. State*, 219 Ga. App. 22, 464 S.E.2d 19 (1995).

**Civil forfeiture proceeding** in a drug case was not a criminal prosecution for purposes of double jeopardy. *Murphy v. State*, 219 Ga. App. 474, 465 S.E.2d 497 (1995), aff'd, 267 Ga. 120, 475 S.E.2d 907 (1996).

**Juvenile proceedings.** — After a juvenile pled guilty to various traffic offenses and paid the fines, such action barred proceedings on a petition seeking an adjudication of delinquency based on other charges related to the same automobile accident. *In re J.B.W.*, 230 Ga. App. 673, 497 S.E.2d 1 (1998).

**Separate proceedings in separate jurisdictions.** — After a Georgia state patrolman began pursuing the defendant in one county after a radar check revealed that the defendant was speeding, the patrolman stated that the defendant's vehicle was observed "weaving" after the vehicle passed into the other county and that the patrolman detected a strong odor of alcohol on the defendant's breath upon stopping the defendant, and the patrolman issued two citations, one for speeding in one county and the other charging the defendant with driving under the influence of alcohol in the other county, a plea of guilty to the speeding charge in one county did not bar a Driving Under the Influence (DUI) prosecution in the other county. *Morgan v. State*, 195 Ga. App. 587, 394 S.E.2d 588 (1990).

**Subsequent prosecution not barred since prosecutor had no earlier knowledge.** — Denial of defendant's double jeopardy plea in bar was proper be-

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cause the defendant did not affirmatively show the prosecutor actually knew of the other crimes when prosecuting the traffic offenses arising out of the same incident. *Turner v. State*, 238 Ga. App. 438, 518 S.E.2d 923 (1999).

When the facts relating to defendant's theft by taking and malfeasance in office convictions, allegedly arose from the same alleged conduct, but were not known to the state in a prior malpractice in office action and the new offenses involved proof of additional facts, the trial court properly denied the defendant's plea in bar of double jeopardy under O.C.G.A. §§ 16-1-7 and 16-1-8. *Atkinson v. State*, 263 Ga. App. 274, 587 S.E.2d 332 (2003).

Because the defendant failed to affirmatively show that the prosecutor had any actual knowledge regarding the approximately \$300,000 worth of jewelry items found in a toolbox located at the defendant's residence upon an eviction, which were the subject of a second theft prosecution involving jewelry the defendant had stolen, the second prosecution regarding those items was not barred on double jeopardy grounds. *White v. State*, 284 Ga. App. 805, 644 S.E.2d 903 (2007), cert. denied, 2007 Ga. LEXIS 564 (Ga. 2007).

As a prosecutor had no actual knowledge of a prior juvenile traffic citation that was resolved against the defendant, a juvenile, when the prosecutor initiated charges against the juvenile on delinquency traffic citations under O.C.G.A. § 15-11-73, the juvenile court properly denied the juvenile's motion to acquit and plea of double jeopardy under O.C.G.A. § 16-1-7(b). *In re C. E. H.*, 297 Ga. App. 467, 677 S.E.2d 318 (2009).

**Joinder and severance when offenses charged are based on same conduct.** — Severance is necessary, when same conduct affords basis of joinder, only in the interest of justice. This standard is quite similar to the American Bar Association standard of achieving "a fair determination of the defendant's guilt or innocence." *Haisman v. State*, 242 Ga. 896, 252 S.E.2d 397 (1979).

**If multiple convictions arising out of single prosecution are barred, suc-**

cessive prosecution is also barred. *Keener v. State*, 238 Ga. 7, 230 S.E.2d 846 (1976), cert. denied, 433 U.S. 911, 97 S. Ct. 2980, 53 L. Ed. 2d 1096 (1977); *Perkins v. State*, 143 Ga. App. 124, 237 S.E.2d 658 (1977); *Brock v. State*, 146 Ga. App. 78, 245 S.E.2d 442 (1978).

**Former Code 1933, §§ 26-505 and 26-506 establish alternative rules** for determining when one crime is included in another as a matter of fact or as a matter of law. *Harmon v. State*, 235 Ga. 329, 219 S.E.2d 441 (1975); *Williams v. State*, 156 Ga. App. 481, 274 S.E.2d 826 (1980) (see O.C.G.A. §§ 16-1-6 and 16-1-7).

**Several crimes arising from the same conduct and within the jurisdiction of a single court** must be prosecuted in a single prosecution except where the court, in the interest of justice, orders one or more of the charges to be tried separately. *Manning v. State*, 162 Ga. App. 494, 292 S.E.2d 95 (1982).

**Same conduct establishes more than one crime.** — While O.C.G.A. § 16-1-7(a) prohibits multiple convictions for the same conduct, it also provides that when the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. *Lunsford v. State*, 260 Ga. App. 818, 581 S.E.2d 638 (2003).

**When prosecutions in different courts of same state viewed as acts of single sovereign.** — Prosecutions of same defendant in different courts of same state, one prosecution being for a felony and the other being for a misdemeanor which was included in the felony offense must be viewed as acts of a single sovereign under double jeopardy clause of Fifth Amendment. *Brock v. State*, 146 Ga. App. 78, 245 S.E.2d 442 (1978).

**Where recorder's court acted without jurisdiction.** — When recorder's court lacked jurisdiction to try a defendant for driving without insurance, a violation of former § 33-34-12, neither O.C.G.A. § 16-1-7(b) nor O.C.G.A. § 16-1-8 precluded later prosecution in superior court for operating a motor vehicle after having been declared an habitual violator and for driving under the influence. *Parker v. State*, 170 Ga. App. 333,

317 S.E.2d 209 (1984) (see O.C.G.A. § 40-5-70 et seq.).

When the proceeding in recorder's court was null and void because the court lacked jurisdiction to try appellant for a state law violation, the defendant's retrial was not a violation of double jeopardy or prior prosecution. *Duncan v. State*, 185 Ga. App. 854, 366 S.E.2d 154 (1988), overruled on other grounds, *Kolker v. State*, 193 Ga. App. 306, 387 S.E.2d 597 (1989).

**Venue in more than one county.** — In a case involving kidnapping and murder, where venue over the murder charge could lie in either of two counties, but venue over the kidnapping was solely in one of the counties, O.C.G.A. § 16-1-7 did not require that prosecution of the "dual venue" criminal charge must occur in the one county where the other criminal charge arising out of the same multi-county crime spree was required to be prosecuted; even though the state sought to prosecute defendant on the murder charge initially in the county that did not have venue of the kidnapping, there was no procedural bar to the state's prosecuting both charges in the county with venue of both so long as the county comported with the "single prosecution requirement." *Griffin v. State*, 266 Ga. 115, 464 S.E.2d 371 (1995).

**When bond forfeiture declared final disposition.** — When a person is arrested for driving under the influence of alcohol, posts a cash bond, and fails to appear in court, and the judge enters an order forfeiting the bond, declaring the forfeiture to be a final disposition of the case, a subsequent arraignment and trial for driving under the influence of alcohol constitutes double jeopardy, and it is error to deny a plea in bar of trial. *Wilson v. State*, 167 Ga. App. 421, 306 S.E.2d 704 (1983).

**No issue of fact as to whether one crime included in another.** — Court did not err in failing to instruct the jury to decide which one of the offenses charged in the indictment or of the lesser included offense to find defendant guilty of. There was no issue of fact as to whether one crime was included in another and the court was not required to charge on O.C.G.A. § 16-1-7. *Leslie v. State*, 211 Ga.

App. 871, 440 S.E.2d 757 (1994).

**Application to verdict.** — Since O.C.G.A. § 16-1-7(a) provides that one cannot be "convicted" of more than one crime arising from the same conduct, it has no application to the verdict. *Sanders v. State*, 212 Ga. App. 832, 442 S.E.2d 923 (1994).

Even though charges of aggravated sodomy and aggravated child molestation arose out of the same act, the jury could find defendant guilty of both offenses, and the trial court was not required to direct a verdict as to one of the offenses. *Sartin v. State*, 223 Ga. App. 759, 479 S.E.2d 354 (1996).

Trial court did not err in denying defendant's motion for a directed verdict on the basis that several counts alleged in the indictment merged because the same facts were used to prove them; although O.C.G.A. § 16-1-7 provides that one cannot be "convicted" of more than one crime arising from the same conduct, it has no application to the verdict. *Williams v. State*, 233 Ga. App. 217, 504 S.E.2d 53 (1998).

**When first jury hung, additional charges may not be brought as penalty.** — When first trial results in a hung jury, the defendant is not to be penalized for the state's failure to obtain a conviction by the addition of new charges at the second trial. *Curry v. State*, 248 Ga. 183, 281 S.E.2d 604 (1981).

**Trial following mistrial on a new indictment** charging involuntary manslaughter in two separate counts was not barred simply because the original indictment charged defendant with the same crime in a single count. *Casillas v. State*, 267 Ga. 541, 480 S.E.2d 571 (1997).

**Re-prosecution for lesser included crimes.** — If a defendant is tried and convicted of a crime, and that conviction is reversed due to insufficient evidence, procedural double jeopardy bars re-prosecution for that same crime and any lesser included crime. *Prater v. State*, 273 Ga. 477, 541 S.E.2d 351 (2001).

**Offenses should have been merged.** — Convictions of aggravated assault with intent to commit rape and aggravated assault with a deadly weapon by a husband who demanded sex from his es-

**General Consideration (Cont'd)**

tranged wife, stabbed his wife in the back when she refused, and then partially penetrated her, should have been merged prior to sentencing; therefore, the case was remanded. *Lynn v. State*, 251 Ga. App. 155, 553 S.E.2d 836 (2001).

**Parole and probation revocation proceedings.** — Permitting defendant to be prosecuted in successive actions for probation revocation based on violations that were part of the same conduct did not violate double jeopardy. *Perry v. State*, 213 Ga. App. 220, 444 S.E.2d 150 (1994).

**Subsequent prosecution denied since prosecutor had earlier knowledge.** — At the time defendant pled guilty to reckless conduct, the prosecutor was aware facts in the arrest report clearly contained evidence of aggravated assault, therefore, knowledge of other crimes was imputed to the prosecutor and subsequent prosecution of defendant under aggravated assault indictments was barred by O.C.G.A. §§ 16-1-7 and 16-1-8. *Billups v. State*, 228 Ga. App. 804, 493 S.E.2d 8 (1997).

Officer's single ambiguous comment to internal affairs describing the officer's sexual assault on woman in the officer's custody was insufficient as a matter of law to affirmatively demonstrate the prosecutor's actual knowledge prior to trial that an act of sodomy had occurred during the alleged assault on the complainant; therefore, the prosecutorial bar under O.C.G.A. § 16-1-7(b) did not apply. *State v. Goble*, 231 Ga. App. 697, 500 S.E.2d 35 (1998).

**Subsequent prosecution not barred where municipal court lacked jurisdiction.** — Since the municipal court lacked jurisdiction to try defendant pursuant to a Uniform Traffic Citation charging him with "simple battery" in violation of "Section 16-5-23", prosecution of the offense before such court was void; accordingly, trial of defendant for simple battery in the state court was not barred on the ground of double jeopardy or prior prosecution. *Rangel v. State*, 217 Ga. App. 152, 456 S.E.2d 739 (1995).

**Indictment on charges previously nolle prossed.** — It was not a violation of O.C.G.A. §§ 16-1-7(b) and 16-1-8(b) to in-

dict the defendant on charges that had previously been nolle prossed under a plea agreement; the defendant breached the agreement by withdrawing a guilty plea to one charge, thereby allowing the state to indict the defendant on the charges that were previously nolle prossed. *Thomas v. State*, 285 Ga. App. 792, 648 S.E.2d 111 (2007), cert. denied, 2007 Ga. LEXIS 628 (Ga. 2007).

**Trial court did not err by entering judgment on multiple counts.** — Because a conviction on a charge of aggravated assault could be based on the defendant's act of cutting of the victim's throat, while a conviction on a charge of aggravated battery could be based on the serious disfigurement of the victim's arms, the trial court did not err by entering judgment on both counts. *Goss v. State*, 289 Ga. App. 734, 658 S.E.2d 168 (2008).

**Appellate review.** — Because one may not be legally convicted of a crime that is included as a matter of law or fact in another crime for which that person stands convicted, an appellate court must vacate the conviction and sentence for an included crime, even where the issue of merger was not raised in the trial court. *Brewster v. State*, 261 Ga. App. 795, 584 S.E.2d 66 (2003).

Cited in *Rowland v. State*, 124 Ga. App. 494, 184 S.E.2d 494 (1971); *Ansley v. State*, 124 Ga. App. 670, 185 S.E.2d 562 (1971); *Ezzard v. State*, 229 Ga. 465, 192 S.E.2d 374 (1972); *Callahan v. State*, 229 Ga. 737, 194 S.E.2d 431 (1972); *Loftin v. State*, 230 Ga. 92, 195 S.E.2d 402 (1973); *Howard v. State*, 128 Ga. App. 807, 198 S.E.2d 334 (1973); *Brown v. State*, 129 Ga. App. 743, 201 S.E.2d 14 (1973); *Lingerfelt v. State*, 231 Ga. 354, 201 S.E.2d 445 (1973); *Estevez v. State*, 130 Ga. App. 215, 202 S.E.2d 686 (1973); *Bennett v. State*, 130 Ga. App. 510, 203 S.E.2d 755 (1973); *Ansley v. Stynchcombe*, 480 F.2d 437 (5th Cir. 1973); *Echols v. State*, 231 Ga. 633, 203 S.E.2d 165 (1974); *Burden v. State*, 131 Ga. App. 522, 206 S.E.2d 533 (1974); *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (1974); *Spence v. State*, 233 Ga. 527, 212 S.E.2d 357 (1975); *Owens v. State*, 233 Ga. 905, 213 S.E.2d 860 (1975); *Harshaw v. State*, 134 Ga. App. 581, 215 S.E.2d 337 (1975); *Summerour v. State*, 135 Ga. App. 43, 217

S.E.2d 378 (1975); *Lanthrip v. State*, 235 Ga. 10, 218 S.E.2d 771 (1975); *Tarpkin v. State*, 236 Ga. 67, 222 S.E.2d 364 (1976); *Hardin v. Hopper*, 237 Ga. 139, 227 S.E.2d 43 (1976); *Frazier v. State*, 138 Ga. App. 640, 227 S.E.2d 284 (1976); *Mena v. State*, 138 Ga. App. 722, 227 S.E.2d 411 (1976); *Thomas v. State*, 237 Ga. 690, 229 S.E.2d 458 (1976); *Jones v. State*, 238 Ga. 51, 230 S.E.2d 865 (1976); *Bonner v. State*, 140 Ga. App. 314, 231 S.E.2d 120 (1976); *Neel v. State*, 140 Ga. App. 691, 231 S.E.2d 394 (1976); *Williams v. State*, 238 Ga. 298, 232 S.E.2d 535 (1977); *Padgett v. State*, 142 Ga. App. 139, 235 S.E.2d 545 (1977); *Padgett v. State*, 239 Ga. 556, 238 S.E.2d 92 (1977); *Hawes v. State*, 239 Ga. 630, 238 S.E.2d 418 (1977); *Hiatt v. State*, 144 Ga. App. 298, 240 S.E.2d 894 (1977); *Corson v. State*, 144 Ga. App. 559, 241 S.E.2d 454 (1978); *Underwood v. State*, 144 Ga. App. 684, 242 S.E.2d 339 (1978); *State v. Bolton*, 144 Ga. App. 797, 242 S.E.2d 378 (1978); *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (1978); *Ramsey v. State*, 145 Ga. App. 60, 243 S.E.2d 555 (1978); *State v. Gilder*, 145 Ga. App. 731, 245 S.E.2d 3 (1978); *Coaxum v. State*, 146 Ga. App. 370, 246 S.E.2d 403 (1978); *State v. Gilder*, 242 Ga. 285, 248 S.E.2d 659 (1978); *Carnes v. State*, 242 Ga. 286, 248 S.E.2d 660 (1978); *Hizine v. State*, 148 Ga. App. 375, 251 S.E.2d 393 (1978); *Dowdy v. State*, 148 Ga. App. 498, 251 S.E.2d 571 (1978); *Callahan v. State*, 148 Ga. App. 555, 251 S.E.2d 790 (1978); *Godfrey v. State*, 243 Ga. 302, 253 S.E.2d 710 (1979); *Boykin v. State*, 149 Ga. App. 457, 254 S.E.2d 457 (1979); *Benton v. State*, 150 Ga. App. 647, 258 S.E.2d 298 (1979); *Schamber v. State*, 152 Ga. App. 196, 262 S.E.2d 533 (1979); *Groves v. State*, 152 Ga. App. 606, 263 S.E.2d 501 (1979); *Duke v. State*, 153 Ga. App. 204, 264 S.E.2d 721 (1980); *Thomas v. State*, 153 Ga. App. 229, 264 S.E.2d 734 (1980); *Askea v. State*, 153 Ga. App. 849, 267 S.E.2d 279 (1980); *Park v. State*, 154 Ga. App. 348, 268 S.E.2d 401 (1980); *State v. Gilmer*, 154 Ga. App. 673, 270 S.E.2d 25 (1980); *State v. Everett*, 155 Ga. App. 162, 270 S.E.2d 345 (1980); *Trimble v. State*, 156 Ga. App. 9, 274 S.E.2d 10 (1980); *Bailey v. State*, 157 Ga. App. 222, 276 S.E.2d 843 (1981); *Bowens v. State*, 157 Ga. App. 334, 277 S.E.2d 326 (1981); *Ward v. State*, 248 Ga. 60, 281 S.E.2d 503 (1981);

*Peavy v. State*, 159 Ga. App. 280, 283 S.E.2d 346 (1981); *Godfrey v. State*, 248 Ga. 616, 284 S.E.2d 422 (1981); *Jones v. State*, 161 Ga. App. 620, 288 S.E.2d 795 (1982); *Rentz v. State*, 162 Ga. App. 357, 291 S.E.2d 434 (1982); *Smith v. State*, 163 Ga. App. 531, 295 S.E.2d 208 (1982); *Westmoreland v. State*, 164 Ga. App. 455, 297 S.E.2d 357 (1982); *Harris v. State*, 165 Ga. App. 249, 299 S.E.2d 924 (1983); *Miller v. State*, 165 Ga. App. 638, 302 S.E.2d 394 (1983); *Mease v. State*, 165 Ga. App. 746, 302 S.E.2d 429 (1983); *Potts v. Zant*, 575 F. Supp. 374 (N.D. Ga. 1983); *In re T.E.D.*, 169 Ga. App. 401, 312 S.E.2d 864 (1984); *Bert v. State*, 169 Ga. App. 628, 314 S.E.2d 466 (1984); *Felker v. State*, 252 Ga. 351, 314 S.E.2d 621 (1984); *Weaver v. State*, 169 Ga. App. 890, 315 S.E.2d 467 (1984); *Chitwood v. State*, 170 Ga. App. 599, 317 S.E.2d 589 (1984); *Bowens v. State*, 171 Ga. App. 364, 320 S.E.2d 189 (1984); *Strozier v. State*, 171 Ga. App. 703, 320 S.E.2d 764 (1984); *Caldwell v. State*, 171 Ga. App. 680, 320 S.E.2d 888 (1984); *Stone v. State*, 253 Ga. 433, 321 S.E.2d 723 (1984); *Pittman v. State*, 172 Ga. App. 22, 320 S.E.2d 71 (1984); *Welch v. State*, 172 Ga. App. 476, 323 S.E.2d 622 (1984); *Jordan v. State*, 172 Ga. App. 496, 323 S.E.2d 657 (1984); *Ingram v. State*, 253 Ga. 622, 323 S.E.2d 801 (1984); *State v. Martin*, 173 Ga. App. 370, 326 S.E.2d 558 (1985); *Ridgeway v. State*, 174 Ga. App. 663, 330 S.E.2d 916 (1985); *Colsson v. State*, 177 Ga. App. 840, 341 S.E.2d 318 (1986); *Clarington v. State*, 178 Ga. App. 663, 344 S.E.2d 485 (1986); *Few v. State*, 179 Ga. App. 166, 345 S.E.2d 643 (1986); *Catchings v. State*, 256 Ga. 241, 347 S.E.2d 572 (1986); *Gordon v. State*, 181 Ga. App. 391, 352 S.E.2d 582 (1986); *Matthews v. State*, 181 Ga. App. 819, 354 S.E.2d 175 (1987); *Hendrick v. State*, 257 Ga. 514, 361 S.E.2d 169 (1987); *Johnson v. State*, 257 Ga. 731, 363 S.E.2d 540 (1988); *Sparks v. State*, 185 Ga. App. 225, 363 S.E.2d 631 (1987); *Hanvey v. State*, 186 Ga. App. 690, 368 S.E.2d 357 (1988); *Pruitt v. State*, 258 Ga. 583, 373 S.E.2d 192 (1988); *Armfield v. State*, 259 Ga. 43, 376 S.E.2d 369 (1989); *State v. Evans*, 192 Ga. App. 216, 384 S.E.2d 404 (1989); *State v. Smith*, 193 Ga. App. 831, 389 S.E.2d 547 (1989); *Neal v. State*, 198 Ga. App. 13, 400 S.E.2d 375 (1990); *Young v. State*, 199 Ga. App.

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520, 405 S.E.2d 338 (1991); Loden v. State, 199 Ga. App. 683, 406 S.E.2d 103 (1991); Timberlake v. State, 200 Ga. App. 64, 406 S.E.2d 537 (1991); Lewis v. State, 262 Ga. 679, 424 S.E.2d 626 (1993); Gentry v. State, 206 Ga. App. 490, 426 S.E.2d 52 (1992); Hill v. State, 207 Ga. App. 65, 426 S.E.2d 915 (1993); Moore v. State, 207 Ga. App. 673, 428 S.E.2d 678 (1993); Burts v. State, 269 Ga. 402, 499 S.E.2d 326 (1998); Golden v. State, 233 Ga. App. 703, 505 S.E.2d 242 (1998); Holmes v. State, 272 Ga. 517, 529 S.E.2d 879 (2000); Allen v. State, 272 Ga. 513, 530 S.E.2d 186 (2000); Donaldson v. State, 244 Ga. App. 89, 534 S.E.2d 839 (2000); Beasley v. State, 244 Ga. App. 836, 536 S.E.2d 825 (2000); Gissendaner v. State, 272 Ga. 704, 532 S.E.2d 677 (2000); Stone v. State, 245 Ga. App. 728, 538 S.E.2d 791 (2000); Stowe v. State, 272 Ga. 866, 536 S.E.2d 506 (2000); Rhode v. State, 274 Ga. 377, 552 S.E.2d 855 (2001); Ruffin v. State, 252 Ga. App. 289, 556 S.E.2d 191 (2001); Henderson v. State, 252 Ga. App. 295, 556 S.E.2d 204 (2001); Tesfaye v. State, 275 Ga. 439, 569 S.E.2d 849 (2002); Curtis v. State, 275 Ga. 576, 571 S.E.2d 376 (2002); Glover v. State, 258 Ga. App. 527, 574 S.E.2d 565 (2002); Wilkerson v. State, 267 Ga. App. 585, 600 S.E.2d 677 (2004); Cole v. State, 282 Ga. App. 211, 638 S.E.2d 363 (2006); Sturgis v. State, 282 Ga. 88, 646 S.E.2d 233 (2007); Leachman v. State, 286 Ga. App. 708, 649 S.E.2d 886 (2007); Walker v. Hale, 283 Ga. 131, 657 S.E.2d 227 (2008); Bennett v. State, 292 Ga. App. 382, 665 S.E.2d 365 (2008); Armstrong v. State, 292 Ga. App. 145, 664 S.E.2d 242 (2008); Smith v. State, 284 Ga. 304, 667 S.E.2d 65 (2008); Wells v. State, 294 Ga. App. 277, 668 S.E.2d 881 (2008); Henley v. State, 285 Ga. 500, 678 S.E.2d 884 (2009); Strickland v. State, 300 Ga. App. 898, 686 S.E.2d 486 (2009).

**Included Crimes****1. In General**

**Applicability of test under double jeopardy clause of Fifth Amendment.** — When same act or transaction

constitutes a violation of two distinct statutory provisions, test to be applied to determine whether there are two offenses or only one for purposes of double jeopardy clause of the Fifth Amendment is whether each provision requires proof of a fact which the other does not. Brock v. State, 146 Ga. App. 78, 245 S.E.2d 442 (1978).

**When crimes charged are same in law or fact.** — Former Code 1933, § 26-506(a) provided that although defendant may be prosecuted for all crimes committed, defendant may not be convicted of more than one crime if crimes charged are same in law or fact. Bailey v. State, 146 Ga. App. 774, 247 S.E.2d 588 (1978) (see O.C.G.A. § 16-1-7(a)).

Although defendant may be prosecuted for all crimes committed, defendant may not be convicted of more than one crime if crimes charged are same in law or fact. Gunter v. State, 155 Ga. App. 176, 270 S.E.2d 224 (1980).

**Required evidence test adopted.** — In determining when one crime is included in another under O.C.G.A. §§ 16-1-6(1) and 16-1-7(a), the actual evidence test has been overruled and replaced with the Blockburger required evidence test, as this is consistent with the statutory framework of O.C.G.A. § 16-1-6(1), which speaks of required elements. Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006).

**Multiple punishment is barred** if crime is same as matter of fact or law as specified in criminal code. State v. Estevez, 232 Ga. 316, 206 S.E.2d 475 (1974), overruled on other grounds Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006).

**Transactions must be identical both as matter of fact and law.** Hiatt v. State, 133 Ga. App. 111, 210 S.E.2d 22 (1974).

**O.C.G.A. § 16-1-6 construed.** — Paragraph (1) of former Code 1933, § 26-505 sets out rules for determining included crimes as a matter of fact, while paragraph (2) sets out rules for determining included crimes as a matter of law. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978) (see O.C.G.A. § 16-1-6).

**Aggravating circumstances.** — Inclusion provisions of former Code 1933, §§ 26-505 and 26-506 do not apply to aggravating circumstances but to crimes. Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781, overruled on other grounds, Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981); Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82 (2002) (see O.C.G.A. §§ 16-1-6 and 16-1-7).

**Corollary of subsection (a) is that defendant cannot be convicted separately of both crimes.** — If defendant can be indicted and tried on one trial for two crimes arising from same conduct, but not convicted of more than one offense if one is lesser included in the other or they differ only in that one prohibits conduct generally and the other specifically, it follows that a defendant can be tried and convicted separately of either one or the other of the two crimes, but not both. State v. O'Neal, 156 Ga. App. 384, 274 S.E.2d 575 (1980).

**Doctrine of merger** is still law in this state. Burns v. State, 127 Ga. App. 828, 195 S.E.2d 189 (1973).

**Merger not required when greater offense not charged.** — Evidence that the object of a conspiracy to traffic in cocaine is completed does not preclude prosecution for conspiracy to traffic in cocaine rather than the substantive offense of trafficking in cocaine. Stafford v. State, 187 Ga. App. 401, 370 S.E.2d 646 (1988).

**Considering lesser offense upon finding guilt as to greater offense.** — Where offense of simple battery was properly charged as lesser included offense of aggravated assault under indictment and evidence and, as such, defendant could not have been convicted of both aggravated assault and simple battery, trial court was justified in instructing jury so as to prevent them from needlessly considering charge of simple battery if they found defendant guilty of aggravated assault. Harper v. State, 157 Ga. App. 480, 278 S.E.2d 28 (1981).

**Request for charge on lesser included offense on retrial.** — Upon re-

trial for a murder charge which had been dismissed after mistrial, the state was not precluded from requesting a charge on the lesser included offense of voluntary manslaughter as was requested at the trial on the original indictment. Rhyne v. State, 209 Ga. App. 548, 434 S.E.2d 76 (1993), aff'd, 264 Ga. 176, 442 S.E.2d 742 (1994).

**Effect of conviction of lesser crime on retrial after reversal of conviction of greater crime.** — When there is a conviction of two crimes in a single prosecution, one of which is included in the other and the defendant obtains reversal of major crime for lack of jurisdiction, remaining conviction of lesser crime does not bar retrial on major crime. In the event the defendant is then convicted on retrial for a major crime, invalidation of the defendant's conviction of a lesser included offenses for the same conduct would be authorized in appropriate proceedings. Keener v. State, 238 Ga. 7, 230 S.E.2d 846 (1976), cert. denied, 433 U.S. 911, 97 S. Ct. 2980, 53 L. Ed. 2d 1096 (1977).

## 2. Crimes Against the Person

**Underlying felony is a lesser included offense of felony murder,** and conviction of both offenses is proscribed under the provisions of former Code 1933, § 26-506(a)(1). Woods v. State, 233 Ga. 495, 212 S.E.2d 322 (1975); Atkins v. Hopper, 234 Ga. 330, 216 S.E.2d 89 (1975); Moss v. State, 262 Ga. 702, 425 S.E.2d 289, overruled on other grounds, Malcolm v. State, 263 Ga. 369, 434 S.E.2d 479 (1993) (see O.C.G.A. § 16-1-7(a)(1)).

As felony murder is defined under Georgia law, the underlying felony is a lesser included offense of felony murder and thus the same offense for double jeopardy purposes. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir.), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. Ed. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

**Serious injury by vehicle and vehicular homicide did not merge.** — Five convictions for serious injury by vehicle and a conviction for vehicular homicide did not merge; although the convictions stemmed from one incident of driving un-

**Included Crimes (Cont'd)****2. Crimes Against the Person (Cont'd)**

der the influence, there were separate victims for each offense. *Harris v. State*, 272 Ga. App. 366, 612 S.E.2d 557 (2005).

**Serious injury by vehicle prosecution barred as defendant pled guilty to failure to maintain lane.** — Under O.C.G.A. §§ 16-1-7(b) and 16-1-8, double jeopardy protection barred the defendant's prosecution for, inter alia, serious injury by vehicle because the defendant had earlier pled guilty in magistrate's court to failure to maintain a lane arising out of the same accident; both charges could have been tried in the superior court, and it was apparent from the record that the prosecuting officer knew that the defendant had been charged with both offenses. When the defendant appeared in court initially, both charges were pending, and the magistrate court judge bound over the serious injury by vehicle charge. *Etienne v. State*, 298 Ga. App. 149, 679 S.E.2d 375 (2009).

**Armed robbery as lesser included offense of felony murder.** See *Berryhill v. Ricketts*, 242 Ga. 447, 249 S.E.2d 197 (1978).

When proof of the armed robbery is essential to the conviction for felony murder, the armed robbery is a lesser included offense in the felony murder. *Sanborn v. State*, 251 Ga. 169, 304 S.E.2d 377 (1983); *Allen v. State*, 262 Ga. 649, 424 S.E.2d 1 (1993).

**Armed robbery as included offense of malice murder.** — When the defendant is charged with an armed robbery of a murder victim, proof of the armed robbery is essential to support the defendant's conviction of malice murder and is an included offense. *Burke v. State*, 234 Ga. 512, 216 S.E.2d 812 (1975).

**Armed robbery and kidnapping** are clearly not included offenses as a matter of law, nor are they included offenses as a matter of fact where the two offenses are based on separate acts. *Emmett v. State*, 199 Ga. App. 650, 405 S.E.2d 707 (1991), cert. denied, 199 Ga. App. 905, 405 S.E.2d 707 (1991).

**Armed robbery and hijacking.** — Defendant's separate convictions for

armed robbery and hijacking a motor vehicle did not violate the prohibitions against double jeopardy as O.C.G.A. § 16-5-44.1(d) provided that hijacking a motor vehicle was a separate offense and did not merge and it therefore superseded the state statutory double jeopardy provision; further, the Georgia Constitution did not prohibit additional punishment for a separate offense that the Georgia legislature had deemed to warrant a separate sanction; the defendant failed to show how the hijacking statute violated the federal double jeopardy clause. *Mullins v. State*, 280 Ga. App. 689, 634 S.E.2d 850 (2006).

**Aggravated assault and burglary convictions properly kept separate from armed robbery.** — Trial court did not err by failing to merge for purposes of sentencing a defendant's aggravated assault and/or the burglary conviction with the armed robbery conviction since, with regard to the aggravated assault and armed robbery convictions, the evidence showed that the victim was first threatened with a gun in an attempt to rob, that, separately, the victim was pistol-whipped with a gun and struck with a hard object in an attempt to rob, and that finally, the victim was shot in an attempt to rob, thus, the trial court was authorized to conclude that the physical beating and either incident of gun use were separate completed crimes. Accordingly, the trial court was authorized to convict the defendant for aggravated assault for the physical beating and for armed robbery by use of a gun and, similarly, the burglary occurred when the defendant walked into the victim's home with intent to rob, which event was separated by time from the aggravated assault and armed robbery, therefore, all three crimes were separate completed crimes and merger was not required. *Yates v. State*, 298 Ga. App. 727, 681 S.E.2d 190 (2009).

**Kidnapping, armed robbery, and aggravated assault.** — Trial court's decision not to merge the conviction of kidnapping, in violation of O.C.G.A. § 16-5-40, with defendant's convictions for aggravated assault and armed robbery, in violation of O.C.G.A. §§ 16-5-21 and 16-8-41, was proper under O.C.G.A.

§ 16-1-7(a), as the facts that supported the kidnapping were not the same as those that supported the convictions for the other offenses; the kidnapping occurred when defendant forced three store employees into an office, the aggravated assaults occurred when defendant pointed a gun at one employee's head and hit another employee with it, and the armed robbery occurred when defendant took money from the store safe. *Hill v. State*, 279 Ga. App. 666, 632 S.E.2d 443 (2006).

**Kidnapping, aggravated assault, and aggravated battery.** — Trial court did not err under O.C.G.A. § 16-1-7 in failing to merge convictions for aggravated assault and aggravated battery with a conviction for kidnapping with bodily injury as each crime required proof of at least one different element, and the state presented independent evidence to prove each individual crime as set out in the indictment. Evidence that the defendant pointed a gun at the victim and fired the gun at the floor near the victim, that the defendant used a wooden stick resembling a baseball bat to repeatedly hit the victim, and that the defendant hit and kicked the victim while the victim was tied up supported the three aggravated assault counts; aggravated battery in Counts 5 and 6 was established by evidence that the defendant broke the victim's nose, wrist, and shoulder and knocked out two teeth and by evidence that the defendant burned the victim's hand and caused the victim to be bitten by fire ants; and kidnapping with bodily injury was proven by evidence of injuries to the victim due to being bound by rope. *Rouse v. State*, 295 Ga. App. 61, 670 S.E.2d 869 (2008).

**Murder is not included within crime of possession of firearm during commission of felony.** *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442, cert. denied, 459 U.S. 1092, 103 S. Ct. 580, 74 L. Ed. 2d 940 (1982).

Defendant's conviction for possession of a knife during the commission of a felony did not merge into the defendant's two convictions for malice murder for sentencing purposes. *Hooks v. State*, 284 Ga. 531, 668 S.E.2d 718 (2008), overruled on other grounds, 287 Ga. 192, 695 S.E.2d 244 (2010).

**Theft of numerous articles in one robbery.** — After the defendant hailed a taxi, pulled a knife and took the driver's money, placed the driver in the trunk of the taxi, drove the taxi for a short period of time, and stopped the taxi and took the driver's cell phone and wallet after hearing the driver talking, the defendant was guilty of robbery; however, the defendant could not be convicted of multiple robberies. *Lewis v. State*, 261 Ga. App. 273, 582 S.E.2d 222 (2003).

**False imprisonment does not merge with armed robbery.** — Offense of false imprisonment requires proof of at least one additional fact which the offense of armed robbery does not. Consequently, under the "required evidence" test, a defendant's false imprisonment conviction did not merge into the defendant's armed robbery conviction. *Simpson v. State*, 293 Ga. App. 760, 668 S.E.2d 451 (2008).

**Sequential assaults held to be two offenses,** the first a completed crime when the second was perpetrated. *Talley v. State*, 164 Ga. App. 150, 296 S.E.2d 173 (1982), aff'd, 251 Ga. 42, 302 S.E.2d 355 (1983).

**Aggravated assault upon one person and malice murder of another not "included."** — Aggravated assault alleged in one count of indictment to have been committed on one person and malice murder alleged in another count of same indictment to have been committed upon another person are not included within meaning of O.C.G.A. § 16-1-7(a)(2). *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981).

**Aggravated assault and malice murder.** — When the evidence used to prove that the defendant perpetrated the aggravated assault of the decedent — that the defendant fired a deadly weapon and wounded the victim — was used to establish that the defendant had committed malice murder, convictions for both aggravated assault and murder violated double jeopardy. *Montes v. State*, 262 Ga. 473, 421 S.E.2d 710 (1992).

When a prisoner was convicted of malice murder under O.C.G.A. § 16-5-1(a), a jury did not return a verdict on felony murder counts because O.C.G.A. § 16-1-7 prohibited a conviction for both offenses

**Included Crimes (Cont'd)****2. Crimes Against the Person (Cont'd)**

for the death of a single victim. Further, the defendant's crime of aggravated assault under O.C.G.A. § 16-5-21(a) also merged with the malice murder offense as it was a crime included within the greater offense. *Newland v. Hall*, 527 F.3d 1162 (11th Cir. 2008), cert. denied, U.S. , 129 S. Ct. 1336, 173 L. Ed. 2d 607 (2009).

Convictions against the defendant for both malice murder and aggravated assault were error under O.C.G.A. § 16-1-7(a)(1) as the aggravated assault was included within the malice murder conviction under O.C.G.A. § 16-1-6(1) because the same conduct established the commission of both offenses. *Bell v. State*, 284 Ga. 790, 671 S.E.2d 815 (2009).

Codefendant's conviction for aggravated assault had to be vacated because it merged as a matter of fact into the conviction for malice murder since the medical examiner who performed the autopsy of the victim testified that the cause of death was "gunshot wounds," did not identify any injury as the fatal shot, acknowledged the examiner could not testify as to the order in which the bullets entered the victim's body, and stated no single wound would have instantly stopped the victim; in the absence of evidence that one wound was fatal and was preceded by a "deliberate interval" in the series of shots fired and by the infliction of non-fatal wounds, there was no evidence to support the infliction of an aggravated assault separate and apart from the malice murder. *Coleman v. State*, 286 Ga. 291, 687 S.E.2d 427 (2009).

Trial court erred in sentencing the defendant on the count of the indictment charging the defendant with making an assault upon the victim with intent to murder in violation of O.C.G.A. § 16-5-21(a) after sentencing the defendant to life in prison for malice murder because the aggravated assault upon the victim and the murder of the victim occurred simultaneously; thus, the evidence used to prove the aggravated assault offense was established by the same, but not all, of the facts required to prove malice murder. *Gresham v. State*, No. S11A0382,

2011 Ga. LEXIS 291 (Apr. 18, 2011).

**Malice murder and cruelty to children.** — Although both malice murder and cruelty to children required a malicious intent, O.C.G.A. §§ 16-5-1(a) and 16-5-70(b), the fact that such intent supported an element in each crime did not warrant merging of the sentences when other mutually exclusive elements of the crimes remained, and the other elements of the two offenses had to be compared; malice murder, but not cruelty to children, required proof that defendant caused the death of another human being, § 16-5-1(a), and cruelty to children, but not malice murder, required proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain, § 16-5-70(b). Each crime required proof of at least one additional element which the other did not and the crimes of malice murder and cruelty to children were not so closely related that multiple convictions were prohibited under other provisions of O.C.G.A. §§ 16-1-6 and 16-1-7; accordingly, even if the same conduct established the commission of both malice murder and cruelty to children, the two crimes did not merge. *Linson v. State*, 287 Ga. 881, 700 S.E.2d 394 (2010).

**Aggravated assault and felony murder.** — It was permissible for the state to indict defendant for both aggravated assault and felony murder, although defendant could not be convicted of both because the aggravated assault was an included offense in the felony murder. *Campbell v. State*, 269 Ga. 186, 496 S.E.2d 724 (1998).

Trial court erred in sentencing defendant on an aggravated assault conviction; as the aggravated assault was the underlying felony that formed the basis for a felony murder charge against defendant under O.C.G.A. § 16-1-7, defendant could not be sentenced on both the aggravated assault and felony murder when found guilty of both. *Bolston v. State*, 282 Ga. 400, 651 S.E.2d 19 (2007).

**Misdemeanor-manslaughter and felony murder.** — Since a misdemeanor can be an included crime in a felony, misdemeanor-manslaughter could be an included crime in felony murder. *Carter v.*

State, 269 Ga. 420, 499 S.E.2d 63 (1998).

**Voluntary manslaughter and felony murder.** — Because there is only one victim, to convict and sentence defendant for both voluntary manslaughter and felony murder would improperly subject defendant to multiple convictions and punishments for one crime. *Smith v. State*, 272 Ga. 874, 536 S.E.2d 514 (2000).

**Aggravated assault with deadly weapon and aggravated assault with intent to murder.** — Since the facts adduced to prove the offense of aggravated assault with intent to murder were the same facts used to prove the offense of aggravated assault with a deadly weapon, as a matter of fact the latter had to be considered an offense included in the former. *Mitchell v. State*, 187 Ga. App. 40, 369 S.E.2d 487, cert. denied, 187 Ga. App. 908, 371 S.E.2d 432 (1988).

Aggravated assault conviction merged into a criminal attempt to commit murder conviction, where both counts were based on allegations that defendant had stabbed the victim with a knife. *Kelley v. State*, 201 Ga. App. 343, 411 S.E.2d 276 (1991).

**Aggravated assault with deadly weapon and aggravated assault with intent to rob.** — Under O.C.G.A. § 16-1-7(a), a trial court erred in convicting and sentencing defendant for both aggravated assault with a deadly weapon and aggravated assault with the intent to rob, as those two offenses merged since the same facts were used to prove both offenses. *Adcock v. State*, 279 Ga. App. 473, 631 S.E.2d 494 (2006).

**Voluntary manslaughter and aggravated assault.** — Convictions for the voluntary manslaughter of one victim and the aggravated assault of another did not merge as a matter of fact because only one shot was fired, striking both victims. *Hall v. State*, 235 Ga. App. 44, 508 S.E.2d 703 (1998).

Trial court erred in entering a judgment of conviction against the defendant for aggravated assault, O.C.G.A. § 16-5-21(a)(2), because that conviction should have been merged into the defendant's conviction for voluntary manslaughter, O.C.G.A. § 16-5-2(a); the defendant was charged in the indictment with voluntary manslaughter and aggra-

vated assault for the stabbing of the victim, and the undisputed evidence at trial showed that the victim was stabbed one time in the chest, causing the victim's death. *Muckle v. State*, 307 Ga. App. 634, 705 S.E.2d 721 (2011).

**Aggravated assault and armed robbery.** — Armed robbery and aggravated assault with a deadly weapon are separate crimes, and one is not included in the other. Neither prohibits a designated kind of conduct generally while the other prohibits a specific instance of such conduct. *Roberts v. State*, 228 Ga. 298, 185 S.E.2d 385 (1971).

Aggravated assault is not an included offense of armed robbery as defined by former Code 1933, § 26-506(a)(1), prohibiting multiple prosecutions for the same conduct. *Harvey v. State*, 233 Ga. 41, 209 S.E.2d 587 (1974) (see O.C.G.A. § 16-1-7(a)(1)).

Separate convictions for armed robbery and aggravated assault, although arising from same conduct, are not prohibited except where one crime is included in the other or where crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct. *Kramer v. Hopper*, 234 Ga. 395, 216 S.E.2d 119 (1975).

There was no violation of defendant's protection from double jeopardy in defendant having been convicted of and punished for both the aggravated assault and armed robbery of the victim, where the indictment charged armed robbery with the specific intent to commit a theft and the two acts were in fact separate though in close succession. *Taylor v. State*, 177 Ga. App. 624, 340 S.E.2d 263 (1986).

Entry of separate convictions for armed robbery and aggravated assault was barred, and conviction for the latter offense would have to be vacated, where the only aggravated assault shown by the evidence was that by which the commission of the armed robbery was effectuated. *Young v. State*, 177 Ga. App. 756, 341 S.E.2d 286 (1986).

Defendant's five convictions of aggravated assault merged with defendant's conviction on five counts of attempted armed robbery where defendant's act of

**Included Crimes (Cont'd)****2. Crimes Against the Person (Cont'd)**

pointing a pistol at bank employees when defendant announced intent to rob the bank was the act underlying both the convictions for attempted armed robbery and for aggravated assault. *Hambrick v. State*, 256 Ga. 148, 344 S.E.2d 639 (1986).

Aggravated assault was included in armed robbery as matter of fact, where the defendant initially pointed a pistol at the victim, which prompted the victim to open the cash drawer, and subsequently cocked the weapon after the victim told defendant that there was no money and fired virtually at the same moment as the victim was hitting the button to open the drawer. *Moreland v. State*, 183 Ga. App. 113, 358 S.E.2d 276 (1987).

Conviction for aggravated assault should have been vacated pursuant to the doctrine of merger. The only aggravated assault shown by the evidence was that by which the commission of armed robbery was effectuated. There having been no additional, gratuitous violence employed against the victim, it followed that the evidentiary basis for the aggravated assault conviction was "used up" in proving the armed robbery. *Kelly v. State*, 188 Ga. App. 362, 373 S.E.2d 63 (1988); *Smith v. State*, 193 Ga. App. 208, 387 S.E.2d 419 (1989); *Jordan v. State*, 218 Ga. App. 679, 462 S.E.2d 801 (1995).

Convictions and sentences for both armed robbery and aggravated assault were proper, where each offense charged was clearly supported by its own set of facts. *Millines v. State*, 188 Ga. App. 655, 373 S.E.2d 838 (1988).

Offenses of aggravated assault and robbery did not merge as a matter of law where, although the occurrences happened within a short span of time, the robbery had been completed at the time defendant fired the gun, and involved different actions and intents. *Phelps v. State*, 194 Ga. App. 493, 390 S.E.2d 899 (1990).

When the defendant's act of pointing a gun at one victim was the act underlying the armed robbery of a second victim, and the robbery was completed before the defendant committed an aggravated assault upon the second victim by pointing a gun

at the victim, the crimes of armed robbery and aggravated assault upon the second victim did not merge. *Perkins v. State*, 216 Ga. App. 118, 453 S.E.2d 135 (1995).

Defendant's ineffective assistance of counsel claim based on counsel's failure to ask at sentencing that defendant's convictions for aggravated assault be merged into the armed robbery convictions was rejected as the convictions were merged at the motion for a new trial hearing. *Buchanan v. State*, 273 Ga. App. 174, 614 S.E.2d 786 (2005).

Since the defendant was indicted for aggravated assault for pointing a handgun at a victim, which was also a substantial step toward commission of the armed robbery, the trial court properly merged the defendant's aggravated assault conviction with the attempted armed robbery conviction. *McKinney v. State*, 274 Ga. App. 32, 619 S.E.2d 299 (2005).

As the armed robberies and aggravated assaults with which the defendant was charged were committed against different victims, the crimes did not merge as a matter of law or fact. *Verdree v. State*, 299 Ga. App. 673, 683 S.E.2d 632 (2009).

Because the assault element of a defendant's aggravated assault with intent to rob conviction under O.C.G.A. § 16-5-21(a) was contained within the "use of an offensive weapon" element of armed robbery under O.C.G.A. § 16-8-41, and both crimes shared the "intent to rob" element, the defendant's aggravated assault conviction merged into the armed robbery conviction. *Lucky v. State*, 286 Ga. 478, 689 S.E.2d 825 (2010).

Defendant's sentence for armed robbery, O.C.G.A. § 16-8-41(a), and aggravated assault, O.C.G.A. § 16-5-21(a)(2), was not void as a result of the trial court's failure to merge the convictions because the convictions did not merge for sentencing purposes since the convictions did not involve the same conduct; the crime of armed robbery was complete when the defendant entered a restaurant and, with the use of a handgun, demanded and took money from a waitress, and, after completion of the armed robbery, the defendant pushed the gun against the waitress's neck and asked whether the waitress wanted to die, which formed the basis of the aggravated

assault conviction. *McKenzie v. State*, 302 Ga. App. 538, 691 S.E.2d 352 (2010).

Trial court erred in failing to merge aggravated assault, O.C.G.A. § 16-5-21(a)(2), and armed robbery, O.C.G.A. § 16-8-41, counts because the state relied on the same act of assault to establish defendant's guilt of aggravated assault and armed robbery, and although the state could have been able to indict the defendant for aggravated assault based on conduct separate and distinct from the defendant's act of hitting the victim in the head with a baseball bat, the indictment specifically charged the defendant with the offense of aggravated assault; while armed robbery requires proof of additional facts, like aggravated assault with intent to rob, aggravated assault under § 16-5-21(a)(2) does not require proof of a fact not required to establish armed robbery. *Taylor v. State*, 304 Ga. App. 395, 696 S.E.2d 686 (2010).

Because defendant's conviction under O.C.G.A. § 16-8-41(a) for armed robbery could be sustained based upon defendant's conduct with a shotgun, and because defendant's conviction under O.C.G.A. § 16-5-21(a)(2) for aggravated assault could be sustained based upon defendant's conduct with a knife, pursuant to O.C.G.A. § 16-1-7(a), the two convictions did not merge. *Johnson v. State*, 305 Ga. App. 838, 700 S.E.2d 726 (2010).

Defendant's aggravated assault conviction should have merged into defendant's armed robbery conviction for sentencing purposes because the defendant's use of the defendant's handgun against the victim was the same conduct in both offenses, designed to immobilize the victim while the victim was robbed. The aggravated assault was established by proof of the same or less than all the facts required to establish the commission of the armed robbery. *Herrera v. State*, 306 Ga. App. 432, 702 S.E.2d 731 (2010).

**Aggravated assault, armed robbery and felony murder as separate crimes.** — When one person was the victim of aggravated assault, and another victim was killed, and both crimes occurred during an armed robbery, separate crimes of aggravated assault, armed robbery, and felony murder were committed.

*Foster v. State*, 230 Ga. 666, 198 S.E.2d 847 (1973).

**Aggravated assault and robbery.** — Aggravated assault conviction merged with robbery conviction where victim was placed in fear of receiving bodily injury before the victim's money was taken. *Luke v. State*, 171 Ga. App. 201, 318 S.E.2d 833 (1984).

**Aggravated assault and aggravated battery.** — Facts adduced to support the aggravated assault charge were the same facts used to support the aggravated battery charge as the crimes were set forth in the indictment with the additional element being the victim's loss of use of the victim's eyes. Because the defendant could not be convicted for both crimes, the conviction for the included offense, the assault, was vacated. *Mills v. State*, 187 Ga. App. 79, 369 S.E.2d 283 (1988).

When the evidence does not demonstrate that the aggravated assault and the aggravated battery were based on the "same conduct" within the contemplation of O.C.G.A. § 16-1-7, the separate convictions for these offenses may stand. *Knight v. State*, 190 Ga. App. 87, 378 S.E.2d 373 (1989); *Malone v. State*, 226 Ga. App. 185, 486 S.E.2d 57 (1997); *Wright v. State*, 243 Ga. App. 167, 532 S.E.2d 724 (2000).

When the defendant shot the victim twice when the victim first turned to see the defendant, then struggled with the victim and knocked the victim down, and the defendant stood over the victim and shot the victim in the neck, the trial court did not commit error when the court convicted and sentenced the defendant for both offenses since the prosecution could well have proved any aggravated battery without introducing any evidence of the first two shots. *White v. Hardegree*, 190 Ga. App. 275, 378 S.E.2d 877, cert. denied, 190 Ga. App. 899, 378 S.E.2d 877 (1989).

Trial court erred in failing to merge defendant's aggravated assault with the aggravated battery conviction inasmuch as the same facts were used to support the indictments on both offenses. *Davis v. State*, 209 Ga. App. 187, 433 S.E.2d 366 (1993); *Riden v. State*, 226 Ga. App. 245, 486 S.E.2d 198 (1997).

Although the evidence that defendant intentionally stabbed a man in the side

**Included Crimes (Cont'd)****2. Crimes Against the Person (Cont'd)**

with a knife, causing a wound that required 100 stitches and that left a scar, was sufficient to support convictions for both aggravated assault under O.C.G.A. § 16-5-21(a)(2) and aggravated battery under O.C.G.A. § 16-5-24(a), the defendant could not be convicted of both crimes as that conviction was prohibited by O.C.G.A. § 16-1-7(a)(1) since the aggravated assault was included in the aggravated battery and arose out of the same conduct; thus, the aggravated assault conviction was vacated. *Townsend v. State*, 256 Ga. App. 837, 570 S.E.2d 47 (2002).

Defendant's aggravated assault and aggravated battery convictions under O.C.G.A. §§ 16-5-21(a) and 16-5-24(a) did not merge under O.C.G.A. § 16-1-7(a), although both stemmed from the same act. The aggravated assault charge required proof that the defendant attempted to commit a violent injury with the intent to murder using a deadly weapon, while the aggravated battery charge required proof that the defendant maliciously caused bodily harm to the victim by rendering a member of the victim's body useless; thus, the offenses were distinct with each requiring proof of a fact which the other did not. *Robbins v. State*, 293 Ga. App. 584, 667 S.E.2d 684 (2008).

Actions of defendant and the codefendant in beating the victim, in breaking the victim's wrist and shoulder, and in causing burns to the victim's hands, although occurring sequentially, constituted separate offenses, as each was established by proof of different facts. Thus, the evidence did not demonstrate that the aggravated assault and the aggravated battery were based on the same conduct within the contemplation of O.C.G.A. § 16-1-7. *Wilkinson v. State*, 298 Ga. App. 190, 679 S.E.2d 766 (2009).

Trial court did not err in refusing to merge the defendant's convictions for aggravated assault and aggravated battery, O.C.G.A. §§ 16-5-21 and 16-5-24, because the offenses were established by proving different facts; the defendant was found guilty of aggravated assault because there was evidence that the defendant as-

saulted the victim with a screwdriver, and the defendant was found guilty of aggravated battery because the victim's left lung was nonfunctional for a period of time due to the stab wound. *Works v. State*, 301 Ga. App. 108, 686 S.E.2d 863 (2009), cert. denied, No. S10C0458, 2010 Ga. LEXIS 251 (Ga. 2010).

Defendant waived the issue of whether the defendant's convictions for aggravated assault and aggravated battery in slitting the defendant's girlfriend's throat merged by pleading guilty to both offenses; moreover, the offenses did not merge because the assault charge accused the defendant of seriously injuring the victim and the battery charge accused the defendant of disfiguring her. *Regent v. State*, 306 Ga. App. 616, 703 S.E.2d 81 (2010).

**Aggravated assault and family violence battery.** — Aggravated assault under O.C.G.A. § 16-5-21 with fists only and family violence battery under O.C.G.A. § 16-5-23.1(f) with fists and a bottle upon the defendant's then live-in girlfriend were not required to be merged under O.C.G.A. § 16-1-7(a) because there were two separate incidents separated by the girlfriend's visit to a store and because the aggravated assault did not require the use of a bottle. *Collins v. State*, 277 Ga. App. 381, 626 S.E.2d 513 (2006).

**Aggravated assault and mutiny.** — When the facts adduced to support an aggravated assault charge were the same facts used to support a mutiny charge, as the crimes were set forth in the indictment, then the aggravated assault charge had to be considered an offense included within the mutiny charge; because O.C.G.A. § 16-1-7 forbids conviction for both crimes, the conviction for the included offense, aggravated assault, was vacated. *Green v. State*, 170 Ga. App. 594, 317 S.E.2d 609 (1984).

**Crimes of aggravated assault on an officer and obstruction of the same officer** were included in each other and defendant could only be convicted of one; the same conduct that proved the aggravated assault proved the obstruction. *Priester v. State*, 249 Ga. App. 594, 549 S.E.2d 429 (2001).

Trial court erred in failing to merge the defendant's convictions for four counts of

obstruction of a police officer into the convictions for four counts of aggravated assault on a police officer because each count of the crime of obstruction was established by proof of the same or less than all the facts required to establish each count of the crime of aggravated assault; the state conceded that the trial court erred in failing to merge the convictions for obstruction into the convictions for aggravated assault on a police officer. *Dobbs v. State*, 302 Ga. App. 628, 691 S.E.2d 387 (2010).

**Aggravated battery and robbery.** — Defendant could not be sentenced on conviction for aggravated battery since that crime merged with defendant's conviction for robbery where the aggravated battery conviction was based on the identical acts of violence through which the defendant effected the taking of the victim's purse. *Kinney v. State*, 234 Ga. App. 5, 505 S.E.2d 553 (1998).

**Aggravated battery conviction not bar to rape and robbery charges.** — Since defendant's act constituting aggravated battery was also used to prove the element of force essential to charges of rape and robbery, but there was evidence indicating use of force independent of the battery, O.C.G.A. § 16-1-7 did not bar prosecution on all three offenses. *McCulligh v. State*, 169 Ga. App. 717, 314 S.E.2d 724 (1984).

**Simple battery and rape.** — When the same impermissible touching — hitting and slapping which constituted simple battery — also supplied the element of force necessary for conviction of rape, the battery merged into rape, thereby requiring reversal of appellant's simple battery conviction. *Johnson v. State*, 195 Ga. App. 723, 394 S.E.2d 586 (1990).

**Simple battery and DUI.** — Simple battery charge did not "arise from the same conduct" as a driving under the influence (DUI) charge, so as to come within the prohibition of the multiple prosecution bar, where the battery occurred 40 minutes after defendant's arrest for DUI and at a different location, the officer who made the DUI arrest was not the same person allegedly struck by defendant, and the DUI involved defendant's operation of a motor vehicle, but

the battery did not. *State v. Littler*, 201 Ga. App. 527, 411 S.E.2d 522 (1991).

**Rape and assault with intent to rape.** — Offense of rape includes the lesser offense of assault with intent to rape. *Padgett v. State*, 205 Ga. App. 576, 423 S.E.2d 411 (1992).

**Simple assault did not merge with aggravated assault with intent to rape.** — There was no merger of offenses as a result of defendant's conviction of simple assault and aggravated assault with the intent to rape, where there was sufficient evidence of two separate assaults, the simple assault having been a sequential reaction to the victim's resistance to the charged sexual assault. *Watson v. State*, 178 Ga. App. 778, 344 S.E.2d 667 (1986).

**Merger of rape and incest.** — Contrary to the defendant's argument, the trial court did not err in failing to merge a conviction for incest, O.C.G.A. § 16-6-22, in one count into a conviction for rape, O.C.G.A. § 16-6-1, in another count, despite the fact that both counts were based on the same act of sexual intercourse because the defendant's conduct established the commission of more than one crime; to establish the crime of rape, the state proved that the defendant had carnal knowledge of the victim, forcibly and against the victim's will, but to establish incest, it was also necessary to prove that the victim had a certain relation to the defendant. Thus, incest was not established by proof of the same or less than all the facts required to establish proof of rape. *Dew v. State*, 292 Ga. App. 631, 665 S.E.2d 715 (2008).

**Molestation.** — State did not err when it charged defendant with four counts of molestation arising out of the same transaction where the indictment alleged four separate immoral or indecent acts committed by defendant with the intent to arouse or satisfy defendant's own sexual desires; while O.C.G.A. § 16-1-7(a) prohibited multiple convictions for the same conduct, it also provided that when the same conduct of an accused could establish the commission of more than one crime, the accused could be prosecuted for each crime. *Lunsford v. State*, 260 Ga. App. 818, 581 S.E.2d 638 (2003).

**Included Crimes (Cont'd)****2. Crimes Against the Person (Cont'd)**

**False imprisonment as lesser included offense of kidnapping.** — After the defendant had been convicted of kidnapping with bodily injury, subsequent charges of false imprisonment, arising out of the same set of facts, were barred by former jeopardy under the "required evidence test" because false imprisonment was a lesser included offense of kidnapping with bodily injury. *Sallie v. State*, 216 Ga. App. 502, 455 S.E.2d 315 (1995).

**Rape and kidnapping with bodily injury as included offenses.** — When rape was a separate crime arising out of the same transaction under former Code 1933, § 26-506(a), evidence of such rape could not be used as a basis for separate convictions of both rape and kidnapping with bodily injury to the victim. *Allen v. State*, 233 Ga. 200, 210 S.E.2d 680 (1974), overruled on other grounds by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006) (see O.C.G.A. § 16-1-7(a)).

In a criminal trial, the offenses of kidnapping with bodily harm and rape were not merged where, under the facts, neither offense was included in the other as a matter of fact nor as a matter of law. *Turner v. State*, 194 Ga. App. 878, 392 S.E.2d 256 (1990).

**Rape and kidnapping with bodily injury.** — Double jeopardy attached where the state sought to prosecute defendant for rape and sodomy in one county based upon the same facts and upon the same actual evidence which was used to convict defendant for kidnapping with bodily injury in another county. *State v. Sallie*, 206 Ga. App. 732, 427 S.E.2d 11 (1992).

Because the proof establishing the crime of rape did not use up the proof establishing the crime of kidnapping with bodily injury, the crimes did not merge; accordingly, the trial court did not err by refusing to merge two of defendant's kidnapping with bodily injury convictions with two of defendant's rape convictions. *Collins v. State*, 267 Ga. App. 784, 600 S.E.2d 802 (2004).

**Rape and kidnapping.** — Trial court did not err in refusing to merge the kid-

napping charge into rape charge, where the evidence authorized the jury to find that defendant, armed with a pistol, forced his way into the victim's car and drove off with the victim to a secluded area where he raped and beat her and moved to another location and again raped and abused the victim, and then drove away with her car and the property in it, leaving the naked victim behind. *Clark v. State*, 166 Ga. App. 366, 304 S.E.2d 494 (1983).

When the victim was kidnapped at knifepoint and then raped at another location, the two offenses were separate and did not merge; and since there was also evidence that, subsequent to completing the offense of rape, defendant again threatened the victim with the knife, these two offenses were separate and did not merge as a matter of fact. *Edmonson v. State*, 212 Ga. App. 449, 442 S.E.2d 300 (1994).

**Kidnapping and aggravated sodomy.** — Kidnapping and aggravated sodomy are not included offenses as a matter of law and, even though they may be included as a matter of fact, where the same evidence was not used to prove both crimes, the trial court did not err by refusing to find a merger. *Hardy v. State*, 210 Ga. App. 811, 437 S.E.2d 790 (1993).

**Kidnapping with bodily injury and malice murder.** — Kidnapping with bodily injury is not included in malice murder as a matter of law. *Tucker v. State*, 244 Ga. 721, 261 S.E.2d 635 (1979), cert. denied, 445 U.S. 972, 100 S. Ct. 1666, 64 L. Ed. 2d 250 (1980).

Malice murder and kidnapping are not same offense for double jeopardy purposes even though they involve same transaction and considerably overlap each other factually. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir.), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. Ed. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

**Kidnapping with bodily injury and murder.** — Murder and kidnapping with bodily injury are not included crimes as a matter of law. *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978).

Murder and kidnapping with bodily injury are not included as a matter of fact under O.C.G.A. § 16-1-6(1) since these crimes have distinct elements. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978).

**Merger of battery and kidnapping with bodily injury.** — In a prosecution for kidnapping with bodily injury and battery, use of the same evidence to prove that defendant perpetrated battery as proof of the offense of kidnapping with bodily injury required reversal of defendant's conviction and sentence for battery. Holmes v. State, 229 Ga. App. 671, 494 S.E.2d 560 (1998).

**Merger of aggravated assault and kidnapping with bodily injury.** — When aggravated assault conviction is included in kidnapping with bodily injury count, the former conviction and sentence will be vacated because there exists a merger of offenses as a matter of fact under former Code 1933, § 26-506. Thornton v. State, 144 Ga. App. 595, 241 S.E.2d 478 (1978) (see O.C.G.A. § 16-1-7).

When one offense is established by the same but less than all of the facts required to establish another offense, the first merges into the second as a matter of fact; aggravated assault is a lesser included offense of, and merges with, the crime of kidnapping with bodily injury, and a trial court erred by failing to merge defendant's aggravated assault conviction into defendant's kidnapping with bodily injury conviction. Bailey v. State, 269 Ga. App. 262, 603 S.E.2d 786 (2004).

**Aggravated stalking and domestic violence orders.** — State may not prosecute a defendant for aggravated stalking based upon the same set of facts previously used to prosecute the same defendant for violation of a domestic violence order. Kinney v. State, 223 Ga. App. 418, 477 S.E.2d 843 (1996).

**Hijacking and armed robbery.** — O.C.G.A. § 16-5-44.1(d) supersedes the double jeopardy provision contained in O.C.G.A. § 16-1-7(a). Thus, the trial court did not err in refusing to merge the defendant's armed robbery and hijacking convictions. Boykin v. State, 264 Ga. App. 836, 592 S.E.2d 426 (2003).

**Carjacking and armed robbery.** — Defendant's prosecution for a car hijacking was not barred by O.C.G.A. § 16-1-7(b) as the car hijacking and the armed robbery did not arise from the same conduct because the car hijacking incident and the armed robbery incident occurred three days apart, took place at different locations, and involved different victims. Syas v. State, 273 Ga. App. 161, 614 S.E.2d 803 (2005).

Separate convictions for armed robbery and hijacking a motor vehicle did not violate the state and federal prohibitions against double jeopardy, as the latter constituted a separate offense warranting a separate sanction under Georgia law, thus warranting an additional punishment. Dumas v. State, 283 Ga. App. 279, 641 S.E.2d 271 (2007).

Defendant's argument that separate convictions for armed robbery and hijacking a motor vehicle violated prohibitions against double jeopardy was properly rejected because O.C.G.A. § 16-5-44.1(d) expressly provided that hijacking a motor vehicle was a separate offense, superseding the statutory double jeopardy provisions of O.C.G.A. § 16-1-7. Souder v. State, 301 Ga. App. 348, 687 S.E.2d 594 (2009), cert. denied, No. S10C0536, 2010 Ga. LEXIS 343 (Ga. 2010).

**Sequential offenses not inclusive.** — Kidnapping with bodily injury and aggravated battery occurred sequentially, and the former was completed when the latter was perpetrated. Robinson v. State, 210 Ga. App. 175, 435 S.E.2d 466 (1993).

**Aggravated stalking.** — Prosecution of the defendant in Fulton County for aggravated stalking was not barred by defendant's previous conviction in Cobb County for aggravated stalking of the same victim, notwithstanding that the Cobb County conviction was introduced into evidence in the Fulton County prosecution in order to show a pattern of harassing and intimidating behavior. Daker v. State, 248 Ga. App. 657, 548 S.E.2d 354 (2001), cert. denied, 535 U.S. 1085, 122 S. Ct. 1977, 152 L. Ed. 2d 1035 (2002).

Defendant's convictions for two counts of aggravated stalking based on the defendant's following and contacting the victim did not merge for sentencing purposes

**Included Crimes (Cont'd)****2. Crimes Against the Person (Cont'd)**

because there was sufficient evidence from which the jury could find that the defendant, in violation of a protective order, both followed the victim to a hotel and then contacted the victim; the act of following was complete when the defendant arrived at the premises of the hotel because at that time the defendant violated the protective order by coming within 500 feet of a place where the victim was residing. *Louisyr v. State*, 307 Ga. App. 724, 706 S.E.2d 114 (2011).

**Aggravated assault and kidnapping.** — Trial court did not err in denying defendant's motion to correct an illegal sentence, pursuant to O.C.G.A. §§ 16-1-6 and 16-1-7, as defendant's convictions for aggravated assault and kidnapping, in violation of O.C.G.A. §§ 16-5-21 and 16-5-40(a), respectively, did not merge as a matter of law, as only aggravated assault and kidnapping with bodily injury merged as a matter of law; further, the crimes did not merge as a matter of fact, as they were based on separate and distinct facts, and due to the timing of defendant's actions during the incident, the separate convictions were proper. *Walker v. State*, 275 Ga. App. 862, 622 S.E.2d 64 (2005).

**Simple assault and kidnapping.** — Trial court did not err in declining to merge a defendant's convictions for assault and kidnapping with bodily injury because assault under O.C.G.A. § 16-5-20(a)(2) was established by evidence that the victim was placed in reasonable apprehension of immediately receiving a violent injury when defendant told the victim the defendant had a gun, and kidnapping with bodily injury in violation of O.C.G.A. § 16-5-40(a), on the other hand, was established by evidence that defendant abducted and held the victim against the victim's will in the victim's car, driving from one location to another, during which time the victim received bodily injuries. *Walker v. State*, 306 Ga. App. 16, 701 S.E.2d 523 (2010).

**Aggravated assault conviction does not merge into robbery by intimidation conviction.** — As the offense of ag-

gravated assault, O.C.G.A. § 16-5-21(a)(1), required proof of at least one additional fact which the offense of robbery by intimidation, O.C.G.A. § 16-8-41(a), did not, under the "required evidence" test of O.C.G.A. § 16-1-7, a defendant's aggravated assault conviction did not merge into the defendant's robbery by intimidation conviction. *Elamin v. State*, 293 Ga. App. 591, 667 S.E.2d 439 (2008).

**Prosecution for kidnapping and escape.** See *Bailey v. State*, 146 Ga. App. 774, 247 S.E.2d 588 (1978).

**Prosecution for felony murder and kidnapping.** — Once the state tried and convicted petitioner for kidnapping, it would be barred from prosecuting petitioner for felony murder only if underlying felony upon which that prosecution was based were that same kidnapping. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir.), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. Ed. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

**Incest and child molestation.** — Trial court correctly determined that child molestation did not merge with separate act of incestuous sexual intercourse. *King v. State*, 209 Ga. App. 529, 433 S.E.2d 722 (1993).

**Aggravated child molestation and rape.** — Entering separate convictions and sentences for aggravated child molestation and rape was error where the evidence established that the injuries sustained by the victim as a result of the rape were the same injuries as those alleged as the basis for the charge of aggravated child molestation. *Caldwell v. State*, 263 Ga. 560, 436 S.E.2d 488 (1993).

Because defendant's aggravated child molestation and rape convictions were based on separate and distinct sexual acts and different conduct, those convictions could not have been included offenses under O.C.G.A. §§ 16-1-6 and 16-1-7; accordingly, defendant's pro se motion to vacate the sentence as void was properly denied. *Reed v. State*, 297 Ga. App. 850, 678 S.E.2d 560 (2009).

**Child molestation as included offense of rape.** — Accused may be prose-

cuted for both rape and child molestation based upon same conduct, but he may not be convicted of both. *Lamar v. State*, 243 Ga. 401, 254 S.E.2d 353, appeal dismissed, 444 U.S. 803, 100 S. Ct. 23, 62 L. Ed. 2d 16 (1979).

**Child molestation and statutory rape.** — Trial court erred when it convicted defendant of child molestation because facts which were used to prove child molestation were the same facts which proved statutory rape, and the court should have merged the child molestation conviction with the statutory rape conviction. *Dorsey v. State*, 265 Ga. App. 404, 593 S.E.2d 945 (2004).

As a defendant's fondling of a 14-year-old victim and then having sexual intercourse with the victim were separate acts, involving different conduct, merger of the defendant's child molestation and statutory rape convictions during sentencing was not required. *Hill v. State*, 295 Ga. App. 360, 671 S.E.2d 853 (2008).

**Child molestation and aggravated sodomy.** — Because the defendant relentlessly subjected his minor stepdaughter to countless episodes of molestation by performing acts of sodomy, the crimes of aggravated sodomy and child molestation were not merged since there were multiple, separate acts as a basis for each charge. *McCollum v. State*, 177 Ga. App. 40, 338 S.E.2d 460 (1985).

Child molestation under O.C.G.A. § 16-6-4(a) was not a lesser included offense of aggravated sodomy under O.C.G.A. § 16-6-2, where the defendant was charged with two different specific sexual acts at different times on the same day. *Hill v. State*, 183 Ga. App. 654, 360 S.E.2d 4 (1987).

Child molestation and aggravated sodomy are legally distinct, and when the indictment for each offense is based on separate and distinct acts, the offenses do not merge. *Howard v. State*, 200 Ga. App. 188, 407 S.E.2d 769, cert. denied, 200 Ga. App. 896, 407 S.E.2d 769 (1991).

Aggravated child molestation charge and the aggravated sodomy charge in each of the two indictments at issue were both based upon the same act of sodomy since only two of the three incidents involved an act of sodomy and, in those two incidents,

each involved only one act of sodomy. *Dobbins v. State*, 262 Ga. 161, 415 S.E.2d 168 (1992).

Convictions for separate acts of aggravated sodomy and aggravated child molestation did not merge for sentencing purposes. *Braddy v. State*, 205 Ga. App. 424, 422 S.E.2d 260 (1992).

Child molestation and aggravated sodomy should have been merged for conviction and sentencing where a single act of oral sodomy, used to prove aggravated sodomy, also was the evidentiary basis for the charge of aggravated child molestation. *Wyatt v. State*, 222 Ga. App. 604, 475 S.E.2d 651 (1996).

**Aggravated child molestation conviction merged into the aggravated sodomy conviction** as a matter of fact because defendant's single act of anal sodomy was necessary to prove the aggravated sodomy count of the indictment, so that there was no remaining evidence upon which to base defendant's conviction for an additional count of aggravated child molestation. *Heidler v. State*, 273 Ga. 54, 537 S.E.2d 44 (2000), cert denied, 532 U.S. 1029, 121 S. Ct. 1979, 149 L. Ed. 2d 771 (2001).

**Aggravated child molestation and false imprisonment.** — Trial court was not required to merge the defendant's false imprisonment and aggravated child molestation convictions since the false imprisonment and aggravated child molestation convictions could be sustained based on different conduct, therefore, separate convictions were appropriate. Specifically, the indictment averred that the defendant committed false imprisonment by unlawfully detaining the victim in violation of the victim's personal liberty and committed aggravated child molestation by forcing the victim to perform oral sex on him and there was evidence that on one occasion, the defendant locked the victim in the home and would not let the victim leave and, as to the aggravated child molestation conviction, there was evidence that the defendant forced the victim to perform oral sex on the defendant on repeated occasions spanning several years. *Metts v. State*, 297 Ga. App. 330, 677 S.E.2d 377 (2009).

**Cruelty to children and use of fighting words.** — Evidence authorized a jury

**Included Crimes (Cont'd)****2. Crimes Against the Person (Cont'd)**

charge on the offense of "fighting words," where defendant schoolteacher was indicted for battery and cruelty to children, and the proof tracked the indictment which set forth words defendant said to a student which would fall within the parameter of those forbidden by the "fighting words" statute. Shuler v. State, 195 Ga. App. 849, 395 S.E.2d 26 (1990).

**No merger of aggravated battery and cruelty to children.** — Aggravated battery and cruelty to children each requires proof of at least one additional element which the other does not, and the two crimes are not so closely related that multiple convictions are prohibited under O.C.G.A. §§ 16-1-6 and 16-1-7; accordingly, even if the same conduct establishes the commission of both aggravated battery and cruelty to children, the two crimes do not merge, and thus a defendant was properly convicted of both crimes (overruling Jones v. State, 276 Ga. App. 762 (624 SE2d 291) (2005); Etchinson v. State, 245 Ga. App. 449 (538 SE2d 87) (2000); and Harmon v. State, 208 Ga. App. 271 (430 SE2d 399) (1993)). Waits v. State, 282 Ga. 1, 644 S.E.2d 127 (2007).

**Offenses of false imprisonment and aggravated assault** did not merge with the offenses of rape and aggravated sodomy where the rape victim was cut with a knife during a break in the numerous sexual assaults committed upon the victim, and where the victim was forced to lie on the floor motionless while the defendant left the room for a period of time. Gilbert v. State, 176 Ga. App. 561, 336 S.E.2d 828 (1985).

**Acquittal on aggravated sodomy charge did not bar conviction for sexual assault** under another count of the indictment. The dates alleged for the two charges were different, and the victim recounted two separate incidents when defendant performed oral sex on the victim. In short, the charges did not involve the same conduct, and no substantive or procedural aspects of double jeopardy were violated. Brown v. State, 188 Ga. App. 510, 373 S.E.2d 293 (1988).

**Voluntary manslaughter and burglary are not included offenses within**

the meaning of former Code 1933, § 26-506(a)(1). Oglesby v. State, 243 Ga. 690, 256 S.E.2d 371 (1979) (see O.C.G.A. § 16-1-7(a)(1)).

**Burglary conviction not bar to rape conviction.** — When the defendant was convicted of rape after pleading guilty to burglary, a motion for autrefois convict was denied because the two separate crimes arose from the same series of acts and defendant's guilty plea to burglary did not operate as a conviction of the rape charge so as to bar the prosecution thereof. Jones v. State, 169 Ga. App. 4, 311 S.E.2d 485 (1983).

Defendant's burglary conviction did not merge with rape and sodomy charges because the burglary was completed when defendant entered the apartment without authority with intent to commit the other crimes charged. Hardegree v. State, 230 Ga. App. 111, 495 S.E.2d 347 (1998).

**Murder and concealing a death are separate crimes**, requiring separate acts and criminal intent. Durham v. State, 243 Ga. 408, 254 S.E.2d 359 (1979).

**Killing two persons with single stroke.** — When one is charged with homicide of different people in different counts and is found guilty on each count, that person may be sentenced separately on each count to run consecutively; killing different persons constitutes separate crimes even though done at the same time with one stroke of the same death-dealing instrument. Rogers v. State, 163 Ga. App. 641, 295 S.E.2d 140 (1982).

**Felony murder and malice murder.** — In a case involving two homicides, when the evidence supported convictions for malice murder, felony murder convictions merged into the malice murder convictions by operation of law and, thus, judgments of conviction and sentences on the felony murder counts would be vacated. Barker v. State, 263 Ga. 746, 438 S.E.2d 625 (1994).

**Escape merged with felony murder.** — Since the underlying felony charged to the jury for the felony murder charge was escape with a dangerous weapon, defendant's separate conviction for this escape was set aside as having merged with the felony murder. Thomas v. State, 256 Ga. 176, 345 S.E.2d 350 (1986).

**Two aggravated assaults, each against different individuals, are separate crimes.** — When two aggravated assault indictments stemming from a single course of conduct differ only in that a different victim was named in each, the difference was crucial as two separate and distinct crimes were thereby charged and former Code 1933, § 26-506 did not apply. Heard v. State, 126 Ga. App. 62, 189 S.E.2d 895 (1972) (see O.C.G.A. § 16-1-7).

**No separation of time in assault and battery.** — In defendant's convictions on one count of simple assault and two counts of battery resulting from a fight with a romantic friend, trial court erred by not merging two counts of battery for which defendant was sentenced to two consecutive 12-month terms as the state failed to present evidence that two separate batteries were completed; the state presented no evidence that defendant delivered the blows to the friend in two completed exchanges separated by a meaningful interval of time or with distinct intentions. Thompson v. State, 291 Ga. App. 355, 662 S.E.2d 135 (2008).

**Robbing two victims constitutes two offenses thus no merger.** — Two armed robbery convictions under O.C.G.A. § 16-8-41(a) did not merge pursuant to O.C.G.A. § 16-1-7(a)(1) as: (1) a store's money was taken from the immediate presence of two employees, who were both responsible for and had possession of the store's receipts, regardless of which employee may actually have been counting the money when the robbery occurred; (2) each employee who was robbed was a victim, regardless of who owned the money; and (3) as two victims were robbed, defendant could be charged with the robbery of each victim. Green v. State, 265 Ga. App. 126, 592 S.E.2d 901 (2004).

**Crime of terroristic threats not included within crime of aggravated assault with intent to murder.** Echols v. State, 134 Ga. App. 216, 213 S.E.2d 907 (1975).

**Carrying concealed weapon not included in aggravated assault with deadly weapon.** — Offense of carrying a concealed weapon is not included in offense of aggravated assault with deadly

weapon under former Code 1933, § 26-506(a)(1). Howard v. State, 128 Ga. App. 807, 198 S.E.2d 334 (1973) (see O.C.G.A. § 16-1-7).

**Carrying weapon without license is not included in aggravated assault with deadly weapon.** Thomas v. State, 128 Ga. App. 538, 197 S.E.2d 452 (1973).

**Multiple felony convictions not related to separate traffic violations.** — Felony charges against a defendant, which included armed robbery, hijacking a motor vehicle, kidnapping, and possessing a firearm during the commission of a crime, did not require proof of the same elements involved in the traffic violations for which the defendant was convicted of in a different court; therefore, the felony convictions imposed against the defendant did not violate the defendant's right against double jeopardy. Jaheni v. State, 285 Ga. App. 266, 645 S.E.2d 735 (2007).

### 3. Crimes Against Property

**Armed robbery and motor vehicle theft as included offenses.** — One who takes a motor vehicle belonging to another from that person by use of an offensive weapon would be guilty of both armed robbery and motor vehicle theft but could be punished for only one crime. Holt v. State, 239 Ga. 606, 238 S.E.2d 399 (1977).

**Possession of firearms as lesser included offense of armed robbery.** — Where only one firearm is involved in commission of armed robbery, its possession becomes a lesser included offense of armed robbery, and accused may not be convicted of both offenses. Jackson v. State, 143 Ga. App. 406, 238 S.E.2d 752 (1977).

Possession of a firearm during the commission of a felony did not merge with an attempted armed robbery conviction because the crime of possession of a firearm is considered to be a separate offense under O.C.G.A. § 16-11-106(b) and (e). McKinney v. State, 274 Ga. App. 32, 619 S.E.2d 299 (2005).

**Possession of a firearm by a convicted felon is not "included" in crime of armed robbery even though both offenses arose during one transaction.** Coleman v. State, 163 Ga. App. 173, 293 S.E.2d 395 (1982).

**Included Crimes (Cont'd)****3. Crimes Against Property (Cont'd)**

**When a convicted felon is in possession of a sawed-off shotgun,** two separate and distinct crimes are being committed, because a prohibited person is in possession of a prohibited weapon. One crime is not "included" in the other and they do not merge. *Bivins v. State*, 166 Ga. App. 580, 305 S.E.2d 29 (1983).

**Theft by deception and theft by taking.** — Defendant's rights against double jeopardy are not infringed upon by prosecutions and subsequent convictions for both theft by deception and theft by taking. *Stone v. State*, 166 Ga. App. 245, 304 S.E.2d 94 (1983).

**Forgery and false writing.** — When defendant was convicted of first-degree forgery under O.C.G.A. § 16-9-1 and false writing under O.C.G.A. § 16-10-20 for obtaining expungement order by presenting a Georgia Crimes Information Center certificate that had been altered to state that defendant had no criminal record, counts were not included in each other under O.C.G.A. §§ 16-1-6 and 16-1-7; false writing charge did not require proof that the writing purported to be made by authority of one who in fact gave no such authority, and forgery charge did not require proof that the writing was made or used in a matter within jurisdiction of the district attorney's office. *Jones v. State*, 290 Ga. App. 490, 659 S.E.2d 875 (2008).

**Entering automobile with intent to commit theft and theft.** — When entering automobile with intent to commit theft was based on the same entry into the automobile which resulted in the theft of a pocketbook, and the evidence introduced to establish the latter also established the former, the former was included in the latter as a matter of fact and defendant could not be convicted of both offenses. *Phillips v. State*, 162 Ga. App. 199, 290 S.E.2d 142 (1982).

**Theft of automobile may constitute armed robbery.** — While theft of automobile may be committed without committing armed robbery, theft of automobile may constitute armed robbery. *Roberts v. State*, 228 Ga. 298, 185 S.E.2d 385 (1971).

**Offenses of robbery and armed robbery did not merge** as a matter of law, when separate incidents (simple taking of a pistol and then taking the other items at gunpoint) involved different actions, different specific objectives or intents, and different victims. *Millines v. State*, 188 Ga. App. 655, 373 S.E.2d 838 (1988).

**Armed robbery and motor vehicle theft do not necessarily arise from same conduct**, and independent prosecutions for each offense will not necessarily implicate the law's prohibition against placing defendant in double jeopardy or subjecting defendant to "successive" or "multiple" prosecutions. *Smith v. State*, 173 Ga. App. 728, 327 S.E.2d 839 (1985).

**Kidnapping as incidental to, rather than included in, robbery.** — When facts supporting robbery charge included taking property in presence of boys, and defendants' additional conduct of forcing the boys into various rooms and the attic and tying them were incidental to, but not part of, the robbery, that conduct constituted a separate crime, kidnapping, which did not merge with the robbery as a matter of fact. *Chambley v. State*, 163 Ga. App. 502, 295 S.E.2d 166 (1982).

**Burglary and robbery not lesser included offenses of each other as matter of law.** — Statutory definition of burglary and robbery makes it clear that the legislature intended to prohibit two designated kinds of general conduct, and that the two crimes, which were codified in separate chapters, are not established by same proof of all facts; thus, neither crime is a lesser included offense of the other as a matter of law or fact. *Moore v. State*, 140 Ga. App. 824, 232 S.E.2d 264 (1976), cert. denied, 462 U.S. 1124, 103 S. Ct. 3097, 77 L. Ed. 2d 1356 (1983).

Neither burglary nor robbery is a lesser, or included, offense of the other as a matter of law or fact, for the facts must differ to convict for each offense. *Luke v. State*, 171 Ga. App. 201, 318 S.E.2d 833 (1984).

No double jeopardy violation occurred when defendant was convicted of and sentenced for both burglary and robbery. *Luke v. State*, 171 Ga. App. 201, 318 S.E.2d 833 (1984).

**Burglary, kidnapping, terroristic threats, and possession of a firearm**

**did not merge with attempted armed robbery.** — Convictions for burglary, kidnapping, terroristic threats, and possession of a firearm during the commission of a felony did not merge with attempted armed robbery conviction because the attempted armed robbery was complete before the crimes were committed inside the residence; the defendant discussed with the co-worker the idea to dress up as a heating and air technician to perform a robbery, traveled to the residence armed with handguns and a hollow clipboard used to conceal the handgun, and pointed the handgun at a victim before entering the house. *McKinney v. State*, 274 Ga. App. 32, 619 S.E.2d 299 (2005).

**Burglary and murder as included offenses.** — Charges of burglary based on defendant's intent to commit aggravated assault on dwelling's occupant, and murder for death of occupant during burglary, were neither legally incompatible nor lesser included offenses of each other. *Williams v. State*, 250 Ga. 553, 300 S.E.2d 301 (1983).

**Theft of numerous articles in one transaction.** — If in single transaction more articles than one belonging to same owner are stolen, indictment may charge larceny of the whole in one count. It is but one larceny. *Breland v. State*, 135 Ga. App. 478, 218 S.E.2d 153 (1975).

In prosecution for theft, the evidence showed that the tractor and plow were stolen at the same time, from the same place and from the same victim; thus, former Code 1933, § 26-506(a)(1) prohibited multiple conviction, since the theft of the plow was included within the larceny of the tractor. *Brogdon v. State*, 138 Ga. App. 900, 228 S.E.2d 5 (1976) (see O.C.G.A. § 16-1-7(a)).

**After the defendant was convicted of both burglary and theft by taking,** the conviction and sentence for theft by taking was set aside because theft by taking is a lesser included offense to burglary, and an accused may not be convicted of more than one crime if one crime is included in the other. *McClinic v. State*, 172 Ga. App. 54, 321 S.E.2d 796 (1984).

**Crimes against property.** — Defendant was properly convicted of both burglary and financial transaction card theft

after gaining entry into the dwelling as each offense had distinct elements. *McConnell v. State*, 263 Ga. App. 686, 589 S.E.2d 271 (2003).

**Criminal trespass as lesser included offense of burglary.** — Defendant could properly be sentenced to serve consecutive terms on defendant's convictions of criminal damage to property in the second degree and criminal trespass, where the latter crime had been charged as the lesser offense of burglary. *Williams v. State*, 180 Ga. App. 854, 350 S.E.2d 837 (1986).

**State may convict and punish accused for burglary and unlawful possession of firearm** by a previously convicted felon, when the firearm was taken in the burglary. The offenses charged were separate and distinct and there was no merger; evidence used to establish the burglary was not again used to establish the later crime of possession of a weapon by a convicted felon. *Bogan v. State*, 177 Ga. App. 614, 340 S.E.2d 256 (1986).

**Criminal trespass and criminal damage to property.** — When the defendant is convicted of criminal damage to property in second degree (a felony) and criminal trespass (a misdemeanor) and when the offenses were committed at different apartments under different tenancies, such convictions do not fall within the purview of former Code 1933, § 26-506(a). *Hiatt v. State*, 133 Ga. App. 111, 210 S.E.2d 22 (1974) (see O.C.G.A. § 16-1-7(a)).

**Residential mortgage fraud and theft by deception.** — Trial court erred in quashing an indictment for counts of residential mortgage fraud, in violation of O.C.G.A. § 16-8-102, and counts of felony theft by deception, in violation of O.C.G.A. § 16-8-3, because the indictment was not duplicitous under O.C.G.A. § 16-1-7(a)(2). *State v. Corhen*, 306 Ga. App. 495, 700 S.E.2d 912 (2010).

#### 4. Application to Other Crimes

**Possession of cocaine included in trafficking offense.** — Offenses of possession of cocaine and possession of cocaine with intent to distribute were lesser included offenses, as a matter of fact, of the trafficking offense since proof of the

**Included Crimes (Cont'd)****4. Application to Other Crimes (Cont'd)**

two possession offenses was established by "the same or less than all the facts" required to establish the distribution of offense; thus, it was error to convict defendant of all three offenses. Hancock v. State, 210 Ga. App. 528, 437 S.E.2d 610 (1993).

**Selling cocaine and selling cocaine within 1000 feet of public housing project.** — Convictions for selling cocaine (O.C.G.A. § 16-13-30) and selling cocaine within 1000 feet of a public housing project (O.C.G.A. § 16-13-32.5) did not merge because the latter statute contains a specific non-merger provision and the intent thereof is simply to increase the punishment for violating both statutes. Harper v. State, 213 Ga. App. 611, 445 S.E.2d 300 (1994).

**Illegal possession of drugs as lesser included offense of illegal sale.** — Illegal sale and distribution of LSD and possession of LSD are included offenses. Wells v. State, 126 Ga. App. 130, 190 S.E.2d 106 (1972).

When the indictment shows offenses allegedly took place on the same date and evidence conclusively shows defendant's arrest arose out of a single transaction, the defendant's conviction of the offense of illegally selling and distributing heroin necessarily includes the offense of possessing heroin. Sturgis v. State, 128 Ga. App. 85, 195 S.E.2d 682 (1973).

Offense of sale of marijuana and heroin necessarily included offense of possession of marijuana and heroin, unless evidence showed they were on different occasions. Burns v. State, 127 Ga. App. 828, 195 S.E.2d 189 (1973).

As a matter of law, crime of illegal possession of heroin is not included in crime of illegal sale of heroin for purposes of double jeopardy and multiple prosecution. Wilson v. Hopper, 234 Ga. 859, 218 S.E.2d 573 (1975).

When the defendant is convicted of both sale and possession of illegal drugs, and evidence required to convict on illegal sale was the only evidence showing possession, the sentence on a conviction of a lesser

included crime (possession) cannot stand. Anthony v. Hopper, 235 Ga. 336, 219 S.E.2d 413 (1975).

**Possession of drug-related objects conviction** merged as a matter of fact into defendant's felony conviction for possession of cocaine. Reddick v. State, 249 Ga. App. 678, 549 S.E.2d 151 (2001), cert. denied, 2001 Ga. LEXIS 802 (Oct. 1, 2001).

**Trafficking and possession of methamphetamine.** — Because the indictment for a charge of possession of methamphetamine clearly stated that it was based upon methamphetamine "separate from the quantity described" in the separate trafficking charge, the trial court did not err in failing to merge the two offenses. Bellamy v. State, 243 Ga. App. 575, 530 S.E.2d 243 (2000).

**Possession and distribution of methamphetamine.** — Possession of methamphetamine and distribution of methamphetamine charges did not merge under O.C.G.A. § 16-1-7 when defendant smoked methamphetamine in the company of a second person who later returned with a fresh supply of the drug with which defendant injected the second person; methamphetamine that defendant possessed while smoking constituted a separate amount of methamphetamine not accounted for in the distribution charge. Crutchfield v. State, 291 Ga. App. 24, 660 S.E.2d 878 (2008).

**Possession of illegal drug is crime separate and distinct from illegal sale** of that same substance, where the illegal sales were alleged to have taken place on dates different from the date on which drugs were found in defendant's residence. Morgan v. State, 168 Ga. App. 310, 308 S.E.2d 583 (1983).

**Delivery of marijuana and distribution of marijuana** are both distinct violations of O.C.G.A. § 16-13-30(b); they are not included but each may be committed exclusive of the other. Buford v. State, 162 Ga. App. 498, 291 S.E.2d 256 (1982).

**Possession of drug paraphernalia and violation of the Georgia Controlled Substance Act, O.C.G.A. § 16-13-1 et seq., are not included crimes** as a matter of fact or of law. Corbitt v. State, 169 Ga. App. 739, 315 S.E.2d 25 (1984).

Trial court erred in sentencing defendant for possession of methamphetamine and possession with the intent to distribute methamphetamine where the convictions were based upon the same evidence. *Gooch v. State*, 249 Ga. App. 643, 549 S.E.2d 724 (2001).

**Possession of marijuana and possession with intent to distribute.** — Offense of possession of marijuana was included in the offense of possession of marijuana with intent to distribute, where the possession charge could be established by proof of a less culpable mental state (general criminal intent) than was required to establish the commission of possession with intent to distribute (specific criminal intent to distribute). *Talley v. State*, 200 Ga. App. 442, 408 S.E.2d 463 (1991).

**Financial transaction card theft not lesser included offense of financial transaction card fraud.** — Financial transaction card theft, O.C.G.A. § 16-9-31, is not a lesser included offense of financial transaction card fraud, O.C.G.A. § 16-9-33; thus, defendant's prior conviction for the former offense did not preclude prosecution for the latter. *Sword v. State*, 232 Ga. App. 497, 502 S.E.2d 334 (1998).

**Offenses of theft by conversion and securities violations did not merge.** — Trial court did not err in failing to merge the theft by conversion counts under O.C.G.A. § 16-8-3, and the securities violation counts under O.C.G.A. § 10-5-12 filed against defendant because the state had to prove separate facts to find defendant guilty of the theft by conversion offenses and the violations of the Georgia Securities Act, O.C.G.A. § 10-5-1 et seq. Furthermore, the securities violation counts were complete before the theft conversion occurred. *Lavigne v. State*, 299 Ga. App. 712, 683 S.E.2d 656 (2009).

**Gambling.** — Gambling is one thing and operating a gambling house is a kindred but entirely different thing; different evidence is required to convict of these separate offenses. No absurdity or repugnancy is created by acquittal of gambling and conviction of operating a gambling house. *McGahee v. State*, 133 Ga. App. 964, 213 S.E.2d 91 (1975).

Although arising from same transaction, offenses of possession of gambling devices and equipment, and commercial gambling by operating a gambling place, are separate and distinct. *Baxter v. State*, 134 Ga. App. 286, 214 S.E.2d 578, cert. denied, 423 U.S. 895, 96 S. Ct. 194, 46 L. Ed. 2d 127 (1975).

Trial court did not err in sentencing defendant for commercial gambling, communicating gambling information and keeping a gambling place; the latter two offenses are not included in offense of commercial gambling. *Romano v. State*, 162 Ga. App. 816, 292 S.E.2d 533 (1982).

**Insurance fraud violations.** — Defendant was properly sentenced to separate terms for insurance fraud violations committed by several co-conspirators; each fraudulent claim made was a separate offense and did not merge under O.C.G.A. § 16-1-7. *Crowder v. State*, 222 Ga. App. 351, 474 S.E.2d 246 (1996).

**Dogfighting** was not, as a matter of law or of fact, a lesser included offense of commercial gambling. *Hargrove v. State*, 253 Ga. 450, 321 S.E.2d 104 (1984).

**Convictions of laying drags, reckless driving and speeding** were not violative of O.C.G.A. § 16-1-7 as each offense was established by proof of different facts and evidence shows that the three offenses occurred at separate times and locations during pursuit of appellant's vehicle. Neither offense was included in the other as a matter of fact or law. *Phillips v. State*, 162 Ga. App. 471, 291 S.E.2d 776 (1982).

**Reckless driving, reckless conduct and speeding merge.** — Trial court erred in failing to merge defendant's convictions for reckless driving, speeding, and reckless conduct since defendant's conviction for reckless conduct was proved by less than all of the facts used to prove defendant guilty of reckless driving, and the speeding charge, as alleged, was an element of both reckless driving and reckless conduct. *Carrell v. State*, 261 Ga. App. 485, 583 S.E.2d 167 (2003).

**Reckless driving and reckless conduct do not merge.** — Trial court did not err by failing to merge the crimes of reckless driving, O.C.G.A. § 40-6-390, and reckless conduct, O.C.G.A. § 16-5-60, for

**Included Crimes (Cont'd)****4. Application to Other Crimes (Cont'd)**

punishment because the two offenses did not merge for sentencing when §§ 40-6-390 and 16-5-60 each had a provision that required proof of a fact that the other did not, and to establish a violation of § 40-6-390, the state only had to prove that the defendant drove the car in a manner exhibiting reckless disregard for the safety of persons or property; reckless conduct requires proof of harm or an actual threat of harm to the bodily safety of another person and does not require that the crime be committed while driving a motor vehicle, but reckless driving does not require that there be an injured or threatened party and instead merely requires that the state prove a general disregard for the safety of persons or property while driving a motor vehicle. Howard v. State, 301 Ga. App. 230, 687 S.E.2d 257 (2009).

**Reckless conduct conviction no bar to aggressive driving conviction.** —

Defendant's previous conviction for reckless conduct under O.C.G.A. § 16-5-60 did not bar a later conviction for aggressive driving under O.C.G.A. § 40-6-397 when both convictions arose out of the same incident, and when conviction for aggressive driving did not require proof of the fact that defendant endangered the bodily safety of the other driver and other driver's family, while reckless conduct conviction did not require proof of the fact that defendant drove with the intent to annoy, harass, intimidate, and injure another; thus, each crime required proof of a fact that the other did not, so neither offense was included in the other so as to violate the substantive bar against double jeopardy of O.C.G.A. § 16-1-7. Winn v. State, 291 Ga. App. 16, 660 S.E.2d 883 (2008).

**Hunting on public road from motor vehicle at night.** — After the defendants hunted from a motor vehicle on a public road at night using a light exceeding six volts, it was not in error to convict the defendants of the three separate crimes of hunting at night, hunting on a public road, and hunting from a motor vehicle. Sanford v. State, 169 Ga. App. 769, 315 S.E.2d 281 (1984).

**Driving under the influence** was lesser included offense of first degree vehicular homicide, and conviction of both offenses was proscribed. Duncan v. State, 183 Ga. App. 368, 358 S.E.2d 910 (1987).

**Driving under the influence and probationary license violation.** — Defendant's convictions for operating a motor vehicle under the influence of alcohol while having a probationary license and driving under the influence of alcohol could not both stand since, under the facts, the latter was a lesser included offense in the violation of the probationary license offense. Williams v. State, 223 Ga. App. 209, 477 S.E.2d 367 (1996).

**Improper lane change, driving without headlights, and driving under the influence of alcohol (DUI) convictions** did not merge because the facts alleged in the accusation with regard to the DUI charge were not also sufficient to establish the lesser offenses of improper lane change and driving without headlights. Parker v. State, 249 Ga. App. 530, 549 S.E.2d 154 (2001).

**Driving on the wrong side of the road** is a lesser included offense of second degree vehicular homicide. Rank v. State, 179 Ga. App. 28, 345 S.E.2d 75 (1986).

**Improper passing and reckless driving** are lesser included offenses of vehicular homicide. Nash v. State, 179 Ga. App. 702, 347 S.E.2d 651 (1986).

**Violation of oath and theft by taking not merged.** — Charges of violation of oath by a public officer and theft by taking in two indictments do not merge, since the essential elements for each crime are different, even though there may be an overlapping of proof between the two. Freeman v. State, 184 Ga. App. 678, 362 S.E.2d 413 (1987).

**Selling alcohol without license and selling on Sunday.** — Although the two crimes alleged share the same essential element of selling alcoholic beverages, each of the crimes has an additional essential element distinct from the other. Proof that defendants sold alcohol without a license would not prove that they sold alcoholic beverages on Sunday, nor would proof of the latter establish the former. Martin v. State, 185 Ga. App. 145, 363 S.E.2d 765 (1987).

**Offenses of furnishing alcohol to minors and maintaining a disorderly house** did not merge, because each of the offenses had elements not required by the other and each prohibited a distinct type of criminal conduct. *Tate v. State*, 198 Ga. App. 276, 401 S.E.2d 549 (1991).

**Predicate offenses for RICO violation.** — Convictions on 75 counts of stealing public records could not stand, where the state, by choosing gratuitously to include as predicates for a Racketeer Influenced and Corrupt Organization (RICO) violation all of the instances of the prohibited acts recited in the counts, "used up" the evidence, so that there was none left to form the basis for the separate offenses enumerated in the counts. *Martin v. State*, 189 Ga. App. 483, 376 S.E.2d 888, cert. denied, 189 Ga. App. 911, 376 S.E.2d 888 (1989).

Failure to strike from a Racketeer Influenced and Corrupt Organizations Act (RICO) indictment, as predicate offenses, three thefts which had been formerly prosecuted was harmless error, where there was no reason to infer that defendant's guilty pleas to other offenses were tainted or otherwise affected by the superfluous addition of predicate offenses which had formerly been prosecuted. *Bethune v. State*, 198 Ga. App. 490, 402 S.E.2d 276, cert. denied, 198 Ga. App. 897, 402 S.E.2d 276 (1991).

**Misuse of a firearm while hunting and failure to report an accidental injury while hunting** were both properly prosecuted against defendant without effecting impermissible multiple convictions since the two offenses contain some different elements and require proof of different facts and thus are not included within each other. *Lewis v. State*, 207 Ga. App. 212, 427 S.E.2d 578 (1993).

**Conspiracy and possession of tools for the commission of a crime.** — Even though the crimes of conspiracy and possession of tools for the commission of a crime do not merge as a matter of law, because the form of the indictment required proof of the possession of tools in order to prove the conspiracy, the offenses merged as a matter of fact. *Green v. State*, 240 Ga. App. 377, 523 S.E.2d 581 (1999).

**Prosecution for violation of O.C.G.A. § 40-6-395(a) and (b)(5)(A)**

**valid.** — Defendant could be lawfully prosecuted for both O.C.G.A. § 40-6-395(a) and (b)(5)(A) without offending O.C.G.A. § 16-1-7(a), although defendant could not be sentenced for both; the court found that because all of the evidence was used up to prove the crime of felony fleeing or attempting to elude, the misdemeanor conviction for fleeing or attempting to elude merged into the greater offense. *Buggay v. State*, 263 Ga. App. 520, 588 S.E.2d 244 (2003).

**Defendant not entitled to jury charge on misdemeanor offense.** — Defense counsel was not ineffective for failing to request a jury charge on the misdemeanor offense of giving a false name to a law enforcement officer under O.C.G.A. § 16-10-25 because the conduct for which a defendant was indicted, falsely telling a GBI special agent that the defendant did not make a 9-1-1 call regarding a fire at another agent's residence when in fact the defendant did make the call, would not constitute a violation of § 16-10-25; the defendant failed to show under O.C.G.A. § 16-1-7(a)(1) that the same conduct would result in the violation of the misdemeanor statute. *Mahoney v. State*, 296 Ga. App. 570, 675 S.E.2d 285 (2009).

## Joint Prosecution of Offenses

### 1. In General

**O.C.G.A. § 16-1-7(b) establishes a prosecutorial bar** which is broader than that in the United States and Georgia Constitutions, and than the literal provisions of O.C.G.A. § 16-1-8(b)(1). *Cochran v. State*, 176 Ga. App. 58, 335 S.E.2d 165 (1985).

**"Same conduct" construed.** — The phrase "the same conduct" in O.C.G.A. § 16-1-7(b) has been used interchangeably with the phrase "the same transaction." *Harrell v. State*, 196 Ga. App. 101, 395 S.E.2d 598 (1990).

**When two or more offenses may be tried together.** — Two or more offenses may be tried together if they are of same or similar character, even if not part of a single scheme or plan; or if they are based on same conduct or on a series of acts connected together or constituting parts of

**Joint Prosecution of Offenses (Cont'd)**

**1. In General (Cont'd)**

a single scheme or plan. *Gober v. State*, 247 Ga. 652, 278 S.E.2d 386 (1981).

Offenses may be joined for trial when they are based: (1) on the same conduct; or (2) on a series of acts connected together; or (3) on a series of acts constituting parts of a single scheme or plan. If offenses are joined for any of these three reasons, the defendant does not have an automatic right of severance; instead, the trial judge may grant severance if it is necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. *Isbell v. State*, 179 Ga. App. 363, 346 S.E.2d 857 (1986), cert. denied, 479 U.S. 1098, 107 S. Ct. 1319, 94 L. Ed. 2d 172 (1987).

Where the evidence showed a continuous scheme or ongoing spree such that evidence of one incident would be admissible in the trial of the similar crimes committed the same night in the other incident, the trial court did not abuse its discretion in granting the state's motion to consolidate the indictments for trial. *Moore v. State*, 245 Ga. App. 641, 537 S.E.2d 764 (2000).

**Driving under the influence and reckless driving merged into vehicular homicide.** — Convictions for driving under the influence of alcohol and reckless driving merged into a vehicular homicide conviction and were vacated. *Harris v. State*, 272 Ga. App. 366, 612 S.E.2d 557 (2005).

**Offenses arising from same conduct, within jurisdiction of single court, must be prosecuted in single action.** *Brock v. State*, 146 Ga. App. 78, 245 S.E.2d 442 (1978).

**Offenses arising from same conduct, but multiple jurisdictions.** — After defendant pled guilty to theft by taking for writing fraudulent checks, defendant could subsequently be prosecuted for forgery for uttering and delivering the checks, without offending the provision of O.C.G.A. § 16-1-7(b), prohibiting multiple prosecutions for crimes arising from the same conduct, because, as venue for the two prosecutions arose in different

counties, the offenses were not known to the proper prosecutor and were not within the jurisdiction of a single court. Furthermore, defendant's subsequent prosecution for forgery for uttering and delivering the checks was not barred under O.C.G.A. § 16-1-6 or § 16-1-7(a), because the two crimes were not lesser included offenses of the other. *Cade v. State*, 262 Ga. App. 206, 585 S.E.2d 172 (2003).

**Same conduct not shown.** — Indictment was not barred by former prosecution since the predicate acts supporting the RICO violation alleged by the indictment in one county were not alleged by the indictment in the other county, and there was otherwise no evidence that the RICO prosecution in one county arose from the same conduct supporting the RICO charges filed against the defendant in the other county. *Garrard v. State*, 242 Ga. App. 189, 528 S.E.2d 273 (2000).

Although both indictments against the defendant alleged similar schemes to defraud lending institutions, double jeopardy protections under O.C.G.A. §§ 16-1-7(b), 16-1-8(b) and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII did not bar the second prosecution; the indictments involved different properties, different conspirators, different real estate transactions, and, for the most part, different lenders, and the fact that the two separate conspiracies may have overlapped in time and resulted in violations of the same criminal statutes was not determinative. *Harrison v. State*, 282 Ga. App. 29, 637 S.E.2d 773 (2006).

**Former Code 1933, § 26-506(b) requires one prosecution** only if several crimes arise from same conduct. *Ealey v. State*, 139 Ga. App. 604, 229 S.E.2d 86 (1976) (see O.C.G.A. § 16-1-7(b)).

**When joint prosecution of multiple charges is mandatory.** — Prosecution of multiple charges together is mandatory where rules relating to venue permit and crimes are known to proper prosecuting officer. *Henderson v. State*, 227 Ga. 68, 179 S.E.2d 76 (1970), sentence vacated, 408 U.S. 938, 92 S. Ct. 2868, 33 L. Ed. 2d 758 (1972).

**State's option upon dismissal of one of several offenses prosecuted together under O.C.G.A. § 16-1-7(b).** —

When more than one offense arises out of same course of action and at same time, upon being faced with dismissal of one offense, state has option of taking appeal from action of trial court while withholding prosecution of other offense or offenses pending outcome of appeal, or alternatively of proceeding with prosecution of remaining offense. Electing to proceed with remaining offense or offenses bars the state from trying dismissed offense by virtue of doctrine of procedural double jeopardy. *State v. Brittain*, 147 Ga. App. 626, 249 S.E.2d 679 (1978).

**Under former Code 1933, § 26-1801, before the jury is impaneled, a nolle prosequi may be entered** at the pleasure of the prosecutor. *Singer v. State*, 156 Ga. App. 416, 274 S.E.2d 612 (1980) (see O.C.G.A. § 17-8-3).

**Indictment is not invalid merely because it includes two entirely separate and distinct crimes.** *Quarles v. State*, 130 Ga. App. 756, 204 S.E.2d 467 (1974).

**Including multiple counts in indictment based on same type of recurring conduct.** — Including multiple counts in indictment does not violate provisions of former Code 1933, § 26-506, even though state does not rely on same conduct to establish commission of offenses, but rather on same type of conduct, reoccurring in a number of instances. *Steele v. State*, 227 Ga. 653, 182 S.E.2d 475 (1971) (see O.C.G.A. § 16-1-7).

When modus operandi of perpetrator is so strikingly alike in different counts that totality of facts unerringly demonstrates and designates the defendant as the common perpetrator, the offenses may be joined, subject to the right of the defendant to severance in the interests of justice. *Davis v. State*, 159 Ga. App. 356, 283 S.E.2d 286 (1981).

**When defendant can be charged with separate, distinct offenses in same indictment.** — Defendant cannot be charged with separate and distinct offenses on same indictment unless they are of same nature, class or species, or arise out of or constitute but one transaction involving same conduct of accused. *Fair v. State*, 129 Ga. App. 565, 200 S.E.2d 296 (1973).

**Impermissible consolidation of indictments is error requiring new trial in each case.** *Bradford v. State*, 126 Ga. App. 688, 191 S.E.2d 545 (1972), overruled on other grounds, *Smith v. State*, 199 Ga. App. 410, 405 S.E.2d 107 (1991).

**If defendant charged with multiple offenses arising from "same conduct" pleads guilty** to certain of these offenses, the defendant may then raise a plea of bar against subsequent prosecutions arising from the same course of conduct where the state, through decision or default, has failed to prosecute all offenses together, provided that it was practicable to do so. *State v. McCrary*, 253 Ga. 747, 325 S.E.2d 151 (1985).

**Prosecutor's knowledge of offenses.** — When there is no showing that all of the charges against a defendant were known to the proper prosecuting officer at the time a previous prosecution was commenced, a subsequent prosecution for other violations arising from the same occurrence is not barred by O.C.G.A. § 16-1-7(b) or by O.C.G.A. § 16-1-8(b). *Webb v. State*, 176 Ga. App. 576, 336 S.E.2d 838 (1985).

O.C.G.A. § 16-1-7(b), requiring that crimes arising out of the same conduct be prosecuted in a single prosecution, applies only with regard to such crimes as are actually known to the prosecuting officer actually handling the proceedings. A constructive knowledge standard is not employed. *Baker v. State*, 257 Ga. 567, 361 S.E.2d 808 (1987); *Dickinson v. State*, 191 Ga. App. 467, 382 S.E.2d 187 (1989); *Price v. State*, 206 Ga. App. 161, 424 S.E.2d 841 (1992); *Bonner v. State*, 249 Ga. App. 358, 548 S.E.2d 84 (2001).

Defendant may be prosecuted for more than one crime arising from the same conduct if the prosecuting officer actually handling the proceedings does not have actual knowledge of the multiple prosecutions. *Farmer v. State*, 184 Ga. App. 851, 363 S.E.2d 62 (1987); *Hayles v. State*, 188 Ga. App. 281, 372 S.E.2d 668 (1988); *Cates v. State*, 206 Ga. App. 694, 426 S.E.2d 576 (1992).

Knowledge means actual, not constructive, knowledge by the prosecuting officer. *Sanders v. State*, 188 Ga. App. 774, 374 S.E.2d 542, cert. denied, 188 Ga. App. 912, 371 S.E.2d 878 (1988).

**Joint Prosecution of Offenses (Cont'd)**  
**1. In General (Cont'd)**

Trial court's denial of defendant's plea of former jeopardy to preclude prosecution for controlled substances act violations was error, where the offense of driving without a license to which defendant pled guilty arose out of the same transaction, and all offenses were known to the prosecutor at the outset. *Smith v. State*, 190 Ga. App. 246, 378 S.E.2d 493, aff'd, 259 Ga. 352, 381 S.E.2d 37 (1989).

After the defendant pled guilty to giving a false name and address, obstruction of an officer, and driving on a suspended license following dismissal of earlier charges of theft of a motor vehicle, concealing the identity of a motor vehicle, and improper parking, offenses of theft and concealing the identity of a motor vehicle charged in a subsequent indictment did not arise from the same conduct as that of which defendant was convicted, but the offense of improper parking, also charged in the indictment, did arise from the same conduct and should have been dismissed since the prosecuting attorney had actual knowledge of all the crimes. *Young v. State*, 214 Ga. App. 585, 448 S.E.2d 477 (1994).

Defendant had the burden of showing that the proper prosecuting officer had actual knowledge of all of the charges against that defendant and since the defendant did not satisfy that fact by evidence, the trial court did not err in finding that the defendant failed to satisfy O.C.G.A. § 16-1-7(b) and denying defendant's motion in autrefois convict and plea in bar. *Rowe v. State*, 265 Ga. App. 809, 463 S.E.2d 21 (1995); *Blackwell v. State*, 232 Ga. App. 884, 502 S.E.2d 774 (1998).

Defendant was charged with speeding, driving under the influence of drugs, and endangering a child. Defendant pled nolo contendere to, and was sentenced on the speeding charge; therefore, the state was barred from prosecuting defendant for the other two charges which arose from the same conduct and of which the prosecutor had actual knowledge. *Weaver v. State*, 224 Ga. App. 243, 480 S.E.2d 286 (1997).

O.C.G.A. § 16-1-7(b) only applies to

crimes which are "actually known" to the prosecuting officer; constructive knowledge by the prosecuting officer is not sufficient. *Hill v. State*, 234 Ga. App. 173, 507 S.E.2d 3 (1998).

Even if both a misdemeanor charge for theft by receiving and subsequent felony charge for that crime were for separate items seized by the same police officer from the same location at the same time, this alone would not be sufficient to invoke the bar of double jeopardy because defendant had the burden of showing that, when the misdemeanor prosecution was commenced, the solicitor general had actual knowledge of the felony charge. *Honea v. State*, 238 Ga. App. 135, 517 S.E.2d 841 (1999).

O.C.G.A. § 16-1-7 does not bar prosecution of other offenses unless the defendant affirmatively shows that the other crimes were actually known to the prosecutor handling the proceedings. *Baker v. State*, 251 Ga. App. 597, 554 S.E.2d 797 (2001).

After the defendant conceded that there was no prosecuting attorneys assigned to the DeKalb County Recorder's Court, and the presiding judge or arresting officer was not deemed the proper prosecuting officer, the defendant failed in the defendant's burden of showing that the proper prosecuting officer had actual knowledge of all the charges against the defendant. *Simmons v. State*, 263 Ga. App. 220, 587 S.E.2d 312 (2003).

**"Proper prosecuting officer" construed.** — Language of subsection (b) of this statute referring to proper prosecuting officer clearly means prosecuting attorney for state; that is, the district attorney or authorized assistants. *Singer v. State*, 156 Ga. App. 416, 274 S.E.2d 612 (1980) (see O.C.G.A. § 16-1-7).

District attorney, not the assistant district attorney who is actually responsible for the prosecution of the case, was the "proper prosecuting officer at the time of commencing the prosecution" within the meaning of O.C.G.A. § 16-1-7(b), since the district attorney's name on the accusation and the indictment was conclusive circumstantial evidence that the district attorney had actual knowledge of all the offenses arising from the same conduct and the pendency of both prosecutions

against the accused but chose to proceed separately as to each. *State v. Smith*, 259 Ga. 352, 381 S.E.2d 37 (1989).

"Proper prosecuting officer," as that phrase is used in O.C.G.A. § 16-1-7(b), means the prosecuting attorney for the state, i.e., the district attorney or authorized assistants, including state court solicitors and their assistants, and the phrase was not meant to include the arresting officer. *Zater v. State*, 197 Ga. App. 648, 399 S.E.2d 222 (1990); *Rowe v. State*, 265 Ga. App. 809, 463 S.E.2d 21 (1995); *Dodd v. State*, 240 Ga. App. 48, 522 S.E.2d 538 (1999).

O.C.G.A. § 16-1-7(b) applies only to such crimes which are actually known to the prosecuting officer who is handling the proceedings. The defendant bears the burden of showing that further prosecution is barred by the previous prosecution, including a showing that the proper prosecuting attorney had actual knowledge of all the charges. *Anderson v. State*, 200 Ga. App. 530, 408 S.E.2d 829 (1991).

Appearance of the district attorney's name on both an accusation and indictment constitutes circumstantial evidence which conclusively establishes the district attorney's actual knowledge of the pendency of the prosecutions and of the offenses charged in each. *Mack v. State*, 249 Ga. App. 424, 547 S.E.2d 697 (2001).

**Subsection (b) does not require exclusion of evidence of crimes not subject to prosecution.** — Although O.C.G.A. § 16-1-7(b) does require single prosecution of known crimes arising from same conduct, it does not contain exclusionary rule concerning evidence of crimes which are not subject to prosecution. *Favors v. State*, 149 Ga. App. 563, 254 S.E.2d 886 (1979).

## 2. Crimes Against the Person

**Failure of prosecuting officials to include underlying felony charge in a murder indictment constitutes a statutory procedural bar to prosecution on the charge of felony murder, where the commission of the felony and the murder arise from the "same conduct."** *McCrary v. State*, 254 Ga. 382, 329 S.E.2d 473 (1985).

**After the defendant committed four distinct offenses** (driving under the in-

fluence, reckless driving, fleeing to elude arrest, and aggravated assault) during a single continuous course of conduct in a single night, and these offenses were known to the prosecutor at the time of the prosecution in the probate court, at which time the court accepted guilty pleas to the two misdemeanor charges, the successive prosecution in the superior court for the felony charges was barred. *McCrary v. State*, 171 Ga. App. 585, 320 S.E.2d 567 (1984), aff'd, 253 Ga. 747, 325 S.E.2d 151 (1985); *Hooker v. State*, 240 Ga. App. 141, 522 S.E.2d 723 (1999).

**Separate victims of obstruction of a law enforcement officer.** — Upon conviction of defendant of three counts of misdemeanor obstruction of a law enforcement officer, since there were three separate victims, the trial court did not err in treating the counts as discrete offenses for sentencing. *Denny v. State*, 222 Ga. App. 674, 475 S.E.2d 698 (1996).

**Kidnapping with bodily injury in one county and murder in another county permitted separate prosecution.** — After the accused kidnapped the victim and inflicted bodily injury upon the victim in one county, and then abducted the victim to a second county in which the accused killed the victim, the two offenses were not within a single court's jurisdiction and could not be tried together; therefore, there was no procedural bar to subsequent prosecution for murder in the second county. *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978).

**Offense of hijacking** did not merge with defendant's armed robbery conviction for sentencing purposes. *Dillard v. State*, 223 Ga. App. 405, 477 S.E.2d 674 (1996).

**When death occurs after conviction for aggravated assault.** — When criminal offense of murder is not yet complete because victim has not died at time of aggravated assault conviction, subsequent prosecution for murder is not barred by express terms of former Code 1933, §§ 26-506(b) and 26-507(b), because the crime of murder is not consummated when the former trial begins. *Lowe v. State*, 240 Ga. 767, 242 S.E.2d 582 (1978).

**Joint Prosecution of Offenses (Cont'd)****2. Crimes Against the Person (Cont'd)**

(see O.C.G.A. §§ 16-1-7(b) and 16-1-8(b)).

**Vehicular homicide prosecution not barred when victim died following traffic violation prosecutions.** — Prosecution for vehicular homicide was not barred against a defendant who, at prior proceedings, had been prosecuted for and pled guilty to other offenses arising from the same incident since, at the time of the earlier proceedings, the victim had not yet died. *Herrera v. State*, 175 Ga. App. 740, 334 S.E.2d 339 (1985).

**Three deaths from one auto accident.** — Defendant could be sentenced on three counts of vehicular homicide although all three deaths resulted from one negligent act. *Smith v. State*, 164 Ga. App. 624, 298 S.E.2d 587 (1982).

**Reckless driving and serious injury by vehicle offenses.** — Trial court did not err by failing to merge a reckless-driving charge into a serious-injury-by-vehicle charge because the two crimes were entirely separate and distinct, requiring a showing of different elements and based on the defendant's drunk driving of a four-wheeler ATV with a 10-year-old passenger, who was brain-damaged when the defendant clipped a tractor and flipped the ATV; the state used the evidence of the clipping of the tractor scoop, which caused the rollover and injury to the child, as the elements of the serious-injury-by-vehicle offense, which was separate from and sequential to the reckless-driving offense, which was premised on the defendant's intoxication. *Croft v. State*, 278 Ga. App. 107, 628 S.E.2d 144 (2006).

**Multiple sex crimes against children.** — Trial court did not err in refusing to merge a charge of statutory rape with an incest charge, a charge of child molestation with that of aggravated child molestation, and charges of aggravated sodomy and aggravated child molestation. Those multiple offenses did not merge as a matter of fact or law; under the circumstances of the case, the same conduct was not being punished twice, nor was one act included in the other so as to proscribe the

separate conviction and punishment for each act. *Williams v. State*, 195 Ga. App. 476, 394 S.E.2d 123 (1990).

**Aggravated child molestation and simple sodomy.** — As defendant's conduct satisfied the elements of aggravated child molestation, the argument that defendant should have been sentenced for the lesser crime of simple sodomy was unavailing; the state was not required to prosecute only a lesser offense committed, but could prosecute the defendant under any or all of the statutes that fit defendant's conduct. *Hunter v. State*, 263 Ga. App. 747, 589 S.E.2d 306 (2003).

**Aggravated assault and feticide.** — Defendant's convictions for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) and feticide in violation of O.C.G.A. § 16-5-80(a) did not merge for sentencing purposes because the victim of the aggravated assault was the defendant's girlfriend, while the victim of the feticide was the girlfriend's unborn child; the merger doctrine does not apply if each of the charged crimes was committed against a different victim. *Carmichael v. State*, 305 Ga. App. 651, 700 S.E.2d 650 (2010).

**Felony murder and vehicular homicide.** — Defendant could be indicted for vehicular homicide under O.C.G.A. § 40-6-393 and felony murder during the commission of fleeing and attempting to elude a police officer under O.C.G.A. § 40-6-395. *State v. Tiraboschi*, 269 Ga. 812, 504 S.E.2d 689 (1998).

**Multiple felony murder convictions, only one person killed.** — Under O.C.G.A. § 16-1-7(a), it was improper to sentence defendant to two felony murder counts under O.C.G.A. § 16-5-1(c) because there was only one death involved. *Rhodes v. State*, 279 Ga. 587, 619 S.E.2d 659 (2005).

**Consecutive sentence for crimes involving two victims proper.** — As a defendant was charged with the malice murder of two victims in different counts and was found guilty on each count, the defendant was properly sentenced separately on each count to run consecutively because the killing of different persons constituted separate crimes. *Hooks v. State*, 284 Ga. 531, 668 S.E.2d 718 (2008),

overruled on other grounds, 287 Ga. 192, 695 S.E.2d 244 (2010).

**Aggravated assault with intent to rob and armed robbery.** — Because all of the facts used to prove the offense of aggravated assault with intent to rob were used up in proving the armed robbery, merger was required. *Mercer v. State*, 289 Ga. App. 606, 658 S.E.2d 173 (2008).

**Conviction of aggravated assault and armed robbery.** — Because: (1) different facts were used to prove an aggravated assault and an armed robbery, specifically, that the armed robbery was complete after the defendant laid a handgun on the counter in the convenience store, demanded that the victim open the register, and a codefendant took money from the a register; and (2) the separate offense of aggravated assault occurred when the defendant struck the victim in the head with the gun, the offenses did not merge as a matter of fact. Thus, the separate sentences imposed for each offense were upheld, and no double jeopardy violation occurred. *Garibay v. State*, 290 Ga. App. 385, 659 S.E.2d 775 (2008).

**Joinder of battery and obstruction of officer charges** was proper because evidence of defendant's conduct in leaving the scene of the battery was relevant and pertinent to the obstruction charge. *McCracken v. State*, 224 Ga. App. 356, 480 S.E.2d 361 (1997).

**Joinder of sexual offenses and solicitation for murder.** — When the defendant planned to murder a child so that the child could not testify about sexual offenses, it was not error to refuse to sever the sexual charges from a solicitation to commit murder charge; joinder was based upon a connected series of acts, and there was no indication that the jury was unable to apply the law intelligently as to each offense. *Borders v. State*, 285 Ga. App. 337, 646 S.E.2d 319 (2007), cert. denied, 2007 Ga. LEXIS 640 (Ga. 2007).

**Conviction of aggravated assault and rape.** — After completing the act of forcible intercourse (rape), defendant drew a gun again, pulled back the hammer, and threatened to shoot both victims if the victim's did not obey the defendant's further commands, this second drawing of

the deadly weapon was subsequent to, and separate from, the completed offense of rape against the first victim; thus, the evidence regarding the use of force during the incident was not "used up" in the offense of rape, and the defendant could properly be convicted of aggravated assault. *Ellis v. State*, 181 Ga. App. 826, 354 S.E.2d 15 (1987).

**Kidnapping, rape, robbery and aggravated sodomy.** — Kidnapping charge was not improperly joined with the charges of rape, robbery and aggravated sodomy where the charges were part of a continuing criminal enterprise. *Smith v. State*, 214 Ga. App. 631, 448 S.E.2d 906 (1994).

**Convictions for aggravated battery, family violence, and family violence battery arising out of same conduct.**

— Charges under both O.C.G.A. § 16-5-24(a) and (h) (aggravated battery, family violence) and O.C.G.A. § 16-5-23.1(a), (b), and (f) (family violence battery, substantial physical and visible bodily harm), which were not based on actions at different times or places or different injuries, violated a defendant's double jeopardy rights under O.C.G.A. § 16-1-7. *Pierce v. State*, 301 Ga. App. 167, 687 S.E.2d 185 (2009), cert. denied, No. S10C0549, 2010 Ga. LEXIS 244 (Ga. 2010).

**Joinder of theft by taking with making harassing telephone calls and using telephone communication for indecent purposes.** — Trial court did not err in refusing to sever offenses for theft by taking and the telephone charges, because the evidence of each crime would be admissible in the trial of either crime if tried separately. *Moss v. State*, 245 Ga. App. 811, 538 S.E.2d 876 (2000).

**Unrelated assaults.** — Defendant's plea to a charge arising from an earlier incident with a carpet cleaner did not preclude a prosecution for a later assault on the defendant's girlfriend because the crimes were separated in time, involved different victims, and did not arise from the same conduct; thus, O.C.G.A. § 16-1-7(b) did not require them to be brought in a single prosecution. *Delph v. State*, 279 Ga. App. 306, 630 S.E.2d 891 (2006).

**Joint Prosecution of  
Offenses (Cont'd)**

**2. Crimes Against the Person (Cont'd)**

**Possession of a firearm by a convicted felon.** — Defendant was not entitled to a new jury on a trial of a possession of a firearm by a convicted felon charge as generally all charges arising out of the same conduct had to be tried in a single prosecution; although there were limited exceptions to the rule allowing, under proper circumstances, the bifurcation of a possession of a firearm by a convicted felon charge, the defendant was not entitled to a separate trial before a new jury on that charge. *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

**3. Crimes Against Property**

**Hijacking and armed robbery.** — Defendant's convictions of hijacking a motor vehicle and armed robbery were properly entered, despite defendant's contention that the state used the same facts to establish both offenses and that defendant should have only been convicted of and sentenced for one of the offenses, as: (1) hijacking a motor vehicle was considered a separate offense and did not merge with any other offense; (2) O.C.G.A. § 16-5-44.1 superseded the double jeopardy provisions of O.C.G.A. § 16-1-7 in motor vehicle hijacking cases; (3) O.C.G.A. § 16-5-44.1(d) did not violate the prohibition against double jeopardy, since the double jeopardy clause of the Georgia Constitution did not prohibit additional punishment for a separate offense which the legislature deemed to warrant separate sanction; and (4) defendant failed to offer any evidence in support of defendant's allegation that O.C.G.A. § 16-5-44.1(d) otherwise violated defendant's double jeopardy rights. *Holman v. State*, 272 Ga. App. 890, 614 S.E.2d 124 (2005).

**Arson and cruelty to animals.** — Defendant was properly convicted for arson in the second degree and cruelty to animals, where the essential elements of each of the crimes differed, and the state carried its burden of proving the distinct

elements of each crime. *Motes v. State*, 189 Ga. App. 430, 375 S.E.2d 893 (1988).

**Burglary and armed robbery.** — There is no prohibition against a defendant's being convicted of both burglary and a completed criminal offense, such as armed robbery, after gaining entry into the dwelling, as each offense has distinct elements. *Brown v. State*, 199 Ga. App. 773, 406 S.E.2d 248 (1991).

**No merger of armed robbery and aggravated assault charges** where defendant threatened victim with knife and took the victim's money and then at knifepoint forced the victim into the bushes, made the victim lie down, straddled the victim and threatened to stab the victim. *Rhodes v. State*, 221 Ga. App. 792, 470 S.E.2d 790 (1996).

**Merger of aggravated assault count with armed robbery.** — Because a defendant's convictions for armed robbery (O.C.G.A. § 16-8-41(a)) and aggravated assault (O.C.G.A. § 16-5-21(a)) were based on the same conduct—the defendant's pointing a gun at the victim with the intent to rob the victim—merger was required. Therefore, the sentence for aggravated assault was vacated. *Reed v. State*, 293 Ga. App. 479, 668 S.E.2d 1 (2008).

**Crimes not of same nature, class, or species.** — Charges of burglary, criminal attempt to steal motor vehicle and possession of firearm during commission of crime are not of same nature, class, or species under former Code 1933, § 26-506. *Fair v. State*, 129 Ga. App. 565, 200 S.E.2d 296 (1973) (see O.C.G.A. § 16-1-7).

**Successive prosecution for financial identity fraud.** — Trial court correctly rejected the defendant's plea in bar and denied defendant's motion in autrefois convict because the defendant did not show that defendant's prosecution for two counts of financial identity fraud under O.C.G.A. § 16-9-121 was barred as an impermissible successive prosecution for the same conduct in another county by defendant's earlier conviction in that county of 33 counts of financial identity fraud. *Summers v. State*, 263 Ga. App. 338, 587 S.E.2d 768 (2003).

#### **4. Application to Other Crimes**

##### **Possession of firearm during felony.**

— O.C.G.A. § 16-1-7(a), the statutory double jeopardy provision, is superseded by the provision in O.C.G.A. § 16-11-106 that offense of possession of a firearm during commission of a felony “shall be considered a separate offense.” *Miller v. State*, 250 Ga. 436, 298 S.E.2d 509 (1983).

Offense of possession of a firearm during the commission of a felony does not merge into the accompanying felony, i.e., armed robbery, so that the defendant can be convicted of both without statutory or constitutional prohibition. *Brown v. State*, 199 Ga. App. 773, 406 S.E.2d 248 (1991).

**Charge requiring evidence of prior felony.** — It is proper under O.C.G.A. § 24-9-20 and O.C.G.A. § 16-1-7 to try a firearms possession charge, which requires evidence of a prior felony conviction, together with a marijuana and a burglary charge. *State v. Santerfeit*, 163 Ga. App. 627, 295 S.E.2d 756 (1982).

**When the defendant, who was arrested for speeding and driving under the influence, sought to dispose of the speeding charge by paying a fine of \$99.00 to the clerk of the probate court, the defendant was not subjected to any former “prosecution” within the meaning of O.C.G.A. §§ 16-1-7 and 16-1-8(b), and the trial court did not err in denying defendant’s plea in bar to the charge of driving under the influence.** *Collins v. State*, 177 Ga. App. 758, 341 S.E.2d 288 (1986).

**After defendant charged with traffic violations and disorderly conduct pled guilty to latter, trial court’s denial of defendant’s plea of former jeopardy to preclude prosecution for the traffic violations was not in error.** The offense of disorderly conduct for which defendant was earlier tried did not arise from the same transaction as the five traffic offenses with which defendant was also charged, as they were completed at a different time and at different locations; therefore, prosecution for the traffic offenses did not constitute double jeopardy for defendant. *Boyette v. State*, 172 Ga. App. 683, 324 S.E.2d 540 (1984).

**DUI offense.** — Driving under the influence (DUI) offense did not arise from

the same transaction as other offenses of obstructing an officer, interfering with government property, and carrying a concealed weapon, where the conduct giving rise to the other offenses did not occur until after defendant had been arrested for DUI by one officer and placed in the custody of a different officer for transportation to the sheriff’s office. *Harrell v. State*, 196 Ga. App. 101, 395 S.E.2d 598 (1990).

Given that a charge of DUI served as the predicate act underlying a charge of serious injury by vehicle, thus constituting a lesser included crime of serious injury by vehicle, O.C.G.A. § 16-1-7(a) barred conviction of and punishment for both; hence, in light of this incongruence, defendant’s DUI conviction and sentence, as well as the sentence for serious injury by vehicle, were vacated. *Hannah v. State*, 280 Ga. App. 230, 633 S.E.2d 800 (2006).

**Prosecutions for DUI and possession of cocaine.** — After the defendant was first charged with driving under the influence and later charged with possession of cocaine, together with the passenger in the vehicle, as a codefendant, the court would reject the contention that the assistant solicitor who handled the defendant’s plea proceeding with regard to the first charge was the prosecuting officer “actually handling the proceedings” and that, since this attorney did not review the file before taking the plea, it could not be said that the “prosecuting officer actually handling the case” had actual knowledge of the alleged drug violation. *Hill v. State*, 234 Ga. App. 173, 507 S.E.2d 3 (1998).

**Speeding in both city and county as one transaction.** — When a city policeman began chasing defendant’s speeding vehicle within the city limits, and a county police officer joined in the chase after the defendant left the incorporated area and entered the county, all of the offenses charged by both officers arose out of one course of conduct, i.e., there was only one transaction. *Anderson v. State*, 200 Ga. App. 530, 408 S.E.2d 829 (1991).

**Offenses under uniform traffic citation.** — Because a uniform traffic citation was deliberately withheld from filing, and the state did not authorize or participate in the prosecution of the case, the probate

**Joint Prosecution of Offenses (Cont'd)**  
**4. Application to Other Crimes (Cont'd)**

court lacked authority to accept defendant's plea to the proposed charge and impose a fine, making its resulting judgment void; hence, the trial court did not err in denying defendant's plea in bar based on double jeopardy, since the probate court's void judgment could not serve as the basis for barring the subsequent indictment and prosecution of defendant in the superior court. Roberts v. State, 280 Ga. App. 672, 634 S.E.2d 790 (2006).

**Denial of plea of former jeopardy held error.** — After the defendant was charged with driving with a suspended license and three counts of violation of the controlled substances act, the trial court's denial of the defendant's plea of former jeopardy to preclude prosecution for controlled substances act violations was in error since the offense of driving without a license to which the defendant pled guilty arose out of the same transaction and all offenses were known to the prosecutor at the outset. Smith v. State, 190 Ga. App. 246, 378 S.E.2d 493, aff'd, 259 Ga. 352, 381 S.E.2d 37 (1989).

**Rape and child molestation.** — An accused may be prosecuted for both rape and child molestation based on the same conduct, but he may not be convicted of both. Mackey v. State, 235 Ga. App. 209, 509 S.E.2d 68 (1998).

**Statutory rape and child molestation.** — Trial court properly denied the defendant's motion to dismiss charges alleging statutory rape and child molestation on jeopardy grounds as double jeopardy did not preclude the state from prosecuting defendant for both offenses, although the same conduct formed the basis for both charges. Moreover, because no corroboration was required for child molestation, the jury logically could have found, and in fact did find, the defendant guilty of molesting the victim by having sex with that victim, despite the jury's not guilty verdict on statutory rape. Maynard v. State, 290 Ga. App. 403, 659 S.E.2d 831 (2008).

**Possession with intent to distribute and sale of cocaine.** — When the defen-

dant was found guilty of possession with intent to distribute cocaine and, in a second trial, convicted of the sale of cocaine, the second trial violated procedural double jeopardy since the defendant was under continuous observation from the time of defendant's sale of cocaine through defendant's journey to a convenience store since the defendant was arrested and found to be in possession of more of the same type of drugs. Morgan v. State, 220 Ga. App. 198, 469 S.E.2d 340 (1996).

**Charges of conspiracy to import marijuana and trafficking in marijuana** could be joined for trial, over objection, since the charges arose from the same conduct. Bridges v. State, 195 Ga. App. 851, 395 S.E.2d 30 (1990).

**False swearing and malicious prosecution.** — Defendant's convictions for false swearing under O.C.G.A. § 16-10-71, proven by evidence that defendant made false statements in an affidavit seeking an involuntary commitment order for the victim, and malicious confinement under O.C.G.A. § 16-5-43, supported by proof apart from the execution of the false affidavit, did not merge as a matter of fact. Washington v. State, 271 Ga. App. 764, 610 S.E.2d 692 (2005).

## Severance

### 1. In General

**Criteria for severance apply in capital cases.** — Criteria for severance of offenses are the same in cases in which the death penalty is sought as in other cases. Terry v. State, 259 Ga. 165, 377 S.E.2d 837 (1989).

**When joinder is based on similarity of offenses, defendant is entitled to severance.** — Whenever two or more offenses have been joined for trial solely on the ground that the offenses are of the same or similar character, the defendant shall have the right under O.C.G.A. § 16-1-7(c) to severance of the offenses. Gober v. State, 247 Ga. 652, 278 S.E.2d 386 (1981); Davis v. State, 159 Ga. App. 356, 283 S.E.2d 286 (1981); Cooper v. State, 253 Ga. 736, 325 S.E.2d 137 (1985).

**When severance is discretionary.** — Severance of charges of several crimes arising from same conduct under former

Code 1933, § 26-506(c) lies within sound discretion of trial judge since facts in each case are likely to be unique. *Dingler v. State*, 233 Ga. 462, 211 S.E.2d 752 (1975) (see O.C.G.A. § 16-1-7(c)).

When the offenses are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, severance lies within the discretion of the trial court since the facts in each case are likely to be unique. *Bailey v. State*, 157 Ga. App. 222, 276 S.E.2d 843 (1981).

When the offenses are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, the court in interests of justice may order that one or more of such charges be tried separately. *Gober v. State*, 247 Ga. 652, 278 S.E.2d 386 (1981).

When there is a valid reason for joinder other than similarity of the offense, severance becomes discretionary with the trial court. *Davis v. State*, 159 Ga. App. 356, 283 S.E.2d 286 (1981).

When the joinder is based upon the same conduct or on a series of acts connected together, severance lies within the sound discretion of the trial judge. *Fluker v. State*, 174 Ga. App. 890, 332 S.E.2d 34 (1985).

When the joinder is based upon the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, severance lies within the discretion of the trial judge. *Smith v. State*, 199 Ga. App. 410, 405 S.E.2d 107 (1991).

**Complexity of evidence as affecting severance.** — When each offense charged is connected to other crimes as part of a larger scheme and evidence presented is not of such complexity as to hinder the jury from applying the law intelligently to each offense, severance is a matter of discretion with the court. *Guthrie v. State*, 147 Ga. App. 351, 248 S.E.2d 714 (1978).

When all three alleged offenses are part of the same conduct within the meaning of that term as used in O.C.G.A. § 16-1-7 and evidence is not of such complexity as to hinder the jury from being able to apply the law of the case intelligently to each alleged offense, the trial court does not

abuse the court's discretion in denying defendant's motion to sever. *Gober v. State*, 247 Ga. 652, 278 S.E.2d 386 (1981).

**Ability to distinguish evidence as factor.** — When the crimes joined are not of a similar kind, on a motion to sever one charge the court should consider whether, in light of the number of offenses charged and the complexity of the evidence, the fact-trier will be able to distinguish the evidence and apply the law intelligently to each offense. *Smith v. State*, 186 Ga. App. 303, 367 S.E.2d 573 (1988).

**Balancing interests of accused with those of state.** — Former Code 1933, § 26-506(c) showed that on question of severance trial court should have discretion and that interests of accused are to be balanced with interests of state. *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975) (see O.C.G.A. § 16-1-7(c)).

Severance made in interest of justice involves balancing of interests of accused with interests of state. *Fowler v. State*, 155 Ga. App. 76, 270 S.E.2d 297 (1980).

**Interests of justice to be considered.** — Only test under former Code 1933, § 26-506(c) is whether the interests of justice will be served by separate trials. The judge may order charges tried separately but he is not required to do so, if in his opinion, the interests of justice will not be served thereby. *Henderson v. State*, 227 Ga. 68, 179 S.E.2d 76 (1970), sentence vacated, 408 U.S. 938, 92 S. Ct. 2868, 33 L. Ed. 2d 758 (1972); *Slocum v. State*, 230 Ga. 762, 199 S.E.2d 202 (1973); *Mathis v. State*, 231 Ga. 401, 202 S.E.2d 73 (1973) (see O.C.G.A. § 16-1-7(c)).

Where same conduct of accused can establish more than one crime, judge may order charges tried separately but the judge is not required to do so if, in the judge's opinion, the interests of justice will not be served thereby. *Pass v. State*, 227 Ga. 730, 182 S.E.2d 779 (1971).

**"Interest of justice" criterion is discretionary with trial judge.** *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975).

**It is merely permissive for court to order separate trials in interest of justice.** *Henderson v. State*, 227 Ga. 68, 179 S.E.2d 76 (1970), sentence vacated, 408 U.S. 938, 92 S. Ct. 2868, 33 L. Ed. 2d 758 (1972).

**Severance (Cont'd)****1. In General (Cont'd)**

**Prejudice to defendant as factor.** — Underlying consideration under former Code 1933, § 26-506(c) concerns degree of prejudice which might result from joint disposition. *Wilson v. State*, 245 Ga. 49, 262 S.E.2d 810 (1980) (see O.C.G.A. § 16-1-7(c)).

**Former Code 1933, § 26-506 did not require that motions to sever be in writing.** *Wigley v. State*, 140 Ga. App. 145, 230 S.E.2d 108 (1976) (see O.C.G.A. § 16-1-7).

## 2. Application

**Facts justifying refusal of motion for severance.** — Judge may refuse motion for severance of trial of multiple charges where crimes alleged were part of a continuous transaction conducted over a relatively short time, and from the nature of the entire transaction, it would be almost impossible to present to jury evidence of one of the crimes without also permitting evidence of the other. *Stewart v. State*, 239 Ga. 588, 238 S.E.2d 540 (1977).

When all the offenses formed a series of acts closely connected in time, involving common witnesses and evidence, refusal to sever the offenses was not an abuse of discretion. *Lane v. State*, 210 Ga. App. 738, 437 S.E.2d 479 (1993).

**What constitutes single scheme or plan.** — When separate crimes are committed in order to accomplish a single criminal purpose, the crimes are said to constitute parts of a single scheme or plan, even if the crimes are somewhat removed from one another in terms of time and place. *Bailey v. State*, 157 Ga. App. 222, 276 S.E.2d 843 (1981).

**Escape** may, under certain circumstances, be one of a series of acts connected together and joined in a multi-count indictment. *Carter v. State*, 155 Ga. App. 840, 273 S.E.2d 417 (1980).

**Scheme encompassing burglary, motor vehicle theft and armed robbery.** — When scheme and purpose to obtain narcotics which encompassed burglary, motor vehicle theft and armed robbery within span of a few hours is clearly

shown by evidence, interests of justice would not be served by ordering separate trials. *Gough v. State*, 232 Ga. 178, 205 S.E.2d 844 (1974).

**Robbery by force and robbery by sudden snatching.** — Trial court did not err in denying defendant's motion to sever charges for robbery by force and robbery by sudden snatching. *Smith v. State*, 225 Ga. App. 738, 484 S.E.2d 773 (1997).

**When overruling of motion to sever is abuse of discretion.** — When separate crimes do not arise out of same conduct, do not involve same victims or witnesses, and evidence of one would not be admissible on trial of the other, judgment of trial court overruling motion to sever is error constituting an abuse of discretion. *Booker v. State*, 231 Ga. 598, 203 S.E.2d 194 (1974).

**Trial court did not abuse discretion in denying motion to sever count alleging possession of a firearm by a convicted felon from counts alleging murder and aggravated assault.** *Pope v. State*, 168 Ga. App. 846, 310 S.E.2d 575 (1983).

When the defendant and others robbed and fatally shot the first victim, who was making a night deposit, then robbed a bartender at gunpoint a month later, it was not error to deny the defendant's motion for severance of the crimes; the crimes involved the same core group of participants committing armed robberies with similar characteristics over a short period of time. *Simmons v. State*, 282 Ga. 183, 646 S.E.2d 55 (2007).

**Severance of one count in indictment not allowed.** — When codefendants A and B were charged with aggravated assault, armed robbery, and criminal damage to property and B was also charged with aggravated assault on B's spouse in the same indictment, a motion by A to sever the latter charge against B from the rest of the charges in the indictment was properly denied; A's rights in regard to that count were limited to a motion to sever A's trial under O.C.G.A. § 17-8-4. *Durden v. State*, 219 Ga. App. 732, 466 S.E.2d 641 (1995).

**Failure to sever count not error.** *Boyd v. State*, 168 Ga. App. 246, 308 S.E.2d 626 (1983).

Trial court did not err in denying defen-

dant's motion for severance of the counts alleging operation a motor vehicle after revocation of defendant's driver's license as an habitual violator and leaving the scene of an accident. *Spradlin v. State*, 174 Ga. App. 658, 331 S.E.2d 50 (1985).

When the purpose of joinder was not to bolster any witness' credibility, but there was a rational connection shown by the evidence between the battery, terroristic threats, and damage to property on the one hand, and defendant's possession of marijuana on the other, the denial of the severance motion as to the marijuana charge was not an abuse of discretion. *Smith v. State*, 186 Ga. App. 303, 367 S.E.2d 573 (1988).

Trial court properly denied a defendant's motion to sever two armed robbery charges; in both incidents, which occurred only three days apart, the defendant began a conversation with the victim at a public facility, took the victim's truck keys and held the keys until the victim gave the defendant money, and canvassed the victim's truck for other items to steal. *Davis v. State*, 287 Ga. App. 410, 651 S.E.2d 518 (2007).

**Failure of the trial court to exercise discretion** on the issue of severance of charges of possession of a firearm during commission of a crime and the subject drug charge, and the absence of any waiver by defendant of double jeopardy violated defendant's procedural double jeopardy protections. *Asberry v. State*, 221 Ga. App. 809, 472 S.E.2d 562 (1996).

### 3. Sentencing

**Sentences for offenses not considered.** — Statutes pertaining to lesser included offenses and multiple prosecutions for the same conduct do not purport to make any offense a greater offense, either as a matter of law or fact, solely because violation thereof mandates or otherwise results in the imposition of a greater sentence, or to make any offense a lesser included offense merely because a lesser sentence was statutorily authorized for its violation. *Hancock v. State*, 210 Ga. App. 528, 437 S.E.2d 610 (1993).

**Suspension of a driver's license** at an administrative hearing is not punishment, nor is the hearing a prosecution, for

the purposes of double jeopardy. *Martinez v. State*, 221 Ga. App. 483, 471 S.E.2d 551 (1996).

**Defendant's obligation to object to sentencing.** — It is incumbent upon a defendant to make an objection at sentencing or to make a proper motion at sentencing if sentenced in violation of O.C.G.A. § 16-1-7. *Jackson v. State*, 254 Ga. App. 562, 562 S.E.2d 847 (2002).

**Sentences for both aggravated assault and rape** did not violate the defendant's protection against double jeopardy, where even if defendant had departed from the victim's apartment prior to the forcible sexual penetration of her, he still would have been guilty of the aggravated assault, because he had pointed a pistol at the victim through the window and held it while he led her from room to room before the rape. *Taylor v. State*, 177 Ga. App. 624, 340 S.E.2d 263 (1986).

**No merger of underlying felony into vacated conviction.** — Underlying felony does not merge as a matter of law into vacated felony murder conviction so that the trial court did not err given the extant malice murder conviction, in imposing separate sentences for aggravated assault and possession of a firearm. *Malcolm v. State*, 263 Ga. 369, 434 S.E.2d 479 (1993).

When defendant was convicted of felony murder and vehicular homicide with the underlying offense of driving under the influence, and vehicular homicide was vacated as a matter of law, the underlying traffic offense did not merge into the felony murder, and defendant was properly sentenced for driving under the influence. *Diamond v. State*, 267 Ga. 249, 477 S.E.2d 562 (1996).

**Convictions merged for sentencing.** — Georgia statutory law prohibited multiple sentences upon multiple convictions for the same conduct; thus, defendant's convictions for aggravated assault with intent to rob and possession of a firearm during the commission of that aggravated assault merged into the armed robbery conviction for sentencing purposes. *Cutkelvin v. State*, 258 Ga. App. 691, 574 S.E.2d 883 (2002).

**Sentencing on two lesser offenses without specifying which served as**

**Severance (Cont'd)****3. Sentencing (Cont'd)**

**foundation.** — Trial court erred in sentencing the defendant on the lesser offenses of reckless driving and driving under the influence, and also sentencing defendant on the greater offense of homicide by vehicle in the first degree, which included the lesser offenses. Had the jury revealed which of the lesser offenses served as the foundation for the homicide verdict, a sentence on the remaining lesser offense might have been appropriate, but as such information did not appear in the record, the defendant could not be sentenced for either of the lesser included offenses of violation of O.C.G.A. §§ 40-6-390 and 40-6-391. McNabb v. State, 180 Ga. App. 723, 350 S.E.2d 314 (1986).

**Felony murder and aggravated assault sentence.** — Defendant charged with two counts of felony murder consisting of underlying felonies involving aggravated assault and being a first offender probationer in possession of a firearm could not be sentenced on both felony murder convictions, as the act of killing a single victim meant that defendant could be sentenced on either count of felony murder but not both. Harris v. State, 274 Ga. 835, 561 S.E.2d 73 (2002).

**Felony murder and malice murder.** — Defendant could not be sentenced for both malice and felony murder under O.C.G.A. § 16-1-7; accordingly, the separate judgment of conviction and sentence for felony murder had to be vacated. Nix v. State, 280 Ga. 141, 625 S.E.2d 746 (2006).

**Armed robbery and aggravated assault.** — O.C.G.A. § 17-10-7(d) did not require the imposition of concurrent sentences for a defendant's convictions of armed robbery and aggravated assault. O.C.G.A. § 16-1-7 authorized separate sentences for the two crimes charged in the same prosecution because the crimes were not included offenses. Redden v. State, 294 Ga. App. 879, 670 S.E.2d 552 (2008).

**Merger of offenses for sentencing proper.** — Defendant was not improperly convicted of more than one offense arising from the same conduct when, at sentencing, those offenses were merged into one offense. Haugland v. State, 253 Ga. App. 423, 560 S.E.2d 50 (2002).

Although the state used up its evidence to prove defendant's guilt on one count to prove another, causing the offenses to merge as a matter of fact, any error in sentencing was harmless, because defendant received no separate sentence. Mitchell v. State, 255 Ga. App. 585, 565 S.E.2d 889 (2002).

## OPINIONS OF THE ATTORNEY GENERAL

**Separate prosecutions for municipal and state law prosecutions.** — An accused arrested for separate non-included offenses arising out of a single transaction, which violate municipal ordinances and state law respectively, may be prosecuted first in the recorder's

court for the municipal ordinance violations, and then transferred to the superior court to be prosecuted for the separate state violations, without violating statutory or constitutional double jeopardy prohibitions. 1986 Op. Att'y Gen. No. U86-32.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 275 et seq.

**C.J.S.** — 22 C.J.S., Criminal Law, §§ 12 et seq., 315 et seq., 325 et seq.

**ALR.** — Conviction or acquittal of larceny as bar to prosecution for burglary, 19 ALR 626.

Pendency in one county of charge of larceny as bar to subsequent charge in

another county of offense which involves both felonious breaking and felonious taking of same property, 19 ALR 636.

Conviction or acquittal upon charge of murder of, or assault upon, one person as bar to prosecution for like offense against another person at the same time, 20 ALR 341; 113 ALR 222.

Forgery of names of several individuals

to the same instrument as more than one offense, 33 ALR 562.

Acquittal or conviction of one offense in connection with operation of automobile as bar to prosecution for another, 44 ALR 564; 172 ALR 1053.

Continuous transaction constituting a complete offense in each county or district as constituting more than one offense, 73 ALR 1511.

Acquittal or conviction of assault and battery as bar to prosecution for rape, or assault with intent to commit rape, based on same transaction, 78 ALR 1213.

Prosecution for robbery of one person as bar to subsequent prosecution for robbery of another person committed at the same time, 51 ALR3d 693.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 ALR4th 960.

Double jeopardy: various acts of weapons violations as separate or continuing offense, 80 ALR4th 631.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts—Modern view, 97 ALR5th 201.

### **16-1-8. When prosecution barred by former prosecution.**

(a) A prosecution is barred if the accused was formerly prosecuted for the same crime based upon the same material facts, if such former prosecution:

- (1) Resulted in either a conviction or an acquittal; or
- (2) Was terminated improperly after the jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts or after a plea of guilty was accepted by the court.

(b) A prosecution is barred if the accused was formerly prosecuted for a different crime or for the same crime based upon different facts, if such former prosecution:

- (1) Resulted in either a conviction or an acquittal and the subsequent prosecution is for a crime of which the accused could have been convicted on the former prosecution, is for a crime with which the accused should have been charged on the former prosecution (unless the court ordered a separate trial of such charge), or is for a crime which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution or unless the crime was not consummated when the former trial began; or

- (2) Was terminated improperly and the subsequent prosecution is for a crime of which the accused could have been convicted if the former prosecution had not been terminated improperly.

(c) A prosecution is barred if the accused was formerly prosecuted in a district court of the United States for a crime which is within the concurrent jurisdiction of this state if such former prosecution resulted in either a conviction or an acquittal and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution or unless the crime was not consummated when the former trial began.

(d) A prosecution is not barred within the meaning of this Code section if:

(1) The former prosecution was before a court which lacked jurisdiction over the accused or the crime; or

(2) Subsequent proceedings resulted in the invalidation, setting aside, reversal, or vacating of the conviction, unless the accused was thereby adjudged not guilty or unless there was a finding that the evidence did not authorize the verdict.

(e) Termination under any of the following circumstances is not improper:

(1) The accused consents to the termination or waives by motion to dismiss or other affirmative action his right to object to the termination; or

(2) The trial court finds that the termination is necessary because:

(A) It is physically impossible to proceed with the trial;

(B) Prejudicial conduct in or out of the courtroom makes it impossible to proceed with the trial without injustice to the defendant;

(C) The jury is unable to agree upon a verdict; or

(D) False statements of a juror on voir dire prevent a fair trial.  
(Code 1933, § 26-507, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1982, p. 3, § 16.)

**Cross references.** — Multiple jeopardy, U.S. Const., amend. 5 and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII.

**Law reviews.** — For survey article on criminal law and procedure for the period

from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 117 (2003).

For comment, "Grady v. Corbin: An Unsuccessful Effort to Define Same Offense," see 25 Ga. L. Rev. 143 (1990).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION

OFFENSES ARISING FROM SAME CONDUCT

REVERSAL OF CONVICTION FOR INSUFFICIENT EVIDENCE

RETRIAL

JURISDICTIONAL ISSUES

APPLICATION GENERALLY

#### General Consideration

**Constitutionality of subsection (c).** — Statutes such as former Code 1933, § 26-507(c) can be enacted by the General

Assembly without contravening Ga. Const. 1976, Art. VI, Sec. IV, Para. I (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I), which endowed the superior courts with exclusive jurisdiction over trial of capital

felonies. Dorsey v. State, 237 Ga. 876, 230 S.E.2d 307 (1976) (see O.C.G.A. § 16-1-8(c)).

**History of section.** — See Marchman v. State, 132 Ga. App. 677, 209 S.E.2d 88 (1974).

**Rationale behind bar to successive prosecutions** is to prevent harassment of accused. State v. White, 145 Ga. App. 730, 244 S.E.2d 579 (1978).

First policy underlying double jeopardy bar is to prevent harassment of accused by successive prosecutions or threat of successive prosecutions. State v. Estevez, 232 Ga. 316, 206 S.E.2d 475 (1974), overruled on other grounds Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006); Marchman v. State, 234 Ga. 40, 215 S.E.2d 467 (1975).

Former Code 1933, § 26-507 prevents accused from being unduly harassed or threatened by successive criminal prosecutions. Dorsey v. State, 237 Ga. 876, 230 S.E.2d 307 (1976) (see O.C.G.A. § 16-1-8).

**Construed with federal and state constitutions.** — Former Code 1933, § 26-507 comports with dimensions of double jeopardy clause of federal and state Constitutions. Jones v. State, 232 Ga. 324, 206 S.E.2d 481 (1974) (see O.C.G.A. § 16-1-8).

Former 1968 Criminal Code extends double jeopardy proscription beyond those contained in the United States and Georgia Constitutions. Marchman v. State, 234 Ga. 40, 215 S.E.2d 467 (1974) (see O.C.G.A. T. 16).

**Double jeopardy questions are controlled by O.C.G.A. §§ 16-1-6, 16-1-7, and 16-1-8.** — Former 1968 Criminal Code (see O.C.G.A. T. 16) extended proscription of double jeopardy beyond that provided for in the United States and Georgia Constitutions. Therefore, questions of double jeopardy in Georgia must now be determined under proscriptions combined in former Code 1933, §§ 26-505 through 26-507 (see O.C.G.A. §§ 16-1-6 through 16-1-8). State v. Warren, 133 Ga. App. 793, 213 S.E.2d 53 (1975).

Former Code 1933, §§ 26-505 through 26-507 provide an expanded statutory test for determining double jeopardy questions, thereby rendering inapplicable previous Georgia decisions applying only

minimum constitutional standards of double jeopardy. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978) (see O.C.G.A. §§ 16-1-6 through 16-1-8).

Questions of double jeopardy in Georgia must be determined under the expanded statutory proscriptions found in O.C.G.A. §§ 16-1-6, 16-1-7, and 16-1-8, which place limitations upon multiple prosecutions, convictions, and punishments for the same criminal conduct. Stone v. State, 166 Ga. App. 245, 304 S.E.2d 94 (1983).

**Jeopardy did not attach because there was no adjudication of guilt.** — Because the defendant's alleged mistake of fact regarding a charge of possession of a firearm by a convicted felon required consideration of facts extrinsic to the accusation to be decided by a jury, the trial court erred in dismissing the charge, *sua sponte*; moreover, as such dismissal was not an adjudication of guilt, the state could appeal from the same without violating the defendant's double jeopardy rights. State v. Henderson, 283 Ga. App. 111, 640 S.E.2d 686 (2006).

**Former Code 1933, §§ 26-505 through 26-507 distinguish between two aspects of double jeopardy:** first, limitations upon multiple prosecutions for crimes arising from same conduct, referred to as procedural bar of double jeopardy; and, second, limitations upon multiple convictions or punishments that may be imposed for such crimes, referred to as substantive bar of double jeopardy. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978) (see O.C.G.A. §§ 16-1-6 through 16-1-8).

**Former Code 1933, § 26-507 is a procedural statute** as distinguished from a jurisdictional statute. Dorsey v. State, 237 Ga. 876, 230 S.E.2d 307 (1976) (see O.C.G.A. § 16-1-8).

**"Previous prosecution" construed.** — To constitute a "previous prosecution" within the meaning of O.C.G.A. §§ 16-1-7(b) and 16-1-8(b), the defendant previously must have been "placed in jeopardy" as to at least one of the offenses arising out of the same conduct as the offense for which the state is subsequently attempting to prosecute the defendant.

**General Consideration (Cont'd)**

**State v. Smith, 185 Ga. App. 694, 365 S.E.2d 846 (1988).**

**When defendant is placed in jeopardy.** — Defendant is placed in jeopardy when, in a court of competent jurisdiction with a sufficient indictment, defendant has been arraigned, has pled and a jury has been impaneled and sworn. *Turner v. State, 152 Ga. App. 354, 262 S.E.2d 618 (1979).*

Plea of guilty on an indictment or complaint with the plea's entry on the record and acceptance by the trial judge constitutes jeopardy for purposes of O.C.G.A. §§ 16-1-7(b) and 16-1-8(b). *State v. Smith, 185 Ga. App. 694, 365 S.E.2d 846 (1988).*

Double jeopardy was violated when the trial court improperly terminated defendant's first trial after the first witness was sworn and by resetting the trial before a different judge. *Puplampu v. State, 257 Ga. App. 5, 570 S.E.2d 83 (2002).*

**No jeopardy if trial had not commenced.** — When the transcript in superior court on the plaintiff's plea in bar indicated that the probate judge who presided over the initial proceeding was hearing motions when the witnesses were sworn, rather than commencing trial, the superior court did not err in finding that the trial never commenced, and jeopardy had not attached. *Henderson v. State, 236 Ga. App. 72, 510 S.E.2d 879 (1999).*

Based on testimony provided by a court reporter that a jury was never sworn prior to the day the defendant's trial started, jeopardy never attached. *Hall v. State, 282 Ga. App. 562, 639 S.E.2d 341 (2006).*

Because jury was never administered oath, the jury's verdict acquitting the defendant of malice murder but convicting him of other charges was a nullity and defendant's double jeopardy plea on the malice murder charge was properly denied. *Spencer v. State, 281 Ga. 533, 640 S.E.2d 267, cert. denied, 551 U.S. 1103, 127 S. Ct. 2914, 168 L. Ed. 2d 243 (2007).*

**"Postponement" construed.** — Postponement, like a continuance, is not a "termination" of the proceedings within the meaning of O.C.G.A. § 16-1-8(a) if the trial is resumed before the same jury. *Knight v. State, 197 Ga. App. 250, 398 S.E.2d 202 (1990).*

**Procedural double jeopardy** prevents successive prosecutions for the same offense; it does not prevent prosecutions for offenses which are separate and similar to a prior prosecuted offense. *Loden v. State, 199 Ga. App. 683, 406 S.E.2d 103 (1991).*

Procedural aspect of the double jeopardy rule prohibits multiple prosecutions arising from the same conduct. *Teal v. State, 203 Ga. App. 440, 417 S.E.2d 666, cert. denied, 203 Ga. App. 908, 417 S.E.2d 666 (1992).*

Defendant's federal prosecution was not a bar to defendant's state prosecution since the defendant's federal convictions required proof that the defendant had counterfeited currency, but that proof was not required in the state charges of trafficking in cocaine and possession of cocaine with intent to distribute. *McAlister v. State, 236 Ga. App. 609, 512 S.E.2d 53 (1999).*

**Each ground for bar sufficient.** — O.C.G.A. § 16-1-8(b)(1) provides three distinct grounds for barring a subsequent prosecution where the former prosecution resulted in a conviction or acquittal, and any of the three is sufficient to establish the bar. *McCannon v. State, 252 Ga. 515, 315 S.E.2d 413 (1984).*

**Trial on subsequent indictment not barred by earlier indictments without trial.** — Since the jury was never impaneled and sworn to hear the trial of defendant on the original accusation, defendant was never placed in jeopardy as to that accusation, and the defendant did not face a repeated prosecution simply because the defendant was to be tried on a subsequent indictment. *Cochran v. State, 176 Ga. App. 58, 335 S.E.2d 165 (1985).*

Pendency of a prior indictment for the same offense based on the same facts for which the defendant was arraigned on and entered a plea did not place the defendant in jeopardy, and the defendant did not face a repeated prosecution simply because of being tried on a subsequent indictment. *Hubbard v. State, 225 Ga. App. 154, 483 S.E.2d 115 (1997).*

**Jeopardy did not attach to court proceedings which occurred before a proper accusation was filed.** *Roberts v. State, 171 Ga. App. 131, 319 S.E.2d 42 (1984).*

**Suspension of a driver's license at an administrative hearing** was not punishment, nor was the hearing a prosecution for the purposes of double jeopardy, thus, a subsequent criminal prosecution for driving under the influence was not barred. *Nolen v. State*, 218 Ga. App. 819, 463 S.E.2d 504 (1995), cert. denied, 518 U.S. 1018, 116 S. Ct. 2550, 135 L. Ed. 2d 1070 (1996); *Martinez v. State*, 221 Ga. App. 483, 471 S.E.2d 551 (1996).

Payment of the fee required for reinstatement of a driver's license after it was suspended following an arrest for driving under the influence was not punishment and did not bar a subsequent prosecution for driving under the influence. *Thompson v. State*, 229 Ga. App. 526, 494 S.E.2d 306 (1997); *Morgan v. State*, 229 Ga. App. 861, 495 S.E.2d 138 (1998).

**Violation of plea agreement.** — Defendant relinquished defendant's double jeopardy rights when defendant failed to testify truthfully at the trial of defendant's codefendant per the negotiated plea agreement. A defendant can not use the double jeopardy clause to shield defendant from the consequences of failure to live up to an agreement with the prosecutor. *Brown v. State*, 261 Ga. App. 115, 582 S.E.2d 13 (2003).

**Waiver of double jeopardy defense.** — Although the procedural bar against double jeopardy can be waived by failure to assert it in writing prior to trial, the failure to file a written plea of former jeopardy prior to trial will not defeat an accused's right to be free of multiple convictions for the criminal act. *McClure v. State*, 179 Ga. App. 245, 345 S.E.2d 922 (1986).

**Waiver of right to plead former jeopardy.** — When the defendant failed to assert a plea of former jeopardy before the defendant's case was called for retrial, the defendant waived the right to such plea based on any abuse of discretion in declaring a mistrial at the first trial. *Ramirez v. State*, 217 Ga. App. 120, 456 S.E.2d 657 (1995).

**Abandonment of statutory double jeopardy protections meant constitutional protections only remained.** — Defendant raised the state constitutional provision and O.C.G.A. §§ 16-1-7 and

16-1-8 in the defendant's plea of former jeopardy; however, the defendant expressly abandoned the statutory grounds at the hearing. By choosing that procedure, defendant actually relied upon the minimum constitutional protections against double jeopardy and chose to forego the additional protections provided by Georgia statutory law; thus, the trial court erred in applying Georgia statutory law in the instant case. *Garrett v. State*, 306 Ga. App. 429, 702 S.E.2d 470 (2010).

**When the first jury hung, additional charges may not be brought as penalty.** — When the first trial results in a hung jury, the defendant is not to be penalized for the state's failure to obtain a conviction by the addition of new charges at the second trial. *Curry v. State*, 248 Ga. 183, 281 S.E.2d 604 (1981).

**Juvenile proceedings.** — While the constitutional protections against double jeopardy apply to juvenile proceedings, the additional and expanded statutory protections afforded by O.C.G.A. § 16-1-8(a)(2) do not rise to the level of "those common law jurisprudential principles which experience and reason have shown are necessary to give the accused the essence of a fair trial." *In re S.L.H.*, 205 Ga. App. 278, 422 S.E.2d 43, cert. denied, 205 Ga. App. 900, 422 S.E.2d 43 (1992).

**Effect of failure to prosecute.** — While O.C.G.A. § 16-1-7(b) requires prosecution of a crime and that crime is not prosecuted, subsequent prosecution is barred because that crime is one "with which the accused should have been charged on the former prosecution" under O.C.G.A. § 16-1-8(1)(b). *McCannon v. State*, 252 Ga. 515, 315 S.E.2d 413 (1984).

**Superseding indictment.** — When a defendant was originally indicted under O.C.G.A. § 16-8-60(a), but was later indicted under § 16-8-60(b) instead, the superseding indictment did not subject the defendant to double jeopardy; no jeopardy ever attached to the first indictment on which the trial court entered an order of *nolle prosequi*. *Hayward-El v. State*, 284 Ga. App. 125, 643 S.E.2d 242 (2007).

**Refiling appropriate where action was dismissed without prejudice.** — When the trial court's dismissal for "want

**General Consideration (Cont'd)**

of prosecution" was without prejudice, the state's refiling of the accusation was appropriate. *State v. Roca*, 203 Ga. App. 267, 416 S.E.2d 836 (1992).

**Forfeiture proceedings not a bar to prosecution.** — Double jeopardy did not attach to bar prosecution of defendant on state drug charges following federal civil forfeiture proceedings because defendant's failure to contest the forfeiture meant defendant was not placed in jeopardy in those proceedings and, also, Georgia's constitutional and statutory provisions did not bar the prosecution because they apply only to criminal proceedings, not civil proceedings. *Waye v. State*, 219 Ga. App. 22, 464 S.E.2d 19 (1995).

**Civil forfeiture proceeding** in a drug case was not a criminal prosecution for purposes of double jeopardy. *Murphy v. State*, 219 Ga. App. 474, 465 S.E.2d 497 (1995), aff'd, 267 Ga. 120, 475 S.E.2d 907 (1996).

Civil federal forfeiture action was neither punishment nor criminal for purposes of the double jeopardy clause. *Battista v. State*, 223 Ga. App. 369, 477 S.E.2d 665 (1996).

**Motion to suppress heard after jury is impaneled and sworn.** — In defendant's motion to suppress, which defendant insisted on raising at trial and failed to ask for a hearing before trial, although the state would have been wise not to suggest impaneling and swearing the jury beforehand, defendant readily consented to this arrangement, thus defendant's contention that the state had no right to this appeal because the motion to suppress was heard after the jury was impaneled and sworn is incorrect. *State v. Smalls*, 203 Ga. App. 283, 416 S.E.2d 531 (1992).

**Effect of trial court's lack of jurisdiction after jury has begun deliberations.** — In a prosecution for shoplifting and while the jury was deliberating, the state court trial judge was informed that defendant had three prior convictions for shoplifting and dismissed the case for lack of jurisdiction; thus, the trial was a nullity and double jeopardy would not prevent a retrial. *State v. Sterling*, 244 Ga. App. 328, 535 S.E.2d 329 (2000).

**Double jeopardy plea denied where defendant impliedly consented to grant of mistrial.** — Although defense counsel had an opportunity to raise an objection after the court announced its intention to excuse the jurors and before the jurors were returned to the courtroom, counsel failed to do so; therefore, the trial court was authorized to find that defendant, through counsel, impliedly consented to the grant of a mistrial and the judge's plea of double jeopardy made during trial was properly denied. *Howell v. State*, 266 Ga. App. 480, 597 S.E.2d 546 (2004).

**Denial of the defendant's plea in bar on double jeopardy grounds** was directly appealable. *Etienne v. State*, 298 Ga. App. 149, 679 S.E.2d 375 (2009).

**Trial court's refusal to permit the defendant to cross-examine the prosecutor** at a hearing on the defendant's plea of double jeopardy amounted to legal error, as such not only amounted to a violation of the defendant's right to confrontation, but also foreclosed the opportunity for the defendant to prove whether the prosecutor intended to goad the defendant into moving for a mistrial. *Wright v. State*, 284 Ga. App. 169, 643 S.E.2d 538 (2007).

**Cited in** *Rowland v. State*, 124 Ga. App. 494, 184 S.E.2d 494 (1971); *Jones v. Anderson*, 404 F. Supp. 182 (S.D. Ga. 1974); *Bennett v. State*, 136 Ga. App. 806, 222 S.E.2d 207 (1975); *Parham v. State*, 137 Ga. App. 498, 224 S.E.2d 485 (1976); *Daughtry v. State*, 138 Ga. App. 504, 226 S.E.2d 773 (1976); *Banks v. State*, 237 Ga. 325, 227 S.E.2d 380 (1976); *Barner v. State*, 139 Ga. App. 50, 227 S.E.2d 874 (1976); *Shaw v. State*, 239 Ga. 690, 238 S.E.2d 434 (1977); *State v. Bolton*, 144 Ga. App. 797, 242 S.E.2d 378 (1978); *State v. Gilder*, 145 Ga. App. 731, 245 S.E.2d 3 (1978); *Barber v. State*, 146 Ga. App. 523, 246 S.E.2d 510 (1978); *Ricketts v. Williams*, 242 Ga. 303, 248 S.E.2d 673 (1978); *Morrow v. State*, 147 Ga. App. 395, 249 S.E.2d 110 (1978); *Dowdy v. State*, 148 Ga. App. 498, 251 S.E.2d 571 (1978); *State v. Gilmer*, 154 Ga. App. 673, 270 S.E.2d 25 (1980); *Chatham v. State*, 155 Ga. App. 154, 270 S.E.2d 274 (1980); *Horne v. State*, 155 Ga. App. 851, 273 S.E.2d 193

(1980); Pate v. State, 158 Ga. App. 395, 280 S.E.2d 414 (1981); Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981); Waddell v. State, 160 Ga. App. 743, 288 S.E.2d 90 (1981); State v. Abdi, 162 Ga. App. 20, 288 S.E.2d 772 (1982); Buford v. State, 162 Ga. App. 498, 291 S.E.2d 256 (1982); Bryant v. State, 163 Ga. App. 872, 296 S.E.2d 168 (1982); Benford v. State, 164 Ga. App. 733, 298 S.E.2d 39 (1982); Potts v. Zant, 575 F. Supp. 374 (N.D. Ga. 1983); Blount v. State, 169 Ga. App. 215, 312 S.E.2d 197 (1983); Zolun v. State, 169 Ga. App. 707, 314 S.E.2d 672 (1984); Welch v. State, 172 Ga. App. 476, 323 S.E.2d 622 (1984); B.J.L. v. State, 173 Ga. App. 317, 326 S.E.2d 519 (1985); Howard v. State, 173 Ga. App. 346, 326 S.E.2d 546 (1985); State v. Martin, 173 Ga. App. 370, 326 S.E.2d 558 (1985); McCrary v. State, 254 Ga. 282, 329 S.E.2d 473 (1985); Walters v. State, 177 Ga. App. 374, 339 S.E.2d 608 (1985); Lemon v. State, 177 Ga. App. 744, 341 S.E.2d 236 (1986); Hogan v. State, 178 Ga. App. 534, 343 S.E.2d 770 (1986); Clarington v. State, 178 Ga. App. 663, 344 S.E.2d 485 (1986); State v. Whitlock, 179 Ga. App. 460, 346 S.E.2d 896 (1986); Thomas v. State, 185 Ga. App. 500, 364 S.E.2d 630 (1988); Williams v. State, 258 Ga. 305, 369 S.E.2d 232 (1988); Price v. State, 187 Ga. App. 239, 370 S.E.2d 6 (1988); Armfield v. State, 259 Ga. 43, 376 S.E.2d 369 (1989); Alexander v. State, 192 Ga. App. 211, 384 S.E.2d 436 (1989); Paquin v. Town of Tyrone, 261 Ga. 418, 405 S.E.2d 497 (1991); Wilson v. State, 199 Ga. App. 900, 406 S.E.2d 293 (1991); Moss v. State, 200 Ga. App. 253, 407 S.E.2d 477 (1991); Merrill v. State, 201 Ga. App. 671, 411 S.E.2d 750 (1991); Duncan v. State, 206 Ga. App. 407, 425 S.E.2d 307 (1992); Moore v. State, 207 Ga. App. 673, 428 S.E.2d 678 (1993); Jackett v. State, 209 Ga. App. 112, 432 S.E.2d 586 (1993); Andrew v. State, 216 Ga. App. 819, 456 S.E.2d 227 (1995); State v. Lane, 218 Ga. App. 126, 460 S.E.2d 550 (1995); Bair v. State, 250 Ga. App. 226, 551 S.E.2d 84 (2001); Lackes v. State, 274 Ga. 297, 553 S.E.2d 582 (2001); State v. Heggs, 252 Ga. App. 865, 558 S.E.2d 41 (2001); Tremelling v. State, 263 Ga. App. 418, 587 S.E.2d 785 (2003); Usher v. State, 290 Ga. App. 710, 659 S.E.2d 920 (2008); Evans v.

State, 293 Ga. App. 371, 667 S.E.2d 183 (2008); Strickland v. State, 300 Ga. App. 898, 686 S.E.2d 486 (2009).

### Offenses Arising from Same Conduct

**Effect of guilty plea to some, but not all, of multiple offenses.** — If defendant charged with multiple offenses arising from “same conduct” pleads guilty to certain of these offenses, the defendant may then raise a plea of bar against subsequent prosecutions arising from the same course of conduct where the state, through decision or default, has failed to prosecute all offenses together, provided that it was practicable to do so. *State v. McCrary*, 253 Ga. 747, 325 S.E.2d 151 (1985).

Defendant was charged with speeding, driving under the influence of drugs, and endangering a child. Defendant pled nolo contendere to, and was sentenced on the speeding charge; therefore, the state was barred from prosecuting defendant for the other two charges which arose from the same conduct and of which the prosecutor had actual knowledge. *Weaver v. State*, 224 Ga. App. 243, 480 S.E.2d 286 (1997).

**Separate prosecutions for greater and included offenses.** — O.C.G.A. § 16-1-8(b) governs cases in which the state brought separate prosecutions for a greater and included offense in violation of O.C.G.A. § 16-1-7(b). *State v. LeMay*, 186 Ga. App. 146, 367 S.E.2d 61 (1988).

**Legal effect of severance.** — Severance not equivalent to finding that crimes did not arise out of same transaction or occurrence. *Lindsey v. State*, 234 Ga. 874, 218 S.E.2d 585 (1975).

**Determining number of offenses where same act violates two statutes.** — When same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one for purposes of the double jeopardy clause of the Fifth Amendment is whether each provision requires proof of a fact which the other does not. *Brock v. State*, 146 Ga. App. 78, 245 S.E.2d 442 (1978).

**State's option upon dismissal of one of several offenses arising from same course of action.** — When more than one offense arises out of same course of action

**Offenses Arising from Same Conduct (Cont'd)**

and at same time, upon being faced with dismissal of one offense, the state has the option of taking the appeal from action of the trial court while withholding prosecution of other offense or offenses pending outcome of appeal, or alternatively of proceeding with prosecution of remaining offense. Electing to proceed with remaining offense or offenses bars state from trying dismissed offense by virtue of doctrine of procedural double jeopardy. *State v. Brittain*, 147 Ga. App. 626, 249 S.E.2d 679 (1978).

**Bifurcated trial.** — Defendant's double jeopardy rights were not barred by holding a bifurcated trial as requested and trying defendant first on a malice murder charge, and then in a separate, second phase on a felony murder charge, as the malice murder proceeding did not involve a former prosecution as required for attachment of double jeopardy principles; rather, the bifurcation of the trial meant the malice murder and felony murder charges were tried at separate phases of the same proceeding. *Jones v. State*, 276 Ga. 663, 581 S.E.2d 546 (2003).

**Multiple accusations and indictments.** — Even assuming arguendo that the defendant's position that O.C.G.A. § 40-6-395 set out two distinct offenses, wilful failure to stop and fleeing and eluding a police officer, the defendant was tried, first in a bench trial and again on remand after an appeal, on an accusation charging the defendant with fleeing and eluding an officer and was found guilty and sentenced both times for fleeing and eluding; hence, because the defendant was not tried on the offense of wilful failure to stop, the defendant's contention that double jeopardy considerations prohibited a jury trial on that charge, was moot. *Harbuck v. State*, 280 Ga. 775, 631 S.E.2d 351 (2006).

Although both indictments against the defendant alleged similar schemes to defraud lending institutions, double jeopardy protections under O.C.G.A. §§ 16-1-7(b), 16-1-8(b) and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII did not bar the second prosecution; the indictments

involved different properties, different co-conspirators, different real estate transactions, and, for the most part, different lenders, and the fact that the two separate conspiracies may have overlapped in time and resulted in violations of the same criminal statutes was not determinative. *Harrison v. State*, 282 Ga. App. 29, 637 S.E.2d 773 (2006).

Because no evidence showed that the information concerning the defendant was known to the proper prosecuting officer in Gwinnett County, and because no basis otherwise existed for a charge of conspiracy to traffic based on what officers recovered in the search of the defendant's home, the appeals court refused to state that the defendant could have been convicted of conspiracy to traffic methamphetamine in Gwinnett County, or that Gwinnett County should have charged the defendant with this crime; hence, under these circumstances, the Dawson County indictment was not barred under O.C.G.A. §§ 16-1-6(b)(1) and 16-1-7(b). *Bradford v. State*, 283 Ga. App. 75, 640 S.E.2d 630 (2006).

**Possession of illegal drug is crime separate and distinct from illegal sale of that same substance.** *Morgan v. State*, 168 Ga. App. 310, 308 S.E.2d 583 (1983).

**Conspiracy to import cocaine not lesser included offense of possession of cocaine.** — When the crime charged in Florida was the conspiracy to import cocaine into a customs district of the United States, and the substantive crime charged in Georgia was the actual and knowing possession of more than 400 grams of cocaine, the conspiracy charge and conviction in Florida was not a lesser included offense to the crime charged in Georgia. *Brown v. State*, 181 Ga. App. 795, 354 S.E.2d 3 (1987).

**Underlying felony is same offense as felony murder for double jeopardy purposes.** — As felony murder is defined under Georgia law, underlying felony is a lesser included offense of felony murder and thus the same offense for double jeopardy purposes. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir.), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. Ed. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

Once state tried and convicted petitioner for kidnapping, it was barred from prosecuting petitioner for felony murder only if the underlying felony upon which that prosecution was based was that same kidnapping. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir.), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. Ed. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

**Malice murder and kidnapping not same offense** for double jeopardy purposes even though involving same transaction and considerably overlapping each other factually. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir.), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. Ed. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

**Dual federal and state prosecutions not barred.** — Federal prosecution for carjacking was not a former jeopardy bar to state prosecutions for carjacking, felony murder, armed robbery, and kidnapping with bodily injury, since the facts necessary to prove the federal charge were different from those necessary to prove the state charges. *Torres v. State*, 270 Ga. 79, 508 S.E.2d 171 (1998).

Circumstances established the exception to O.C.G.A. § 16-1-8(c) bar to state prosecution after a federal conviction based on the same conduct, because defendant's conviction for conspiracy in federal court required proof of defendant's knowing and voluntary participation in an unlawful agreement to possess and distribute methamphetamine, whereas the Georgia crimes required proof of the possession alleged in the indictments, and, in the case of trafficking methamphetamine, proof of possession of 28 grams or more. *Moser v. State*, 246 Ga. App. 268, 538 S.E.2d 904 (2000).

State prosecution of a drug offense arising out of the same conduct prosecuted in federal court and pled upon by defendant was not barred under O.C.G.A. § 16-1-8(c), as the federal case was dismissed after the state action was filed, and thus a final judgment was never entered. *Thorpe v. State*, 251 Ga. App. 334, 553 S.E.2d 171 (2001).

Trial court did not err in denying defendant's motion to dismiss the state charge of possession of a firearm during the commission of a felony based on a double jeopardy argument made pursuant to O.C.G.A. § 16-1-8(c), as the state's prosecution was not barred due to defendant's acquittal in federal district court on a related charge, and since the state's later prosecution of defendant required proof of an element not required in the federal prosecution. *Scott v. State*, 250 Ga. App. 870, 553 S.E.2d 276 (2001).

**Prosecution on state and federal charges of murder and kidnapping.** — Since the facts necessary to prove the federal charges of kidnapping and interstate travel with intent to commit murder for extortion are different from the facts necessary to prove the Georgia charges of murder and aggravated assault, there was no violation of Georgia's statutes barring multiple prosecutions, O.C.G.A. §§ 16-1-7 and 16-1-8, nor the constitutional prohibition against double jeopardy, when the defendants were prosecuted in federal and state courts for all of the above offenses. *Satterfield v. State*, 256 Ga. 593, 351 S.E.2d 625 (1987).

**Reindictment and reprosecution under O.C.G.A. § 16-9-1 barred by prior prosecution under O.C.G.A. § 16-13-43.** — If O.C.G.A. § 16-13-43 was the exclusive statute to be applied in a given case, O.C.G.A. § 16-9-1 still generally proscribes part of the same conduct, and any attempt to reindict and reprosecute would be barred by a plea of former jeopardy under O.C.G.A. § 16-1-8. *State v. O'Neal*, 156 Ga. App. 384, 274 S.E.2d 575 (1980).

**Reindictment proper when judgment of conviction vacated.** — Trial court did not adjudge the defendant not guilty, but vacated a judgment of conviction because the offense of enticing a child for indecent purposes was not a lesser-included offense of child molestation. Thus, O.C.G.A. § 16-1-8(d) did not prevent the state from reindicting the defendant for child molestation. *Phillips v. State*, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

**When victim dies after aggravated assault conviction, subsequent prose-**

**Offenses Arising from Same Conduct (Cont'd)**

**cution for murder not barred.** — When criminal offense of murder is not yet complete because the victim has not died at time of the aggravated assault conviction, the subsequent prosecution for murder is not barred by express terms of former Code 1933, § 26-506(b) or § 26-507(b), because the crime of murder is not consummated when the former trial begins. Lowe v. State, 240 Ga. 767, 242 S.E.2d 582 (1978) (see O.C.G.A. § 16-1-7(b) or § 16-1-8(b)).

**Conviction of lesser crime does not bar retrial upon reversal of conviction of greater crime.** — When there is a conviction of two crimes in a single prosecution, one of which is included in the other and defendant obtains reversal of the major crime for lack of jurisdiction remaining conviction of the lesser crime does not bar retrial on major crime. In the event that the defendant is then convicted on retrial for major crime, invalidation of defendant's conviction of the lesser included offenses for the same conduct would be authorized in appropriate proceedings. Keener v. State, 238 Ga. 7, 230 S.E.2d 846 (1976), cert. denied, 433 U.S. 911, 97 S. Ct. 2980, 53 L. Ed. 2d 1096 (1977).

**Felony prosecution not barred by prior plea of guilty to traffic offense.** — Defendant's entry of a plea of guilty to a traffic code violation did not bar prosecution for felony charges arising out of defendant's stop for the traffic violation, where it would have been unreasonable to impute the knowledge of one prosecuting officer to another, since two entirely separate prosecuting officers were involved and defense counsel had deliberately set out to exploit the situation by seeking expeditious disposition of the traffic violation. Powe v. State, 181 Ga. App. 429, 352 S.E.2d 783 (1986).

Subsequent prosecution of defendant for robbery after defendant pled guilty in traffic court to fleeing to elude did not violate O.C.G.A. § 16-1-8 since the offenses involved wholly different elements and facts and defendant could not have been prosecuted in traffic court for the

felony charge of robbery. Blackwell v. State, 230 Ga. App. 611, 496 S.E.2d 922 (1998).

**Statutory rape and child molestation.** — Trial court properly denied the defendant's motion to dismiss charges alleging statutory rape and child molestation on jeopardy grounds, as double jeopardy did not preclude the state from prosecuting defendant for both offenses, although the same conduct formed the basis for both charges. Moreover, because no corroboration was required for child molestation, the jury logically could have found, and in fact did find, the defendant guilty of molesting the victim by having sex with that victim, despite the jury's not guilty verdict on statutory rape. Maynard v. State, 290 Ga. App. 403, 659 S.E.2d 831 (2008).

**Independent prosecutions of armed robbery and motor vehicle theft.** — Offense of armed robbery and that of theft of a motor vehicle do not necessarily arise from the same conduct, and independent prosecutions for each offense will not necessarily implicate the law's prohibition against placing defendant in double jeopardy or subjecting defendant to "successive" or "multiple" prosecutions. Smith v. State, 173 Ga. App. 728, 327 S.E.2d 839 (1985).

**Assault and criminal damage to property not barred by original traffic offenses.** — Since the defendant could not have been convicted for aggravated assault and criminal damage to property under prior traffic offenses and each prosecution required proof of facts not required on the other, the prosecution for assault and criminal damage was not barred. Cates v. State, 206 Ga. App. 694, 426 S.E.2d 576 (1992).

**When the defendant committed four distinct offenses** (driving under the influence, reckless driving, fleeing to elude arrest, and aggravated assault) during a single continuous course of conduct in a single night, and these offenses were known to the prosecutor at the time of the prosecution in the probate court, at which time the court accepted guilty pleas to the two misdemeanor charges, the successive prosecution in the superior court for the felony charges was barred. McCrary v.

State, 171 Ga. App. 585, 320 S.E.2d 567 (1984), aff'd, 253 Ga. 747, 325 S.E.2d 151 (1985); *Hooker v. State*, 240 Ga. App. 141, 522 S.E.2d 723 (1999).

**When defendant, who was arrested for speeding and driving under the influence, sought to dispose of the speeding charge by paying a fine of \$99.00 to the clerk of the probate court, defendant was not subjected to any former "prosecution" within the meaning of O.C.G.A. §§ 16-1-7(b) and 16-1-8(b) and the trial court did not err in denying defendant's plea in bar to the charge of driving under the influence.** *Collins v. State*, 177 Ga. App. 758, 341 S.E.2d 288 (1986).

**Separate proceedings on traffic-related offenses and controlled substances offenses.** — When defendant was arrested for various traffic-related offenses following an accident and the officer investigating the accident found evidence of controlled substance violations, a separate prosecution of the traffic offenses after prosecution for the controlled substance offenses was not barred by double jeopardy since the offenses involved different acts and occurred on different dates and in different locations. *State v. Steien*, 214 Ga. App. 345, 447 S.E.2d 701 (1994).

**Subsequent prosecution for driving under the influence not barred.** — When the defendant was charged with two occurrences on different dates of driving while intoxicated, the fact that the second charge was pending when the defendant pled to the first does not prohibit prosecution for the second charge. *Grogan v. State*, 179 Ga. App. 300, 346 S.E.2d 378 (1986).

**Convictions for various traffic offenses did not bar subsequent prosecution for theft by receiving stolen property**, i.e., a motorcycle, where the only connection between the theft charge and the traffic offenses was the fact that defendant committed the traffic offenses with the stolen vehicle. *Grant v. State*, 180 Ga. App. 742, 350 S.E.2d 582 (1986), cert. denied, 481 U.S. 1006, 107 S. Ct. 1630, 95 L. Ed. 2d 203 (1987).

**Multiple felony convictions not related to separate traffic violations.** — Felony charges against a defendant,

which included armed robbery, hijacking a motor vehicle, kidnapping, and possessing a firearm during the commission of a crime, did not require proof of the same elements involved in the traffic violations for which the defendant was convicted of in a different court, therefore, the felony convictions imposed against the defendant did not violate the defendant's right against double jeopardy. *Jaheni v. State*, 285 Ga. App. 266, 645 S.E.2d 735 (2007).

**Serious injury by vehicle prosecution barred as defendant pled guilty to failure to maintain lane.** — Under O.C.G.A. §§ 16-1-7(b) and 16-1-8, double jeopardy protection barred the defendant's prosecution for, *inter alia*, serious injury by vehicle because the defendant had earlier pled guilty in magistrate's court to failure to maintain a lane arising out of the same accident; both charges could have been tried in the superior court, and it was apparent from the record that the prosecuting officer knew that the defendant had been charged with both offenses. When the defendant appeared in court initially, both charges were pending, and the magistrate court judge bound over the serious injury by vehicle charge. *Etienne v. State*, 298 Ga. App. 149, 679 S.E.2d 375 (2009).

**Theft by deception prosecution barred.** — Prosecution of theft by deception was barred as either was based on the same conduct which formed the basis of defendant's earlier prosecution for theft by deception or based on conduct stemming from the same transaction which formed the basis of defendant's earlier prosecution. *Gentry v. State*, 206 Ga. App. 490, 426 S.E.2d 52 (1992).

**Forgery prosecution not barred if forgery had not been committed.** — After defendant pled guilty to theft by taking for writing fraudulent checks, defendant's subsequent prosecution for forgery for uttering and delivering the checks was not barred under O.C.G.A. § 16-1-8(b)(1), because, when defendant pled guilty to theft by taking, the forgery offenses had not been completed, so defendant could not have been prosecuted for the latter offenses when defendant pled guilty to the former. Furthermore, because the two prosecutions each required

**Offenses Arising from Same Conduct (Cont'd)**

proof of facts not required by the other, as proof of forgery did not require proof that defendant unlawfully took property and proof of theft by taking did not require proof that defendant uttered and delivered checks, the subsequent prosecution was not barred. *Cade v. State*, 262 Ga. App. 206, 585 S.E.2d 172 (2003).

**Successive prosecution for financial identity fraud.** — Trial court correctly rejected the defendant's plea in bar and denied defendant's motion in autrefois convict because the defendant did not show that defendant's prosecution for two counts of financial identity fraud under O.C.G.A. § 16-9-121 was barred as an impermissible successive prosecution for the same conduct in another county by defendant's earlier conviction in that county of 33 counts of financial identity fraud. *Summers v. State*, 263 Ga. App. 338, 587 S.E.2d 768 (2003).

**Prosecutor had no prior knowledge, thus prosecution allowed.** — When the facts relating to the defendant's theft by taking and malfeasance in office convictions allegedly arose from the same alleged conduct, but were not known to the state in a prior malpractice in office action and the new offenses involved proof of additional facts, the trial court properly denied the defendant's plea in bar of double jeopardy under O.C.G.A. §§ 16-1-7 and 16-1-8. *Atkinson v. State*, 263 Ga. App. 274, 587 S.E.2d 332 (2003).

**Subsequent prosecution denied since prosecutor had earlier knowledge.** — At the time defendant pled guilty to reckless conduct, the prosecutor was aware of facts in the arrest report that clearly contained evidence of aggravated assault, therefore, knowledge of other crimes was imputed to the prosecutor and subsequent prosecution of defendant under aggravated assault indictments was barred by O.C.G.A. §§ 16-1-7 and 16-1-8. *Billups v. State*, 228 Ga. App. 804, 493 S.E.2d 8 (1997).

**Term "same conduct" means activities relating to the "same transaction," or earlier crime, not "the same type of conduct," thus, drug sales on March 12 and 25**

were not the "same conduct" as a sale made in April, a separate and distinct transaction, and prosecution under two indictments was not barred. *State v. Gillespie*, 206 Ga. App. 427, 425 S.E.2d 418 (1992).

**Conviction for violating county ordinance did not bar conviction under code.** — Defendant's pit bull mauled a child. The defendant's conviction in recorder's court of violating a county ordinance by failing to exercise ordinary care in controlling the defendant's pet for the protection of others was sufficiently separate from a misdemeanor reckless conduct charge under O.C.G.A. § 16-5-60(b), which required proof of a gross deviation from the standard of care, that a successive prosecution for violating § 16-5-60(b) did not violate the double jeopardy ban. *State v. Stepp*, 295 Ga. App. 813, 673 S.E.2d 257 (2009).

**Reversal of Conviction for Insufficient Evidence**

**Second prosecution barred.** — Unless evidence at first trial is sufficient to authorize verdict of guilty, second prosecution is barred. *Bethay v. State*, 235 Ga. 371, 219 S.E.2d 743 (1975); *Holcomb v. Peachtree*, 187 Ga. App. 258, 370 S.E.2d 23 (1988).

Trial court erroneously admitted an officer's testimony regarding a statement made by one of the victims who died of natural causes prior to trial as the admission violated the defendant's right to confrontation; moreover, because there was no other evidence to support the armed robbery count, the defendant could not be retried for it. *Gifford v. State*, 287 Ga. App. 725, 652 S.E.2d 610 (2007).

**Verdict not authorized by evidence is same as directed verdict of acquittal.** — Under O.C.G.A. § 16-1-8, result of finding that evidence does not authorize verdict is same as directed verdict of acquittal (no retrial in either event); thus, in reviewing overruling of motion for directed verdict of acquittal, Supreme Court will utilize standard used in reviewing overruling of motion for new trial on ground that verdict is contrary to evidence; i.e., the "any evidence" test. *Bethay*

v. State, 235 Ga. 371, 219 S.E.2d 743 (1975).

**Reversal of conviction due to insufficient evidence bars subsequent prosecution for same crime.** — When one is prosecuted and convicted, a subsequent prosecution is barred if subsequent proceedings (e.g., motion for new trial on general grounds, or appeal) resulted in finding that evidence did not authorize the verdict. *Bethay v. State*, 235 Ga. 371, 219 S.E.2d 743 (1975).

**Reversal barred retrial for lesser-included offense.** — Reversal of the defendants' convictions for felony murder based upon armed robbery due to insufficient evidence not only raised a procedural double jeopardy bar for that particular crime, it also raised a procedural double jeopardy bar for the lesser-included offense of criminal attempt to commit armed robbery. *Prater v. State*, 273 Ga. 477, 541 S.E.2d 351 (2001).

**Reversal of conviction due to insufficient evidence.** — After the court of appeals reversed the defendant's first conviction because the evidence did not authorize the verdict, prosecution for a different crime which should have been included in the first trial was barred by former Code 1933, § 26-507(b). *Marchman v. State*, 234 Ga. 40, 215 S.E.2d 467 (1975) (see O.C.G.A. § 16-1-8(b)).

### Retrial

**O.C.G.A. § 16-1-8(d)(2) specifically permits retrial** where a conviction is set aside on appeal for reasons other than the sufficiency of the evidence. *Samuel v. State*, 190 Ga. App. 539, 379 S.E.2d 571, cert. denied, 190 Ga. App. 899, 379 S.E.2d 571 (1989).

**No double jeopardy.** — Double jeopardy claim properly denied where the grant of defendant's motion for a new trial set aside defendant's conviction without adjudging the defendant not guilty or finding that the evidence did not authorize the verdict. *Garrard v. State*, 242 Ga. App. 189, 528 S.E.2d 273 (2000).

Trial court did not err in denying defendant's plea in bar of former jeopardy where there was no intent on the part of the state to create the circumstances lead-

ing to a mistrial, because the case was properly terminated under O.C.G.A. § 16-1-8(e)(2)(B); a finding that the requirements of O.C.G.A. § 16-1-8(e)(1) had not been met did not automatically lead to the conclusion that the former prosecution terminated improperly. *Seymour v. State*, 262 Ga. App. 823, 586 S.E.2d 713 (2003).

Evidence at defendant's first trial was sufficient to sustain convictions for aggravated sodomy pursuant to O.C.G.A. § 16-6-2(a), sexual battery pursuant to O.C.G.A. § 16-6-22.1, and aggravated sexual battery pursuant to O.C.G.A. § 16-6-22.2(b); thus, double jeopardy did not prohibit a retrial granted on the ground that defendant received ineffective assistance of counsel. *Weldon v. State*, 270 Ga. App. 574, 607 S.E.2d 175 (2004).

To the extent that defendant argued that a retrial on charges of burglary and false imprisonment was barred by the extended protection of procedural double jeopardy embodied in O.C.G.A. § 16-1-8, in a case in which the state redacted the charge of burglary in the first trial before the jury was impaneled and sworn, the first trial on the charge of false imprisonment ended in a mistrial, and the state tried and defendant was convicted in a second trial on both the burglary and false imprisonment charges, defendant's failure to file a written plea in bar prior to the second trial waived any right to subsequently raise a challenge on procedural double jeopardy grounds. *Alexander v. State*, 279 Ga. 683, 620 S.E.2d 792 (2005).

Trial court properly denied the defendant's plea in bar based on double jeopardy under U.S. Const., amend. 5 and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, seeking to prevent a retrial of criminal charges against defendant after the motion for a mistrial under O.C.G.A. § 16-1-8(e)(1) was granted in the first trial upon the jury's advisement to the trial court judge that they were hopelessly deadlocked due to the refusal by two jurors to consider the direct evidence; the mistrial was properly declared and there was no improper conduct shown by the trial court or the state but rather, the defendant's counsel admitted that defendant hoped that another jury would be more sympathetic to the defendant upon a

**Retrial (Cont'd)**

retrial, as the first jury was deadlocked 10-2 in favor of conviction. *Jackson v. State*, 282 Ga. App. 476, 638 S.E.2d 865 (2006).

Retrial after not guilty finding returned by an unsworn jury was not barred by the double jeopardy principles under both the U.S. and Georgia Constitutions as the jury lacked any authority to pass upon any of the issues at trial, and hence, could not make any determinations whatsoever as to the defendant's guilt or innocence. *Spencer v. State*, 281 Ga. 533, 640 S.E.2d 267, cert. denied, 551 U.S. 1103, 127 S. Ct. 2914, 168 L. Ed. 2d 243 (2007).

Because a plea of double jeopardy was found to be frivolous, the defendant's filing of a notice of appeal from the denial of an earlier double jeopardy plea did not divest the trial court of jurisdiction over the case, and hence the filing of a notice of appeal merely deprived the trial court of the court's power to execute the sentence; thus, because the sentence was not imposed against the defendant until after the remittitur was filed below, that sentence was upheld. *DeSouza v. State*, 285 Ga. App. 201, 645 S.E.2d 684 (2007), cert. denied, 2007 Ga. LEXIS 539 (Ga. 2007).

Retrial of a charge of possession of a firearm by a convicted felon would not itself violate double jeopardy or any other constitutional right since the right not to be prosecuted on a count which was quashed for the second time was purely statutory pursuant to O.C.G.A. § 17-7-53.1. *Langlands v. State*, 282 Ga. 103, 646 S.E.2d 253 (2007).

**Allen charge.** — After a jury indicated that it was deadlocked and then requested a second Allen charge, the trial court did not abuse its discretion in declaring a mistrial; consequently, defendant's plea in bar for double jeopardy lacked merit. *DeSouza v. State*, 270 Ga. App. 849, 608 S.E.2d 313 (2004).

**Retrial and sentencing after conviction set aside.** — State generally may retry defendant who succeeds in having first conviction set aside and, as a corollary of that power, to impose whatever sentence may be authorized, whether or not it is greater than sentence imposed

after first conviction. *McClure v. Hopper*, 234 Ga. 45, 214 S.E.2d 503 (1975).

Although defendant's conviction was reversed because the state did not meet its burden of production as to defendant's motion challenging the sufficiency of a search warrant affidavit, the defendant could be retried since defendant's conviction was set aside on procedural grounds. *Watts v. State*, 261 Ga. App. 230, 582 S.E.2d 186 (2003).

In the context of a granted motion for mistrial, governmental misconduct will support a plea in bar based on double jeopardy if the prosecutor or trial judge intended to goad the defendant into moving for a mistrial. In the context of a reversal or grant of a motion for new trial, on the other hand, double jeopardy may bar a retrial where the prosecutor intended to prevent an acquittal, or the trial judge accused of misconduct, believed at the time was likely to occur in the absence of the judge's misconduct. *Paul v. State*, 266 Ga. App. 126, 596 S.E.2d 670 (2004).

**Imposition of greater sentence upon retrial.** — Imposition of higher sentence on defendant being retried for crime does not violate due process or constitute double jeopardy so long as jury is not informed of prior sentence and second sentence is not otherwise shown to be a product of vindictiveness. *McClure v. Hopper*, 234 Ga. 45, 214 S.E.2d 503 (1975).

**When the state seeks to prosecute a defendant for two offenses**, one of which is included in the other, and the defendant receives a mistrial on the greater offense, the remaining conviction of the lesser offense does not bar retrial of the greater offense. *Rower v. State*, 267 Ga. 46, 472 S.E.2d 297 (1996).

**Effect of reversal for error at trial.** — Because the reversal of defendant's conviction was based on trial error, double jeopardy did not prevent retrial. *Daniels v. State*, 165 Ga. App. 397, 299 S.E.2d 746 (1983).

**Retrial was not barred where reversal based on inadmissible evidence.** — When the conviction was reversed on the basis that the testimony of certain witnesses was inadmissible hearsay, and since it was clear from the court's opinion that the majority neither intended

to nor actually did pass upon the sufficiency of the evidence, the defendant's plea of double jeopardy was properly denied; the question remained whether the evidence did indeed support the verdict, and the trial transcript revealed circumstantial evidence from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Glisson v. State*, 192 Ga. App. 409, 385 S.E.2d 4, cert. denied, 192 Ga. App. 901, 385 S.E.2d 4 (1989).

**When the actions of a prosecutor cause a mistrial,** a second trial does not constitute double jeopardy in violation of the defendant's constitutional rights. *Japhet v. State*, 176 Ga. App. 189, 335 S.E.2d 425 (1985).

**Prosecutor's actions resulting in mistrial and creating double jeopardy.** — Because a prosecutor's conduct violated one of the most basic rules of prosecutorial procedure, specifically, producing documents in discovery showing that the defendant refused to speak with police and requested a lawyer after being advised of Miranda, and hence intentionally goading the defendant into moving for a mistrial, the trial court erred in denying the defendant's motion for a plea in bar on double jeopardy grounds. *Anderson v. State*, 285 Ga. App. 166, 645 S.E.2d 647 (2007).

**Nature of prosecutor's misconduct.** — When it was not shown that the prosecutor's misconduct was for the purpose of aborting the trial and securing an opportunity to retry the case, the trial court properly concluded that double jeopardy did not bar defendant's retrial. *Dinning v. State*, 267 Ga. 879, 485 S.E.2d 464 (1997).

**Governmental misconduct.** — After the trial court previously granted the defendant's motion for a mistrial and, although it was not specified why the motion was granted, it was assumed that it was granted due to the state's intentional misconduct during that first trial, because there was no indication in the trial court record of any specific intent by the state to subvert defendant's double jeopardy rights by provoking the defendant into seeking the mistrial, the trial court erred in granting the defendant's motion for discharge and acquittal of a retrial on

double jeopardy grounds. *State v. Brown*, 278 Ga. App. 827, 630 S.E.2d 62 (2006).

**Retrial after mistrial due to jury's failure to reach verdict** did not constitute double jeopardy under former Code 1933, § 26-507(e)(2)(C). *Phillips v. State*, 238 Ga. 632, 235 S.E.2d 12 (1977) (see O.C.G.A. § 16-1-8(e)(2)(C)).

**Retrial for lack of sufficient venue evidence.** — Absent sufficient proof establishing venue, the defendant's aggravated sexual battery and aggravated sodomy convictions were reversed; but, given that sufficient evidence otherwise existed to support the former charge, retrial on the same would not violate the defendant's double jeopardy rights. *Melton v. State*, 282 Ga. App. 685, 639 S.E.2d 411 (2006).

Because the state failed to prove the element of venue beyond a reasonable doubt, and there was no indication in the record that the juvenile waived venue or that the court took judicial notice of venue as an element of the offenses charged, the juvenile's adjudications of delinquency had to be reversed. However, although the delinquency adjudications had to be reversed, the state was permitted to retry the juvenile without violating the double jeopardy clause, because there was otherwise sufficient evidence at trial to support the adjudications entered. *In the Interest of J.B.*, 289 Ga. App. 617, 658 S.E.2d 194 (2008).

**Purposes of discharge of jury for failure to agree.** — Possibility of retrial after discharge of jury for failure to agree serves to discourage putting excessive pressure on juries to agree, and reduces risk that verdict will not be a genuine jury decision freely arrived at. In addition, it serves to prevent a single juror from unreasonably holding out for acquittal, causing a mistrial, and thereby invoking bar of double jeopardy singlehandedly. *Orvis v. State*, 237 Ga. 6, 226 S.E.2d 570 (1976).

**Retrial allowed following mistrial based on juror's disqualification.** — Removal of a juror who had mistakenly misadvised the trial court as to the juror's qualifications upon voir dire, thereby depriving the jury of the statutory minimum number, constituted "manifest necessity" for a mistrial, and retrial following such

**Retrial (Cont'd)**

mistrial was not barred by a plea of double jeopardy. *Bishop v. State*, 179 Ga. App. 606, 347 S.E.2d 350 (1986).

**Retrial not necessarily barred by fact that alternative to mistrial existed.** — Mere existence of some alternative will not compel conclusion that declaration of mistrial by trial judge was sufficiently precipitate to bar retrial. *Jones v. State*, 232 Ga. 324, 206 S.E.2d 481 (1974).

When a mistrial was granted at the request of the defendant, retrial was not prohibited since it was not established that the state intended to goad the defendant into moving for a mistrial. *Williams v. State*, 268 Ga. 488, 491 S.E.2d 377 (1997).

After the trial court duly weighed the respective rights of the defendant and the state before electing *sua sponte* to declare a mistrial in a trial where no evidence had been presented and the defense's case still remained unknown to the state, and since the court had considered other lesser alternatives, including the granting of a continuance, the trial court did not err in denying the defendant's motion to dismiss or acquit by reason of former jeopardy. *Terrell v. State*, 236 Ga. App. 163, 511 S.E.2d 555 (1999).

While more options other than a mistrial are available to a trial court faced with a deadlocked jury, the trial court is not required to exercise those options under all circumstances; instead, an appellate court considers the trial court's decision in this regard to be discretionary and it will reverse only if the trial court abuses that discretion. *Leonard v. State*, 275 Ga. App. 667, 621 S.E.2d 599 (2005).

**Retrial is permissible only if a manifest necessity existed for declaration of mistrial lest otherwise the end of public justice be defeated.** *Jones v. State*, 232 Ga. 324, 206 S.E.2d 481 (1974).

**"Manifest necessity" for a mistrial shown.** — In a bench trial, the judge's inability to disregard evidence the judge ruled inadmissible constituted a manifest necessity for a mistrial and the defendant's double jeopardy rights would not be violated by a retrial to a jury. *Bailey v.*

*State*, 219 Ga. App. 258, 465 S.E.2d 284 (1995).

After a news story about the case appeared in a local newspaper the morning after the trial court had decreed a recess to consider a question regarding the admissibility of certain evidence objected to by the defense, it was within the court's discretion to declare a mistrial based on "manifest necessity." *Putnam v. State*, 245 Ga. App. 95, 537 S.E.2d 384 (2000).

**"Manifest necessity" for a mistrial not shown.** — Failure to hold a Jackson-Denno hearing over defendant's allegation that a custodial statement had been coerced and introduction of testimony of the defendant related thereto did not create "manifest necessity" for a mistrial. *Smith v. State*, 263 Ga. 782, 439 S.E.2d 483 (1994).

Cross examination of an accomplice who has negotiated a plea and is testifying against a defendant, in order to bring out bias inherent in the witness's testimony, is proper and constitutionally protected, therefore granting a mistrial over defendant's objection was error and manifest necessity did not exist. *Hernandez v. State*, 244 Ga. App. 874, 537 S.E.2d 149 (2000).

**Retrial was barred** where the trial court improperly terminated a trial because defendant was not timely notified of additional charges; the court failed to consider alternative remedies which would have preserved defendant's right to proceed with the trial. *Jefferson v. State*, 224 Ga. App. 8, 479 S.E.2d 406 (1996).

Because the trial court's grant of a new trial stemmed from trial error, the defendant could not be retried on an offense of *per se DUI*, given that the defendant was adjudged not guilty of that charge based upon the insufficiency of the evidence; thus, the trial court erred in denying the plea in bar. *Shah v. State*, 288 Ga. App. 788, 655 S.E.2d 347 (2007).

**If the possibility of prosecutorial abuse exists, examination of the alternatives to mistrial is more stringent.** *Jones v. State*, 232 Ga. 324, 206 S.E.2d 481 (1974).

**Defense could not prevent retrial by withholding consent to mistrial**, since even if the trial court had erred in terminating the homicide trial, and even

if the defense could not be blamed for misunderstanding the trial court's ruling on whether the court would permit argument and admit evidence concerning the prosecutor's political ambitions, nevertheless it was the defense who injected the matter that resulted in the mistrial. *McGarvey v. State*, 186 Ga. App. 562, 368 S.E.2d 127, cert. denied, 186 Ga. App. 918, 368 S.E.2d 127 (1988).

When a defendant faced two separate charges for driving under the influence, occurring on two different dates, defendant's acquittal on the first charge of driving under the influence did not bar a subsequent prosecution for driving under the influence on the later date, where neither of the accusations stated that the date of the alleged offenses was a material averment and the state could prove their commission at any time within the two-year statute of limitations. *Sandner v. State*, 193 Ga. App. 62, 387 S.E.2d 27 (1989).

**Defendant's abuse of rape shield statute justified retrial.** — Defendant's introduction of evidence that was prohibited by the rape shield statute gave the court grounds to find manifest necessity for a mistrial; therefore, state and federal double jeopardy provisions did not bar reprocsecution. *Banks v. State*, 230 Ga. App. 258, 495 S.E.2d 877 (1998).

### Jurisdictional Issues

**Acquittal before court having no jurisdiction is void**, and therefore is not a bar to subsequent indictment and trial in a court which has jurisdiction of the offense. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir.), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. Ed. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

**Failure to prove venue in first trial is not prohibition to new trial.** — Retrial of defendants was not barred by O.C.G.A. § 16-1-8 because a subsequent prosecution was not barred if the former prosecution was before a court which lacked jurisdiction over the accused or the crime, and the trial court in the first trial lacked jurisdiction over the crime because the state failed to prove venue, and there-

fore O.C.G.A. § 16-1-8(d)(1) applied. *Grier v. State*, 275 Ga. 430, 569 S.E.2d 837 (2002).

After a defendant was granted a directed verdict on the basis that the state failed to prove venue in a criminal prosecution for driving under the influence per se, retrial was not barred under U.S. Const., amend. V and O.C.G.A. § 16-1-8 because, while venue had to be laid in the county in which the crime was allegedly committed under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2 and venue was a jurisdictional fact, failure to prove venue was a procedural error that implied nothing as to defendant's guilt or innocence. *Hudson v. State*, 296 Ga. App. 758, 675 S.E.2d 603, cert. denied, No. S09C1163, 2009 Ga. LEXIS 413 (Ga. 2009); cert. denied, U.S. , 130 S. Ct. 799, 175 L. Ed. 2d 559 (2009).

**No former jeopardy bar from prior accusation.** — As defendant was initially charged by accusation with terroristic threats and aggravated stalking, which were not properly prosecuted without an indictment or a written waiver thereof pursuant to O.C.G.A. §§ 17-7-70(a) and 17-7-70.1, the dismissal of the accusation after the jury was sworn and the indictment of the same charges was proper and there was no former jeopardy bar under O.C.G.A. § 16-1-8(d)(1), as the former prosecution under the indictment was void and of no effect. *Armstrong v. State*, 281 Ga. App. 297, 635 S.E.2d 880 (2006).

**Effect of proceedings in municipal court which lacks jurisdiction.** — Fact that charges are initially brought against criminal defendant in municipal court under former Code 1933, § 79A-9917 does not bar subsequent proceedings against defendant in state court on double jeopardy grounds, where municipal court lacks jurisdiction of such case. *State v. Millwood*, 242 Ga. 244, 248 S.E.2d 643 (1978) (see O.C.G.A. § 16-13-2).

Since the recorder's court lacked jurisdiction to try a defendant for driving without insurance, a violation of state law, neither O.C.G.A. § 16-1-7(b) nor § 16-1-8(b) precluded later prosecution in superior court for operating a motor vehicle after having been declared an habitual violator and for driving under the influ-

**Jurisdictional Issues (Cont'd)**

ence. *Parker v. State*, 170 Ga. App. 333, 317 S.E.2d 209 (1984) (see O.C.G.A. § 40-5-70 et seq.).

Proceeding in recorder's court was null and void because the court lacked jurisdiction to try the defendant for a state law violation; thus, the defendant's retrial did not constitute double jeopardy or prior prosecution. *Duncan v. State*, 185 Ga. App. 854, 366 S.E.2d 154 (1988), overruled on other grounds, *Kolker v. State*, 193 Ga. App. 306, 387 S.E.2d 597 (1989).

Since the municipal court lacked jurisdiction to try defendant pursuant to a Uniform Traffic Citation charging defendant with "simple battery" in violation of "Section 16-5-23", prosecution of the offense before such court was void; accordingly, trial of defendant for simple battery in the state court was not barred on the ground of double jeopardy or prior prosecution. *Rangel v. State*, 217 Ga. App. 152, 456 S.E.2d 739 (1995).

**Jurisdictional effect of election to try misdemeanor included within felony.** — Even though evidence in case indicates a felony was committed, prosecuting authorities may very well elect to try defendant in state court for misdemeanor included within that felony, and fact that they have so proceeded will not deprive state court of jurisdiction. *Perkins v. State*, 143 Ga. App. 124, 237 S.E.2d 658 (1977).

**Kidnapping with bodily injury in one county and murder in another.** — When the accused kidnapped the victim and inflicted bodily injury upon the victim in one county, and then abducted the victim to a second county and killed the victim there, the two offenses are not within a single court's jurisdiction and cannot be tried together; therefore, there is no procedural bar to the accused's subsequent prosecution for murder in the second county. *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978).

**Jurisdiction not barred where defects in charge amendable.** — Probate court did not lack jurisdiction over defendant even though a proper accusation was

not filed since the defects cited by the defendant in demurrers were amendable. *Dean v. State*, 214 Ga. App. 768, 449 S.E.2d 158 (1994).

**Concurrent jurisdiction required.**

— Because the state could not indict defendant for unlawfully using or causing another to use a telephone to arrange the commission of the victim's murder, no concurrent jurisdiction existed; therefore, O.C.G.A. § 16-1-8(c) did not bar the state from prosecuting defendant for malice murder, felony murder, aggravated assault, and burglary. *Sullivan v. State*, 279 Ga. 893, 622 S.E.2d 823 (2005).

**Application Generally**

**Application of subsection (a).** — O.C.G.A. § 16-1-8(a) governs in a case where an accused is being prosecuted for a crime, the first trial of which was terminated for any reason listed in O.C.G.A. § 16-1-8(e), since it is a situation in which the accused was formerly prosecuted for the same crime based upon the same material facts. If a case fits within the parameters of subsection (a), that becomes the exclusive means for determining whether double jeopardy bars a retrial. *State v. LeMay*, 186 Ga. App. 146, 367 S.E.2d 61 (1988).

When a defendant consented to the entry of nolle prosequi after the jury had been impaneled and sworn, and the defendant was thereafter charged with the same offense, the original prosecution was neither an acquittal nor an improperly terminated prosecution for the purposes of O.C.G.A. § 16-1-8. *Burks v. State*, 194 Ga. App. 809, 392 S.E.2d 300 (1990).

In a criminal matter wherein the state brought charges against defendant, a bench trial was commenced, witnesses were sworn in and testified, and the state thereafter terminated that case when it nolle prossed the charges over defendant's objection, jeopardy attached under Ga. Const. 1983, Art. I, Sec. 1, Para. XVIII, and under O.C.G.A. § 16-1-8(a)(2), the state could not thereafter retry defendant on the same charges; although the state's reason for nolle prossing the first set of charges was due to the state's inability to introduce DNA evidence as to defendant's identity, as the state failed to include that

information in the indictment in order to avoid a limitations issue, the reason was inconsequential because jeopardy had attached. *State v. Aycock*, 283 Ga. App. 876, 643 S.E.2d 249 (2007).

Trial court properly granted the defendant's plea in bar and plea of former jeopardy in a burglary prosecution as the state improperly terminated the first trial by dismissing the indictment after jeopardy attached without the defendant's consent, and the second burglary prosecution, although alleging a different date, residence, and accomplice, was based on the same material facts as the first indictment. *State v. Jackson*, 290 Ga. App. 250, 659 S.E.2d 679 (2008).

**Application of subsection (b).** — Prosecution for forgery was not barred by O.C.G.A. § 16-1-8(b)(1) because defendant could not have been convicted of forgery in the state court due to the court's lack of jurisdiction and because there was no evidence that the district attorney handling the former prosecution case knew of all the crimes. *State v. Hulsey*, 216 Ga. App. 670, 455 S.E.2d 398 (1995).

**Both multiple convictions and successive prosecutions barred.** — If multiple convictions arising out of single prosecution are barred, successive prosecution is likewise barred. *Brock v. State*, 146 Ga. App. 78, 245 S.E.2d 442 (1978).

**Multiple accusations and indictments not barred.** — Because the crimes alleged in the accusation and indictment involved different victims, locations, and times, and hence did not arise from the same conduct, the trial court did not err in denying the defendant's motion to dismiss the charges in the indictment on double jeopardy grounds based on the defendant's prior plea to the charges in the accusation. *Davis v. State*, 287 Ga. App. 535, 652 S.E.2d 177 (2007).

**No reprosecution for armed robbery.** — Reversal of defendant's convictions for felony murder based on the felony of armed robbery due to insufficient evidence raises a procedural double jeopardy bar to any reprosecution for armed robbery. *Prater v. State*, 273 Ga. 477, 541 S.E.2d 351 (2001).

**Carjacking and armed robbery.** — Defendant's prosecution for a car hijack-

ing was not barred by O.C.G.A. § 16-1-8(b)(1) as the car hijacking and the armed robbery did not arise from the same conduct because the car hijacking incident and the armed robbery incident occurred three days apart, took place at different locations, and involved different victims. *Syas v. State*, 273 Ga. App. 161, 614 S.E.2d 803 (2005).

**Effect of erroneously labeling dismissal for failure to prosecute as acquittal.** — Trial judge cannot terminate state's right to prosecute by erroneously labeling ruling an acquittal. Accordingly, the state is not barred from appealing such void acquittals, since the issue has not been joined in criminal cases and the defendant has not been placed in jeopardy on those charges. *State v. Cooperman*, 147 Ga. App. 556, 249 S.E.2d 358 (1978).

**Effect of improper revocation of bond.** — Incarceration of defendant resulting from the improper revocation of defendant's bond was not a bar to prosecution for vehicular homicide and related offenses. *Shaw v. State*, 225 Ga. App. 193, 483 S.E.2d 646 (1997).

**Continuation of a trial for two months before the same jury, absent exceptional circumstances or consent of the parties, was improper; however, the continuance did not constitute a "termination" within the meaning of O.C.G.A. § 16-1-8 and later proceedings were not barred by double jeopardy;** overruling *Paquin v. Town of Tyrone*, 261 Ga. 418, 405 S.E.2d 497 (1991). *Morris v. State*, 264 Ga. 823, 452 S.E.2d 100 (1995).

**Effect on subsequent prosecution of nolle prosequi before jury impaneled.** — When in superior court, before a jury is impaneled and sworn, the state enters a nolle prosequi of the indictment, and one of the charges is transferred to the county solicitor's office where it subsequently is included in an accusation before the state court, this does not result in an improper termination or constitute the basis for prosecutorial misconduct, and the prosecution is not barred because of double jeopardy. *Newman v. State*, 166 Ga. App. 609, 305 S.E.2d 123 (1983).

**Motion to dismiss waives right to object to termination of trial and no former jeopardy arises.** *Daughtrey v.*

**Application Generally (Cont'd)**

State, 138 Ga. App. 504, 226 S.E.2d 773 (1976).

**Defendant was named as unindicted coconspirator in entirely different proceeding which in no way operated to place defendant in double jeopardy.** Caldwell v. State, 171 Ga. App. 680, 320 S.E.2d 888 (1984).

**Record must affirmatively demonstrate that issue in second trial was previously determined.** — Unless record of prior proceeding affirmatively demonstrates that issue involved in second trial was definitely determined in former trial, possibility that it may have been does not prevent relitigation of that issue. State v. Tate, 136 Ga. App. 181, 220 S.E.2d 741 (1975).

**Effect of trial court's findings of juror impartiality.** — Although question of juror impartiality is a mixed question of law and fact, trial court's findings of impartiality will be set aside only where manifest prejudice to defendant has been shown. Jones v. State, 247 Ga. 268, 275 S.E.2d 67, cert. denied, 454 U.S. 817, 102 S. Ct. 94, 70 L. Ed. 2d 86 (1981).

**Vehicular homicide prosecution not barred when victim died following traffic violation prosecutions.** — Prosecution for vehicular homicide was not barred against a defendant who at prior proceedings had been prosecuted for and pled guilty to other offenses arising from the same incident since, at the time of the earlier proceedings, the victim had not yet died. Herrera v. State, 175 Ga. App. 740, 334 S.E.2d 339 (1985).

**Effect of prior hearing under Uniform Code of Military Justice.** — Recommended dismissal, arising from Article 32 hearing under Uniform Code of Military Justice (10 U.S.C. § 832), is not acquittal or an equivalent resolution of factual issues in defendant's favor. Coalter v. State, 183 Ga. App. 335, 358 S.E.2d 894 (1987).

**Federal firearm conviction did not bar prosecution for felony murder.** — Fact that the defendant had been convicted in federal court of possession of a firearm under 18 U.S.C. § 922 did not bar a felony murder prosecution in state court

on double jeopardy grounds as the state had to prove facts in the felony murder case that were not required to be proved in the federal case. Moreover, the federal offense, which required that a firearm be possessed in and affecting interstate commerce, was not within the concurrent jurisdiction of Georgia and under O.C.G.A. § 16-1-8(c) did not bar a subsequent prosecution for felony murder predicated on the underlying firearm possession charge. Marshall v. State, 286 Ga. 446, 689 S.E.2d 283 (2010).

**Trial in Georgia appropriate despite trial in another state.** — As the defendant's theft by taking an automobile occurred in both Georgia and Kentucky, the fact that the defendant was prosecuted in Kentucky did not bar Georgia from also prosecuting the defendant under the dual sovereignty doctrine of the double jeopardy clause; further, O.C.G.A. § 16-1-8(c) was inapplicable because there was not a federal prosecution for the same crime. Jackson v. State, 284 Ga. 826, 672 S.E.2d 640 (2009).

**Acquittal on aggravated sodomy charge did not bar conviction for sexual assault** under another count of the indictment. The dates alleged for the two charges were different, and the victim recounted two separate incidents when defendant performed oral sex on the victim. In short, the charges did not involve the same conduct, and no substantive or procedural aspects of double jeopardy were violated. Brown v. State, 188 Ga. App. 510, 373 S.E.2d 293 (1988).

**Indictment on charges previously nolle prossed.** — It was not a violation of O.C.G.A. §§ 16-1-7(b) and 16-1-8(b) to indict the defendant on charges that had previously been nolle prossed under a plea agreement; the defendant breached the agreement by withdrawing a guilty plea to one charge, thereby allowing the state to indict the defendant on the charges that were previously nolle prossed. Thomas v. State, 285 Ga. App. 792, 648 S.E.2d 111 (2007), cert. denied, 2007 Ga. LEXIS 628 (Ga. 2007).

**Indictment returned while jeopardy ongoing.** — Second indictment, which was apparently filed to address the eventuality that the defendants' motion to

withdraw a guilty plea would be granted, was returned while the defendant's jeopardy was ongoing, and, as such, the indictment did not violate U.S. Const., amend. V; Ga. Const. 1983, Art. I, Sec. I, Para. XVIII; or O.C.G.A. § 16-1-8. Phillips v. State, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

Second indictment did not violate double jeopardy under O.C.G.A. § 16-1-8(a) as entry of nolle prosequi as to earlier counts did not give rise to a viable double jeopardy challenge to reindictment on the same offenses. Phillips v. State, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

**Independent offenses.** — Defendant's plea of guilty to receipt of the victim's automobile did not bar prosecution for burglary of the victim's home prior to taking the vehicle. Maxey v. State, 239 Ga. App. 638, 521 S.E.2d 673 (1999).

**Defendant not placed in jeopardy.** — Trial court erred by granting defendant's plea in bar and by granting defendant's request for acquittal and discharge of aggravated battery and aggravated assault counts based on procedural double jeopardy protections as defendant was never placed in jeopardy as to those charges, which were brought in a new indictment against defendant, and defendant's speedy trial request did not apply to the new indictment since the case had been transferred to the superior court. State v. Jones, 290 Ga. App. 879, 661 S.E.2d 573 (2008).

**Firearm conviction not precluded by collateral estoppel.** — Defendant's conviction of possession of a firearm by a convicted felon was not precluded by collateral estoppel where defendant was acquitted of two other charges (aggravated assault and possession of a firearm during commission of a crime against a person) arising out of the same incident; the jury could have concluded that defendant had the gun but did not assault or attempt to rob the victim with it. Clark v. State, 194 Ga. App. 280, 390 S.E.2d 425 (1990).

**Disorderly conduct and DUI.** — State was not barred from prosecuting defendant for the charges of violation of probationary license and DUI even though defendant had already been prosecuted for a disorderly conduct charge

which arose out of a disturbance at a restaurant shortly before defendant drove off and was then stopped and charged with DUI. Selvey v. State, 201 Ga. App. 848, 412 S.E.2d 611 (1991).

**Double jeopardy issues with vehicular offenses.** — Because a uniform traffic citation was deliberately withheld from filing, and the state did not authorize or participate in the prosecution of the case, the probate court lacked authority to accept defendant's plea to the proposed charge and impose a fine, making its resulting judgment void; hence, the trial court did not err in denying defendant's plea in bar based on double jeopardy, since the probate court's void judgment could not serve as the basis for barring the subsequent indictment and prosecution of defendant in the superior court. Roberts v. State, 280 Ga. App. 672, 634 S.E.2d 790 (2006).

**Premature termination of trial.** — Termination of defendant's trial after the first witness was sworn, but before findings were rendered by the trier of facts, was improper, where there was nothing in the record to indicate that defendant consented to the premature termination of trial, nor any evidence that defendant waived the right to object to the termination. Phillips v. State, 197 Ga. App. 491, 399 S.E.2d 234 (1990).

Superior court erred in overruling defendant's plea of former jeopardy to a prosecution for driving under the influence, where a recorder's court judge had improperly terminated defendant's trial on the same charge in referring the case to the superior court. Phillips v. State, 197 Ga. App. 491, 399 S.E.2d 234 (1990).

Defendant was placed in double jeopardy where the probate court terminated the trial after the first witness was sworn and before findings of fact were rendered by the trier of fact and the court, *sua sponte*, bound over the case to the superior court without consent of the defendant to the bind-over. Dean v. State, 214 Ga. App. 768, 449 S.E.2d 158 (1994).

Defendant waived the right to object to termination of probate court proceedings by requesting the probate court judge to bind the case over to the superior court. Bramlett v. State, 222 Ga. App. 687, 475 S.E.2d 704 (1996).

**Application Generally (Cont'd)**

**Predicate offenses for RICO violation.** — Failure to strike from a Racketeer Influenced and Corrupt Organizations Act (RICO) indictment, as predicate offenses, three thefts which had been formerly prosecuted was harmless error, where there was no reason to infer that defendant's guilty pleas to other offenses were tainted or otherwise affected by the superfluous addition of predicate offenses which had formerly been prosecuted. *Bethune v. State*, 198 Ga. App. 490, 402 S.E.2d 276, cert. denied, 198 Ga. App. 897, 402 S.E.2d 276 (1991).

**Sale and possession or drug offenses.** — When defendant engaged in two separate courses of conduct, the attempt to sell marijuana to an undercover police officer and the possession of 12 pounds of marijuana at defendant's home, double jeopardy did not attach to the second prosecution, as these acts occurred at different times and locations, with distinct quantities of contraband, even though defendant might have at some earlier time possessed all the marijuana in defendant's home; thus, defendant's argument on substantive double jeopardy was rejected. *Kinchen v. State*, 265 Ga. App. 474, 594 S.E.2d 686 (2004).

**Felony murder prosecution not precluded by double jeopardy claim.**

— In a case arising out of a robbery and shooting death, where, in the original trial, a mistrial was entered on the felony murder count, and defendant was found not guilty of aggravated assault with intent to rob, the state's subsequent prosecution of defendant for felony murder based on the separate underlying felony of aggravated assault with a deadly weapon was not barred by collateral estoppel as a violation of defendant's double jeopardy rights because evidence adduced at the first trial revealed that defendant jury could have concluded that defendant assaulted the victim with a deadly weapon

but did not do so with the intent to rob. *Phillips v. State*, 272 Ga. 840, 537 S.E.2d 63 (2000).

**State's motion for mistrial based on lack of disclosure did not prohibit retrial.** — Trial court did not abuse its discretion in granting the state's motion for a mistrial and ordering that defendant disclose additional alibi witnesses that defense counsel did not disclose after the state demanded such disclosure, but whom defense counsel mentioned in opening statement to the jury in defendant's death penalty case, as the trial court's decision to grant that sanction was entitled to great deference and the failure to disclose the additional alibi witnesses violated the state's right to a fair trial and the state was not precluded from retrying defendant after it obtained such disclosure. *Tubbs v. State*, 276 Ga. 751, 583 S.E.2d 853 (2003).

**Subsequent prosecution not barred since prosecutor had no earlier knowledge.** — Because the defendant failed to affirmatively show that the prosecutor had any actual knowledge regarding approximately \$300,000 worth of jewelry items found in a toolbox located at the defendant's residence upon an eviction, which were the subject of a second theft prosecution involving jewelry the defendant had stolen, the second prosecution regarding those items was not barred on double jeopardy grounds. *White v. State*, 284 Ga. App. 805, 644 S.E.2d 903 (2007), cert. denied, 2007 Ga. LEXIS 564 (Ga. 2007).

**Sentence vacated and resentencing ordered** when the trial court erred by increasing a juvenile defendant's voluntary manslaughter sentence after defendant had already begun serving the sentence, because the original sentence was final at the time it was imposed, and defendant had no reason to believe otherwise; hence, the trial court's increased sentence constituted double jeopardy and could not stand. *Williams v. State*, 273 Ga. App. 42, 614 S.E.2d 146 (2005).

**OPINIONS OF THE ATTORNEY GENERAL****Separate prosecutions for municipal and state law prosecutions.** — An

accused arrested for separate non-included offenses arising out of a sin-

gle transaction, which violate municipal ordinances and state law respectively, may be prosecuted first in the recorder's court for the municipal ordinance violations, and then transferred to the superior

court to be prosecuted for the separate state violations, without violating statutory or constitutional double jeopardy prohibitions. 1986 Op. Att'y Gen. No. U86-32.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 16B Am. Jur. 2d, Constitutional Law, § 643 et seq. 21 Am. Jur. 2d, Criminal Law, §§ 275 et seq., 321 et seq., 329 et seq. 75B Am. Jur. 2d, Trials, § 1469 et seq.

**C.J.S.** — 22 C.J.S., Criminal Law, §§ 265 et seq., 502.

**ALR.** — Conviction or acquittal of larceny as bar to prosecution for burglary, 19 ALR 626.

Pendency in one county of charge of larceny as bar to subsequent charge in another county of offense which involves both felonious breaking and felonious taking of same property, 19 ALR 636.

Conviction or acquittal upon charge of murder of, or assault upon, one person as bar to prosecution for like offense against another person at the same time, 20 ALR 341; 113 ALR 222.

Acquittal or conviction of one offense in connection with operation of automobile as bar to prosecution for another, 44 ALR 564; 172 ALR 1053.

Illness or death of member of juror's family as justification for declaring mistrial and discharging jury in criminal case, 53 ALR 1062.

Award of *venire de novo* or new trial after verdict of guilty as to one or more counts and acquittal as to another as permitting retrial or conviction on latter count, 80 ALR 1106.

Discharge on habeas corpus after conviction as affecting claim or plea of former jeopardy, 97 ALR 160.

Impersonation or false statement by juror as to his identity as ground for new trial, 127 ALR 717.

Conviction or acquittal in criminal prosecution as bar to action for statutory damages or penalty, 42 ALR2d 634.

Conviction of lesser offense as bar to prosecution for greater on new trial, 61 ALR2d 1141.

Conviction from which appeal is pending as bar to another prosecution for same offense, 61 ALR2d 1224.

Propriety, and effect as double jeopardy, of court's grant of new trial on own motion in criminal case, 85 ALR2d 486.

Prejudicial effect of prosecuting attorney's argument to jury that people of city, county, or community want or expect a conviction, 85 ALR2d 1132.

Prosecution for robbery of one person as bar to subsequent prosecution for robbery of another person committed at the same time, 51 ALR3d 693.

Former jeopardy: Propriety of trial court's declaration of mistrial or discharge of jury, without accused's consent, on ground of prosecution's disclosure of prejudicial matter to, or making prejudicial remarks in presence of, jury, 77 ALR3d 1143.

Propriety and prejudicial effect of informing jury that accused has taken polygraph test, where results of test would be inadmissible in evidence, 88 ALR3d 227.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused — modern state cases, 88 ALR3d 449.

Acquittal of criminal charges other than contempt as precluding contempt proceedings relating to same transaction, 88 ALR3d 1089.

Acquittal as bar to prosecution of accused for perjury committed at trial, 89 ALR3d 1098.

Propriety and prejudicial effect of prosecutor's argument to jury indicating that he has additional evidence of defendant's guilt which he did not deem necessary to present, 90 ALR3d 646.

Propriety and prejudicial effect of prosecutor's argument giving jury impression that judge believes defendant guilty, 90 ALR3d 822.

Instructions urging dissenting jurors in state criminal case to give due consideration to opinion of majority (Allen charge) — modern cases, 97 ALR3d 96.

Conviction or acquittal in federal court

as bar to prosecution in state court for state offense based on same facts — modern view, 18 ALR4th 802.

Effect of juror's false or erroneous answer on voir dire in personal injury or death action as to previous claims or ac-

tions for damages by himself or his family, 38 ALR4th 267.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts — modern view, 97 ALR5th 201.

### **16-1-9. Application of title to crimes committed prior to enactment.**

This title shall govern the construction and punishment of any crime defined in this title committed on and after July 1, 1969, as well as the construction and application of any defense. This title does not apply to or govern the construction or punishment of any crime committed prior to July 1, 1969, or the construction or application of any defense. Such a crime must be construed and punished according to the law existing at the time of the commission thereof in the same manner as if this title had not been enacted. (Laws 1833, Cobb's 1851 Digest, p. 838; Code 1863, § 4550; Code 1868, § 4570; Code 1873, § 4664; Code 1882, § 4664; Penal Code 1895, § 18; Penal Code 1910, § 18; Code 1933, § 26-103; Code 1933, § 26-103, enacted by Ga. L. 1968, p. 1249, § 1.)

#### **JUDICIAL DECISIONS**

**Cited** in Ponder v. State, 121 Ga. App. 788, 175 S.E.2d 55 (1970); Nestor v. State, 122 Ga. App. 290, 176 S.E.2d 637 (1970); Blankenship v. State, 123 Ga. App. 496, 181 S.E.2d 544 (1971); Gunn v. State, 227 Ga. 786, 183 S.E.2d 389 (1971); Sadler v. State, 124 Ga. App. 266, 183 S.E.2d 501 (1971); Price v. State, 124 Ga. App. 850,

186 S.E.2d 360 (1971); Papp v. State, 129 Ga. App. 718, 201 S.E.2d 157 (1973); State v. Hasty, 158 Ga. App. 464, 280 S.E.2d 873 (1981); State v. Williams, 172 Ga. App. 708, 324 S.E.2d 557 (1984); Moton v. State, 242 Ga. App. 397, 530 S.E.2d 31 (2000).

### **16-1-10. Punishment for crimes for which punishment not otherwise provided.**

Any conduct that is made criminal by this title or by another statute of this state and for which punishment is not otherwise provided, shall be punished as for a misdemeanor. (Orig. Code 1863, § 4395; Ga. L. 1865-66, p. 233, § 2; Code 1868, § 4436; Code 1873, § 4509; Code 1882, § 4509; Penal Code 1895, § 334; Penal Code 1910, § 339; Code 1933, § 26-5001; Code 1933, § 26-104, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — Punishment for misdemeanors generally, § 17-10-3.

#### **JUDICIAL DECISIONS**

**Cited** in MacDougald v. State, 124 Ga. App. 619, 184 S.E.2d 687 (1971); Blair v.

State, 127 Ga. App. 111, 192 S.E.2d 542 (1972); Cook v. State, 256 Ga. 808, 353

S.E.2d 333 (1987); English v. State, 282 Ga. App. 552, 639 S.E.2d 551 (2006).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 1. soldiers, sailors, and militiamen, 143 ALR 1530.

**ALR.** — Civil and criminal liability of

#### **16-1-11. Effect of repeal or amendment of criminal law on prosecution of prior violations.**

The repeal, repeal and reenactment, or amendment of any law of this state which prohibits any act or omission to act and which provides for any criminal penalty therefor, whether misdemeanor, misdemeanor of a high and aggravated nature, or felony, shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment unless the General Assembly expressly declares otherwise in the Act repealing, repealing and reenacting, or amending such law. (Code 1981, § 16-1-11, enacted by Ga. L. 1987, p. 260, § 1.)

**Editor's notes.** — The title of Ga. L. 1987, p. 260, declares the purpose of the Act which enacted this Code section is "to supersede and abolish the rule of common

law stated by the Supreme Court of Georgia in the case of Robinson v. State, 256 Ga. 564, 350 S.E.2d 464 (1986)."

#### OPINIONS OF THE ATTORNEY GENERAL

**Prosecution of persons designated habitual violators before January 1, 1991.** — Holding of the Court of Appeals in Galletta v. Hardison, 168 Ga. App. 36 (1983) is applicable solely to appeals from driver's license revocations by the Georgia Department of Public Safety and individuals designated as habitual violators prior to January 1, 1991, based upon one or

more convictions for driving with a suspended license who drive prior to obtaining reinstatement of their driving privileges by the Department of Public Safety. These groups are subject to felony prosecution pursuant to O.C.G.A. § 40-5-58(c) notwithstanding the 1990 amendment to that Code Section. 1992 Op. Att'y Gen. No. U92-5.

## CHAPTER 2

### CRIMINAL LIABILITY

| <b>Article 1</b>   | Sec.   |  |
|--------------------|--|--|
| <b>Culpability</b> | 16-2-6.  | Intention a question of fact.  |
| Sec.               |  | <b>Article 2</b>   |
| 16-2-1.            | “Crime” defined.   |  |
| 16-2-2.            | Effect of misfortune or accident on guilt.                                       | <b>Parties to Crimes</b>   |
| 16-2-3.            | Presumption of sound mind and discretion.  | 16-2-20. When a person is a party to a crime.                          |
| 16-2-4.            | Presumption that acts of sound person willful.                                   | 16-2-21. Prosecution of parties who did not directly commit the crime. |
| 16-2-5.            | Presumption that sound person intends natural and probable consequences of acts. | 16-2-22. Criminal responsibility of corporations.                      |

### ARTICLE 1 CULPABILITY

#### **16-2-1. “Crime” defined.**

(a) A “crime” is a violation of a statute of this state in which there is a joint operation of an act or omission to act and intention or criminal negligence.

(b) Criminal negligence is an act or failure to act which demonstrates a willful, wanton, or reckless disregard for the safety of others who might reasonably be expected to be injured thereby. (Laws 1833, Cobb’s 1851 Digest, p. 779; Code 1863, § 4188; Code 1868, § 4227; Code 1873, § 4292; Code 1882, § 4292; Penal Code 1895, § 31; Penal Code 1910, § 31; Code 1933, § 26-201; Code 1933, § 26-601, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2004, p. 57, § 2.)

**Editor’s notes.** — Ga. L. 2004, p. 57, § 6, not codified by the General Assembly, provides that the amendment by that Act shall apply to all crimes which occur on or after July 1, 2004.

**Law reviews.** — For article on 2004 amendment of this Code section, see 21 Georgia St. U.L. Rev. 45 (2004).

### JUDICIAL DECISIONS

#### ANALYSIS

GENERAL CONSIDERATION

INTENT

CRIMINAL NEGLIGENCE

### General Consideration

**Only violations of public laws are recognized as criminal offenses.** Jenkins v. State, 14 Ga. App. 276, 80 S.E. 688 (1914).

**An act specially authorized by public law cannot be a crime.** Vason v. South Carolina R.R., 42 Ga. 631 (1871).

**New felonies become subject to existing rules of procedure.** — When statute is passed defining a new felony, it becomes incorporated in the body of the criminal law, subject to all rules of procedure applicable to other crimes of like grade. Bishop v. State, 118 Ga. 799, 45 S.E. 614 (1903).

**Infractions of local laws and ordinances** have no place in the Penal Code. Pearson v. Wimbish, 124 Ga. 701, 52 S.E. 751, 4 Ann. Cas. 501 (1906).

**Penalty is not an ingredient of a crime,** only a consequence of its commission. Jenkins v. State, 14 Ga. App. 276, 80 S.E. 688 (1914).

**Absent intention or criminal negligence, there is no crime,** notwithstanding fact that criminal act has been committed. Cargile v. State, 194 Ga. 20, 20 S.E.2d 416, answer conformed to, 67 Ga. App. 610, 21 S.E.2d 326 (1942).

**Every crime consists in union or joint operation of act and intention.** Mallette v. State, 119 Ga. App. 24, 165 S.E.2d 870 (1969).

**Statutory reference in indictment not required.** — Indictment need not specify statute drawn under since offense charged shall be determined by allegations. Turner v. State, 233 Ga. 538, 212 S.E.2d 370 (1975).

In order to charge statutory offenses, indictments are not constitutionally required to cite or name statute. Turner v. State, 233 Ga. 538, 212 S.E.2d 370 (1975).

**Failure to charge jury in exact language of section is not error** when the court fully instructs on essential elements of the crime charged including the requisite intent. Coleman v. State, 137 Ga. App. 689, 224 S.E.2d 878 (1976); Redd v. State, 141 Ga. App. 888, 234 S.E.2d 812 (1977); Ward v. State, 271 Ga. 648, 520 S.E.2d 205 (1999).

**Failure to include instruction on intent.** — It was not error to omit, with-

out request, a statement in the charge with regard to defendant's intent to commit the act, where the charge did include instructions on the statutory requirements of the offense in question. Nestor v. State, 122 Ga. App. 290, 176 S.E.2d 637 (1970).

**Absent request, court need not specifically charge exact language of section.** — Failure to specifically charge exact language of former Code 1933, §§ 26-601 and 26-605 is not reversible error absent request therefore and where subject of intent is fully charged. Smith v. State, 139 Ga. App. 660, 229 S.E.2d 74 (1976) (see O.C.G.A. §§ 16-2-1 and 16-2-6).

**Inclusion in charge where omission or negligence are not part of crime charged.** — When an unchallenged charge to the jury included language mirroring O.C.G.A. § 16-2-1 in charging that a crime could consist of an omission to act or criminal negligence, two elements not involved in the defendant's case, but the charge as a whole properly instructed on the burden of proof and the elements of the crimes and omitted the language at issue on a recharge, there was no substantial or reversible error. Ramey v. State, 235 Ga. App. 690, 510 S.E.2d 358 (1998).

**Violations of municipal ordinances and administrative regulations are not crimes.** — Purpose of former Code 1933, § 26-201 is to make clear that only violations of state statutes, and not of municipal ordinances and administrative regulations, are crimes. Turner v. State, 233 Ga. 538, 212 S.E.2d 370 (1975); Horace Mann Ins. Co. v. Drury, 213 Ga. App. 321, 445 S.E.2d 272 (1994) (see O.C.G.A. § 16-2-1).

Former Code 1933, § 26-201 refers only to violations of statutes of this state, thereby excluding municipal ordinances and administrative regulations. State v. Burroughs, 244 Ga. 288, 260 S.E.2d 5 (1979) (see O.C.G.A. § 16-2-1).

**Cited in Steele v. State, 227 Ga. 653, 182 S.E.2d 475 (1971); Gunn v. State, 227 Ga. 786, 183 S.E.2d 389 (1971); Teasley v. State, 228 Ga. 107, 184 S.E.2d 179 (1971); Robertson v. State, 127 Ga. App. 6, 192 S.E.2d 502 (1972); K.M.S. v. State, 129 Ga. App. 683, 200 S.E.2d 916 (1973); Gentry v.**

**General Consideration (Cont'd)**

State, 129 Ga. App. 819, 201 S.E.2d 679 (1973); Golson v. State, 130 Ga. App. 577, 203 S.E.2d 917 (1974); Bentley v. State, 131 Ga. App. 425, 205 S.E.2d 904 (1974); Tift v. State, 133 Ga. App. 455, 211 S.E.2d 409 (1974); Snell v. McCoy, 135 Ga. App. 832, 219 S.E.2d 482 (1975); Johnson v. State, 235 Ga. 486, 220 S.E.2d 448 (1975); Proctor v. State, 235 Ga. 720, 221 S.E.2d 556 (1975); Bradley v. State, 137 Ga. App. 670, 224 S.E.2d 778 (1976); Wiggins v. State, 139 Ga. App. 98, 227 S.E.2d 895 (1976); Dodson v. State, 237 Ga. 607, 229 S.E.2d 364 (1976); Brooks v. State, 144 Ga. App. 97, 240 S.E.2d 593 (1977); Stone v. State, 145 Ga. App. 816, 245 S.E.2d 62 (1978); Barrett v. State, 146 Ga. App. 207, 245 S.E.2d 890 (1978); Clary v. State, 151 Ga. App. 301, 259 S.E.2d 697 (1979); Puritan/Churchill Chem. Co. v. Eubank, 245 Ga. 334, 265 S.E.2d 16 (1980); Hardeman v. State, 154 Ga. App. 364, 268 S.E.2d 415 (1980); Jones v. State, 154 Ga. App. 806, 270 S.E.2d 201 (1980); Morrow v. State, 155 Ga. App. 574, 271 S.E.2d 707 (1980); Craft v. State, 158 Ga. App. 745, 282 S.E.2d 203 (1981); Williams v. State, 159 Ga. App. 865, 285 S.E.2d 597 (1981); Mitchell v. State, 162 Ga. App. 780, 293 S.E.2d 48 (1982); Brinson v. State, 163 Ga. App. 567, 295 S.E.2d 536 (1982); Coker v. State, 163 Ga. App. 799, 295 S.E.2d 538 (1982); Fambro v. State, 164 Ga. App. 359, 297 S.E.2d 111 (1982); Johnson v. State, 170 Ga. App. 433, 317 S.E.2d 213 (1984); Cherry v. State, 174 Ga. App. 145, 329 S.E.2d 580 (1985); Whitley v. State, 176 Ga. App. 364, 336 S.E.2d 301 (1985); Lewis v. State, 180 Ga. App. 369, 349 S.E.2d 257 (1986); Daughtry v. State, 180 Ga. App. 711, 350 S.E.2d 53 (1986); Abernathy v. State, 191 Ga. App. 350, 381 S.E.2d 537 (1989); Howard v. State, 192 Ga. App. 813, 386 S.E.2d 667 (1989); Frost v. State, 200 Ga. App. 267, 407 S.E.2d 765 (1991); Bohannon v. State, 230 Ga. App. 829, 498 S.E.2d 316 (1998); Mitchell v. State, 233 Ga. App. 92, 503 S.E.2d 293 (1998); Stokes v. State, 232 Ga. App. 232, 501 S.E.2d 599 (1998); Barnes v. Greater Ga. Life Ins. Co., 243 Ga. App. 149, 530 S.E.2d 748 (2000); Maynor v. State, 257 Ga. App. 151, 570 S.E.2d 428 (2002).

**Intent**

**Crimes require act which violates the law, and intent to do the act done.** Owens v. State, 120 Ga. 296, 48 S.E. 21 (1904); Mitchell v. State, 20 Ga. App. 778, 93 S.E. 709 (1917); James v. State, 153 Ga. 556, 112 S.E. 899 (1922).

**General intent is essential element of all state crimes** except those involving criminal negligence. Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**General intent** refers to proposition that one intends consequences of one's voluntary physical actions. Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**Word "intention"** means an intention to commit the act statutorily prohibited, not an intention to violate a penal statute. Schwerdtfeger v. State, 167 Ga. App. 19, 305 S.E.2d 834 (1983).

**Criminal intent is simply intention to do act which legislature has prohibited.** Herbert v. State, 45 Ga. App. 340, 164 S.E. 452 (1932).

**Criminal intent is an essential element** in every crime where criminal negligence is not involved. Bacon v. State, 209 Ga. 261, 71 S.E.2d 615 (1952).

**Intention is manifested by circumstances surrounding perpetration of offense.** — Sometimes intention can be proved, sometimes it can only be inferred or presumed, and general rule is that intention will be manifested by circumstances connected with perpetration of offense. Mallette v. State, 119 Ga. App. 24, 165 S.E.2d 870 (1969).

**Term "maliciously" includes intent.** Maltbie v. State, 139 Ga. App. 342, 228 S.E.2d 368 (1976).

**Intent with which act is done is peculiarly a question of fact** for determination by jury and although finding that accused had intent to commit crime charged may be supported by evidence which is exceedingly weak and unsatisfactory, verdict will not be set aside on that ground. Mallette v. State, 119 Ga. App. 24, 165 S.E.2d 870 (1969).

**One mentally incapable of having intent cannot commit a crime.** — One

too young, too feeble-minded, or otherwise mentally incapable of having an intent, cannot commit a crime. *Miley v. State*, 118 Ga. 274, 45 S.E. 245 (1903).

**Statute does not make guilty knowledge indispensable to conviction of crime.** — There are certain cases, especially those which relate to public safety, in which commission of prohibited act, whether knowingly or not, makes actor guilty. *General Oil Co. v. Crowe*, 54 Ga. App. 139, 187 S.E. 221 (1936).

**Scienter is not an indisputable element of the intent referred to in this statute;** it is sufficient if the act intended and committed constitutes a violation of the law. *Ware v. State*, 6 Ga. App. 578, 65 S.E. 333 (1909); *Mitchell v. State*, 20 Ga. App. 778, 93 S.E. 709 (1917); *Nelson v. State*, 27 Ga. App. 50, 107 S.E. 400 (1921) (see O.C.G.A. § 16-2-1).

**If scienter is made part of offense by statute,** it must be established as a necessary element of the crime. One's belief in the lawfulness of the act done, coupled with exercise of reasonable diligence to ascertain the truth, may negative scienter. *Robinson v. State*, 6 Ga. App. 696, 65 S.E. 792 (1907).

**Intent need not be alleged specifically** if, from language employed, it must necessarily be inferred that a criminal intent existed. *Cason v. State*, 16 Ga. App. 820, 86 S.E. 644 (1914).

**Intent may be inferred from circumstances.** *Steadman v. State*, 18 Ga. 736, 8 S.E. 420 (1888).

**Intent may be ascertained by acts and conduct.** *Lawrence v. State*, 68 Ga. 289 (1881).

**Intent may be presumed** when it is the natural and necessary consequence of act done. *Marshall v. State*, 59 Ga. 154 (1877); *Freeman v. State*, 70 Ga. 736 (1883); *Lee v. State*, 102 Ga. 221, 29 S.E. 264 (1897).

**Culpable neglect may take the place of positive intent** in constituting an act a crime; and even where an act is committed by misfortune or accident, in order to free it from the imputation of crime, it must be made satisfactorily to appear that it did not result from evil design, intention, or culpable neglect. *Loeb v. State*, 75 Ga. 258 (1885).

**When the defendant denies committing crime, charge as to intent not required.** — Judge is not required to charge as to intent when it is not in issue because defendant never contended to have committed the acts unintentionally, but rather denied having committed the act at all. *Redd v. State*, 141 Ga. App. 888, 234 S.E.2d 812 (1977).

**When the defendant acknowledged intent, erroneous charge as to intent was harmless.** — Error, if any, in jury charge on presumed intent in trial for malice murder was harmless since the petitioner pled self-defense at trial and acknowledged that the homicide was intentional. *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**Intent in aggravated sodomy case.** — Trial judge was authorized to find beyond a reasonable doubt that defendant acted with the criminal intent to commit the prohibited act of aggravated sodomy by placing defendant's sexual organ in the victim's mouth with force and against the victim's will. Since there was no evidence that the trial court did not make the requisite finding regarding criminal intent, the appellate court found no error. *Sims v. State*, 267 Ga. App. 572, 600 S.E.2d 613 (2004).

**Offenses of murder, voluntary manslaughter, and aggravated assault** do not require that the necessary element of intent to kill or injure, as the case may be, must have been directed toward the person who was killed or injured. *Cook v. State*, 255 Ga. 565, 340 S.E.2d 843, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

**Intent element of aggravated assault.** — Defendant's argument that the indictment against defendant charging defendant with aggravated assault was flawed because no intent was alleged was without merit. Aggravated assault with a deadly weapon did not require a specific criminal intent; rather, it only required a general intent to injure, and that general intent did not have to be expressly alleged. *Bishop v. State*, 266 Ga. App. 129, 596 S.E.2d 674 (2004).

**Allegation that defendant "unlawfully" possessed cocaine** was sufficient

**Intent** (Cont'd)

to encompass both the intent to commit the proscribed act and the knowledge necessary to form that intent. *Dye v. State*, 177 Ga. App. 813, 341 S.E.2d 469 (1986), overruled on other grounds, *Eason v. State*, 260 Ga. 445, 396 S.E.2d 492 (1990), overruled on other grounds, *State v. Lucious*, 271 Ga. 361, 518 S.E.2d 677 (1999).

**Taking money from vehicle held separate offense from taking vehicle.**

— Although money was in a van at the time the van was stolen, the jury was authorized to find that defendant was not then aware of its presence, and defendant's act of physically taking the money from its hiding place, coupled with the then present intent to steal it, was a second criminal act against the property of the victim, separate and distinct from the earlier theft of the van. Accordingly, the trial court did not err in failing to grant defendant's motion for a directed verdict of acquittal as to one of the counts of theft by taking. *Cook v. State*, 180 Ga. App. 139, 348 S.E.2d 687 (1986).

**Intent in DUI case.** — Trial court erred in the court's charge to the jury because the charge had the effect of eliminating the jury's consideration of defendant's defense that defendant was not driving or in actual physical control of the car. Defendant claimed that the car's movement was "an accident" caused by defendant's falling headfirst onto the floorboard. *Virgil v. State*, 227 Ga. App. 96, 488 S.E.2d 694 (1997).

**Verdict of "intent" insufficient for conviction for "attempt."** — When the jury's verdict found the defendant "guilty" of only the "intent" to traffic in narcotics, a rewritten verdict for "attempt" was a mere nullity under the double jeopardy provision of the bill of rights since the original verdict amounted to an acquittal. *Douglas v. State*, 206 Ga. App. 740, 426 S.E.2d 628 (1992).

**Age of victim impacts ability to consent.** — When the 14-year-old victim allegedly consented to having sex with defendant, the sexual molestation conviction under O.C.G.A. § 16-6-4(a) was supported by sufficient evidence; under O.C.G.A.

§ 16-2-1, consent by the victim was irrelevant due to the inability of the victim to legally consent to intercourse, and it was for the jury to determine, in accordance with the testimony of at least a single witness pursuant to O.C.G.A. § 24-4-8, whether defendant's conduct was immoral or indecent under O.C.G.A. § 16-6-4(a). *Slack v. State*, 265 Ga. App. 306, 593 S.E.2d 664 (2004).

**Criminal Negligence**

**Words "criminal negligence" are properly included in jury charge.** — Words "criminal negligence" are an integral part of the definition of a crime, and are properly included in a jury charge on former Code 1933, § 26-601. *Smith v. State*, 238 Ga. 146, 231 S.E.2d 757 (1977); *Owen v. State*, 266 Ga. 312, 467 S.E.2d 325 (1996) (see O.C.G.A. § 16-2-1).

**Instruction on definition of "crime."** — Although "criminal negligence" was not an issue in a murder trial, the trial court did not err by employing the entirety of the language of O.C.G.A. § 16-2-1 in its charge to the jury on the general definition of "crime." *Harper v. State*, 182 Ga. App. 760, 357 S.E.2d 117 (1987).

**Criminal negligence defined.** — Criminal negligence is the reckless disregard of consequences, or a heedless indifference to rights and safety of others and a reasonable foresight that injury would probably result. *Collins v. State*, 66 Ga. App. 325, 18 S.E.2d 24 (1941).

Criminal negligence means not merely such negligence as might be foundation of a damage suit, but reckless and wanton negligence and of such character as to show utter disregard for safety of others who might reasonably be expected to be injured thereby. *Keye v. State*, 136 Ga. App. 707, 222 S.E.2d 172 (1975).

**Criminal negligence is something more than ordinary negligence** which would authorize recovery in civil action. *Collins v. State*, 66 Ga. App. 325, 18 S.E.2d 24 (1941).

**Term "heedless disregard" includes criminal negligence.** *Maltbie v. State*, 139 Ga. App. 342, 228 S.E.2d 368 (1976).

**Charge on criminal negligence warranted.** — In light of the extensive jury

instructions that emphasized the requirement for finding that the defendant knew of the prostitution activities at the employee's business before the jury could convict the defendant of keeping a place of

prostitution, there was no error in giving the O.C.G.A. § 16-2-1 charge on the definition of a crime that referenced criminal negligence. *Ahn v. State*, 279 Ga. App. 501, 631 S.E.2d 711 (2006).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 1 et seq.

**C.J.S.** — 22 C.J.S., Criminal Law, §§ 37, 38.

### 16-2-2. Effect of misfortune or accident on guilt.

A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking, intention, or criminal negligence. (Laws 1833, Cobb's 1851 Digest, p. 779; Code 1863, § 4198; Code 1868, § 4237; Code 1873, § 4302; Code 1882, § 4302; Penal Code 1895, § 40; Penal Code 1910, § 40; Code 1933, § 26-404; Code 1933, § 26-602, enacted by Ga. L. 1968, p. 1249, § 1.)

### JUDICIAL DECISIONS

#### ANALYSIS

GENERAL CONSIDERATION

SELF-DEFENSE

CULPABLE NEGLECT OR UNLAWFUL ACT

#### General Consideration

**Logic of O.C.G.A. § 16-2-2 is questionable** as in almost every circumstance an event that transpires by reason of "misfortune or accident" lacks the essential element of "any crime," which is the existence of a "criminal scheme or undertaking intention, or criminal negligence." Thus, it is difficult to comprehend how "any crime" can be "committed by misfortune or accident." *Hamilton v. State*, 260 Ga. 3, 389 S.E.2d 225 (1990).

**Every person is presumed to intend natural and probable consequences of own conduct**, particularly if that conduct be unlawful and dangerous to safety or lives of others. *Keye v. State*, 136 Ga. App. 707, 222 S.E.2d 172 (1975).

**There are wanton or reckless states of mind**, sometimes equivalent of specific intention to kill, and which may and should be treated by jury as amounting to such intention, when productive of violence likely to result in destruction of life.

*Keye v. State*, 136 Ga. App. 707, 222 S.E.2d 172 (1975).

**Crimes are not committed by accident.** — Jury instruction that crimes are not committed by accident was not erroneous, as such an instruction is an authorized reference to O.C.G.A. § 16-2-2. *Stone v. State*, 257 Ga. App. 306, 570 S.E.2d 715 (2002).

Defendant's request to charge the jury on accident was properly denied as the state's evidence indicated that defendant was the aggressor in the attack and that defendant intentionally threw a cup of liquid containing bleach into the victim's face; further, defendant admitted that defendant intentionally knocked the cup of bleach out of the victim's hand. *Payne v. State*, 273 Ga. App. 483, 615 S.E.2d 564 (2005).

**Offense of murder may be committed when there is no actual intent to kill.** *Keye v. State*, 136 Ga. App. 707, 222 S.E.2d 172 (1975).

**Strict criminal liability.** — In a pros-

**General Consideration (Cont'd)**

ecution for driving an unsafe motor vehicle with defective equipment, the defense of accident did not apply. The fact that there was no criminal scheme, undertaking, or criminal negligence was not a defense to a strict liability criminal statute. *Coates v. State*, 216 Ga. App. 93, 453 S.E.2d 35 (1994).

After the defendant was charged with disobeying a traffic control device, rejection of an instruction under O.C.G.A. § 16-2-2 was proper because the charge was a strict liability offense. *Arnold v. State*, 228 Ga. App. 470, 491 S.E.2d 819 (1997).

**Accidental death not attributable to conduct of defendant.** — Homicide by accident as defined in former Code 1933, § 26-602 does not include death from accidental means not attributable to any conduct, culpable or otherwise, on part of defendant. *Johnson v. State*, 239 Ga. 324, 236 S.E.2d 661 (1977).

Defendant's testimony suggesting that the victim died from a drug overdose and denying that defendant took any action to cause the victim's death by manual strangulation did not involve homicide by accident, but only death from accidental means not attributable to any conduct on the part of defendant; thus, this testimony did not raise the issue of accident or misfortune, but related solely to causation, and defendant was not entitled to a charge on the law of accident. *Wilson v. State*, 279 Ga. 104, 610 S.E.2d 66 (2005).

**Decision to pursue accident defense not ineffective assistance.** — Defense counsel's decision to pursue an accident defense was an informed strategic choice and was not ineffective assistance of counsel as the decision was not due to a misunderstanding of the law or the facts of the case; rather, counsel consulted with the defendant and learned that the defendant contended that the gun accidentally discharged. There was no evidence that the defendant pointed the gun at the victim before the shooting occurred and there was no dispute as to how the fatal injury was inflicted. *Mayberry v. State*, 281 Ga. 144, 635 S.E.2d 736 (2006).

**Consideration of section in connection with involuntary manslaughter**

**section.** — When the court attempts to apply involuntary manslaughter section, the court must consider in connection therewith former Code 1933, § 26-404 (see O.C.G.A. § 16-2-2), the ordinary care sections, former Code 1933, §§ 105-201 and 105-401 (see O.C.G.A. §§ 51-1-2 and 51-3-1), together with the section which specifies indispensable ingredients of crime. *Geele v. State*, 203 Ga. 369, 47 S.E.2d 283 (1948).

**Failure to charge accident in child molestation trial.** — When there was evidence that defendant may have unintentionally touched the victim while sleeping in the same bed with the victim, and the record reflected that the accident was the entire thrust of defendant's defense, the trial court was required to give appropriate instructions on this principle to call the defense to the jury's attention. *Metts v. State*, 210 Ga. App. 197, 435 S.E.2d 525 (1993).

In a child molestation case, the defendant was not entitled to an accident defense jury instruction under O.C.G.A. § 16-2-2; the defense relied upon by the defendant at trial was not that the illegal conduct occurred by accident but that the illegal conduct never happened at all. *Haynes v. State*, 281 Ga. App. 81, 635 S.E.2d 370 (2006).

**DUI offense.** — Trial court erred in the court's charge to the jury because the charge had the effect of eliminating the jury's consideration of the defendant's defense that the defendant was not driving or in actual physical control of the car. Defendant claimed that the car's movement was "an accident" caused by the defendant's falling headfirst onto the floorboard. *Virgil v. State*, 227 Ga. App. 96, 488 S.E.2d 694 (1997).

Driving under the influence and failure to maintain lane convictions were affirmed because defendant was not entitled to a jury charge on the law of accident as the charges related not to the accident but to defendant's condition while driving. Moreover, the defendant did not admit to driving under the influence or failure to maintain a lane, and, as a result, defendant had no right to a charge of accident with regard to these crimes. *Stefanell v. State*, 263 Ga. App. 412, 587 S.E.2d 868 (2003).

In a prosecution for driving under the influence and making an improper lane change, because the defendant did not request instructions on accident and justification, the trial court did not err in failing to give them; moreover, because the jury was charged on involuntary intoxication, the failure to charge on accident was not harmful as a matter of law. *Walker v. State*, 280 Ga. App. 393, 634 S.E.2d 177 (2006).

**Relevant evidence to defendant's defense of accident.** — In connection with defendant's conviction for reckless driving, causing serious bodily injury due to reckless driving, and other crimes, the trial court abused the court's discretion in granting the state's motion in limine to exclude defendant's evidence of the design of the intersection as such evidence was relevant to defendant's defense of accident. *Dunagan v. State*, 283 Ga. 501, 661 S.E.2d 525 (2008).

**Malfunction of light showing green lights in both directions is not accident defense.** — When the case arose from an intersection collision between a car which the defendant drove and another car, because the trial court correctly and repeatedly charged that the defendant could be convicted only if the state proved beyond a reasonable doubt that the stop light facing the defendant was red, any defense based upon the light being green when the defendant went through it was not an accident defense; logically, one cannot be convicted of running a red light if the light was, in fact, green; accordingly, the defendant's contention that there was a malfunction of the light showing green lights in both directions did not give rise to the defense of accident. *Hoffer v. State*, 192 Ga. App. 378, 384 S.E.2d 902, cert. denied, 192 Ga. App. 902, 385 S.E.2d 307 (1989).

**Charge on homicide by accident does not conflict with charge on law of reasonable doubt.** *Jones v. State*, 140 Ga. 478, 79 S.E. 114 (1913).

**Charging O.C.G.A. § 16-2-2 does not cure omission to charge law of voluntary manslaughter.** — Instruction charging this section does not cure failure to charge law of manslaughter when required. *Freeman v. State*, 158 Ga. 369, 123 S.E. 126 (1924).

Instruction which embraces law embodied in this section does not cure omission of court to charge law of involuntary manslaughter, when latter grade of homicide is involved in case. *Jackson v. State*, 43 Ga. App. 468, 159 S.E. 293 (1931).

**Charge on accident using words "any neglect" rather than "culpable neglect" is error.** — Charge that "No one can be convicted for an accident unmixed with any neglect" was error in that court used words "any neglect" instead of words "culpable neglect," and "any neglect" is patently a broader expression than "culpable neglect." *Dunahoo v. State*, 46 Ga. App. 310, 167 S.E. 614 (1933).

**When essential elements of crime are charged, statute need not be charged absent request.** — Charge of O.C.G.A. § 16-2-2 is not required in absence of timely written request when the court charges on essential elements of the crime with which the defendant is charged, including necessity of intent, with which the crime is committed. *Whigham v. State*, 131 Ga. App. 261, 205 S.E.2d 467 (1974), overruled on other grounds, *Harris v. State*, 145 Ga. App. 675, 244 S.E.2d 620 (1978); *Henderson v. State*, 141 Ga. App. 430, 233 S.E.2d 505 (1977).

**Charge not required where defendant did nothing by accident or mistake.** — Although there may be evidence that the defendant's sister accidentally left the diazepam in defendant's possession, where there is nothing to indicate that the defendant personally did anything by accident or mistake, a charge on accident or misfortune is not required, particularly in the absence of a request for one. *Sampson v. State*, 165 Ga. App. 833, 303 S.E.2d 77 (1983).

Although defendant may not have initially acted aggressively toward the victim, by defendant's own admission the victim was attempting to run from defendant at the time defendant intentionally struck the victim again with a gun and the gun discharged. Thus, notwithstanding defendant's contention that accident constituted defendant's sole defense, the trial court was not required to give a charge thereon since it was not authorized by the evidence. *Gaston v. State*, 209 Ga. App. 477, 433 S.E.2d 306 (1993).

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Trial court was not obligated to instruct the jury as to an accident defense since the defendant tried to remain locked in defendant's prison cell and injured a corrections officer when the officer tried to get defendant out of the cell after the officer threatened to place the defendant in a padded cell if the defendant did not quit yelling. *Grant v. State*, 257 Ga. App. 678, 572 S.E.2d 38 (2002).

**Harmless error found.** — Any error in the failure to charge accident in a situation in which the gun going off and hitting the first officer as well as the police vehicle could be deemed an "accident" if defendant did not intend those results was harmless as the first officer was not shot and defendant was acquitted of the charges related to the shooting of the second officer and the police vehicle. *Mills v. State*, 273 Ga. App. 699, 615 S.E.2d 824 (2005).

**Charge not required where participation in crime denied.** — Defendant's denial of participation in any manner in the crime, accidentally, mistakenly, or otherwise was inconsistent with the defendant's request to charge that one is not guilty of a crime if the act is committed by misfortune or accident. *Gann v. State*, 190 Ga. App. 82, 378 S.E.2d 369 (1989).

With regard to a defendant's convictions for felony murder, with the underlying felony being rape, among other crimes, the trial court did not err by refusing the defendant's request to instruct the jury that the defendant could not be found guilty if the victim's death was the result of an accident as such a defense was not available to the defendant since the defendant did not admit to the victim's killing but, instead, denied any involvement in the victim's death. *Mangrum v. State*, 285 Ga. 676, 681 S.E.2d 130 (2009).

Trial court did not err by refusing to give the defendant's requested charge on misfortune or accident because the defendant, who was charged with driving under the influence, reckless driving, and failure to maintain lane, was not entitled to a charge that the accident was unavoidable; because the defendant did not admit to committing any act that constituted the

offenses with which the defendant was charged, the defendant was not entitled to an instruction on accident. *Davis v. State*, 301 Ga. App. 484, 687 S.E.2d 854 (2009), cert. dismissed, No. S10C0633, 2010 Ga. LEXIS 339 (Ga. 2010).

**Collision during police chase not accident.** — In a prosecution for reckless conduct and battery arising from collisions occurring during a police chase, defendant was not entitled to a charge based on the defense that the collisions were accidents. *Helton v. State*, 216 Ga. App. 748, 455 S.E.2d 848 (1995).

**Court must charge jury on accident where issue raised by defendant's testimony.** — When the defendant's testimony is sufficient to raise a jury question as to whether physical encounter is an accident or an aggravated assault with a deadly weapon, it is harmful error for the court to fail to give any charge to the jury on an accident. *Dotson v. State*, 144 Ga. App. 113, 240 S.E.2d 238 (1977).

Failure to charge O.C.G.A. § 16-2-2 as a defense when such defense was supported by evidence and defendant's counsel had made a timely written request for the instruction was reversible error. *Taylor v. State*, 164 Ga. App. 660, 297 S.E.2d 755 (1982).

In a prosecution for vehicular homicide, where there was overwhelming evidence that the foggy weather conditions made it impossible or almost impossible for defendant to see a stop sign defendant ran at the time defendant struck the deceased's vehicle, the defendant was entitled to an instruction on accident. *Morris v. State*, 210 Ga. App. 617, 436 S.E.2d 785 (1993).

**When accident is a main theory of defense, law relative thereto must be charged.** — When misadventure and accident was one of the main theories of the defense, and was involved by the evidence, it was error to omit to charge the law relative thereto, with or without a request. *Patterson v. State*, 181 Ga. 698, 184 S.E. 309 (1936).

**Charge required when sole defense is accident.** — Even without request, when the defendant's sole defense is accident, the trial court must give appropriate instructions on this principle to call the defense to the jury's attention, and enable

the jury to intelligently consider it. *Metts v. State*, 210 Ga. App. 197, 435 S.E.2d 525 (1993).

**Evidence of criminal design.** — Homicide by misadventure, where the law absolves the slayer and holds the slayer guiltless of the crime, must not only exclude any evil design or intention on the slayer's part, but must also show an absence of culpable neglect, whether the evidence adduced to show an accidental killing may warrant an instruction upon manslaughter is a different question. *Allen v. State*, 134 Ga. 380, 67 S.E. 1038 (1910).

**Evidence insufficient to establish accident.** — Sufficient evidence negated the defense of accident, O.C.G.A. § 16-2-2, where the victim who was shot by defendant while hunting waved to signal defendant before the gun was fired and where defendant was hunting while on medication that could have caused mental and physical impairment; the jury also could have considered defendant's actions after the shooting in removing the victim's orange vest, hiding two guns, failing to aid the victim, and failing to alert paramedics of the victim's location. *Wilson v. State*, 279 Ga. App. 136, 630 S.E.2d 640 (2006).

**Failure to charge the jury on the affirmative defense of accident** was reversible error, where defendant's testimony was sufficient to raise a jury question as to whether any obstruction by defendant of a sheriff and sheriff's men was deliberate or accidental, i.e., caused by defendant's misfortune in being stricken ill while being confronted by the sheriff. *Sapp v. State*, 179 Ga. App. 614, 347 S.E.2d 354 (1986).

Trial court did not commit error by not charging the jury on accident and misfortune, as defendant did not submit a written request to charge on accident and misfortune and absent a written request it is not error for the trial court to fail to give an instruction. *Colbert v. State*, 263 Ga. App. 193, 587 S.E.2d 300 (2003).

Defendant's convictions for voluntary manslaughter, aggravated assault, and possession of a knife during the commission of a felony were reversed because the trial court erred in failing to charge the

jury on the defense of accident as requested when that defense was raised by the evidence, and the Court of Appeals could not find that it was highly probable that the failure to give the requested charge did not contribute to the verdict; at least slight evidence supported the theory that the defendant armed oneself with a knife in order to fend off the victim's attack with a pipe wrench and that although the defendant was prepared to intentionally stab the victim in self-defense, the defendant did not do so, but the victim lunged at the defendant and was impaled on the knife. *Hill v. State*, 300 Ga. App. 210, 684 S.E.2d 356 (2009).

Trial court did not err in rejecting the defendant's request to instruct the jury on the affirmative defense of accident, O.C.G.A. § 16-2-2, since although the defendant said that the defendant did not fire a gun intentionally, the defendant also testified that the defendant climbed into bed with the victim holding a loaded handgun with the defendant's finger on the trigger because the defendant wanted the victim to understand the seriousness of the defendant's concerns about infidelity; while the defendant initially denied pointing the gun at the victim and said the defendant kept the gun by the defendant's side, the defendant later admitted that the defendant did point the gun at the victim's head and that the gun went off when the victim smacked the gun away, and misuse of a firearm in the manner described by the defendant showed a degree of culpability that constituted criminal negligence. *Mills v. State*, 287 Ga. 828, 700 S.E.2d 544 (2010).

**Charge on accident held proper.** — There was no reason to reverse the defendant's convictions because the trial court properly instructed the jury on the defense of accident, and as such: (1) followed the language of O.C.G.A. § 16-2-2; (2) tracked the Suggested Pattern Jury Instructions; and (3) did not diminish the state's burden of proving all elements of the crimes charged beyond a reasonable doubt. *Watkins v. State*, 290 Ga. App. 41, 658 S.E.2d 812 (2008).

In a defendant's homicide prosecution, the trial court did not err in failing to give

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the complete charge on accident requested by the defendant as the court instructed the jury on accident as defined under O.C.G.A. § 16-2-2. *Hamilton v. State*, 297 Ga. App. 47, 676 S.E.2d 773 (2009).

**Cited** in *Coggins v. State*, 227 Ga. 426, 181 S.E.2d 47 (1971); *Teasley v. State*, 228 Ga. 107, 184 S.E.2d 179 (1971); *Towns v. State*, 127 Ga. App. 751, 195 S.E.2d 235 (1972); *Spencer v. State*, 231 Ga. 705, 203 S.E.2d 856 (1974); *Ford v. State*, 232 Ga. 511, 207 S.E.2d 494 (1974); *Beckman v. State*, 134 Ga. App. 118, 213 S.E.2d 527 (1975); *D.C.A. v. State*, 135 Ga. App. 234, 217 S.E.2d 470 (1975); *Davis v. State*, 138 Ga. App. 317, 226 S.E.2d 101 (1976); *Smith v. State*, 238 Ga. 146, 231 S.E.2d 757 (1977); *Harris v. State*, 145 Ga. App. 675, 244 S.E.2d 620 (1978); *Kimbrell v. State*, 148 Ga. App. 302, 250 S.E.2d 883 (1978); *Smith v. State*, 148 Ga. App. 634, 252 S.E.2d 62 (1979); *Boling v. State*, 244 Ga. 825, 262 S.E.2d 123 (1979); *Johnson v. State*, 151 Ga. App. 887, 262 S.E.2d 201 (1979); *Davis v. State*, 153 Ga. App. 847, 267 S.E.2d 263 (1980); *Phillips v. State*, 247 Ga. 13, 273 S.E.2d 606 (1981); *Taylor v. State*, 157 Ga. App. 212, 276 S.E.2d 691 (1981); *Holt v. State*, 247 Ga. 648, 278 S.E.2d 390 (1981); *Pennamon v. State*, 248 Ga. 611, 284 S.E.2d 403 (1981); *Jones v. State*, 161 Ga. App. 610, 288 S.E.2d 788 (1982); *Mansfield v. State*, 161 Ga. App. 875, 289 S.E.2d 814 (1982); *Williams v. State*, 249 Ga. 822, 295 S.E.2d 293 (1982); *Stovall v. State*, 169 Ga. App. 691, 314 S.E.2d 707 (1984); *Kennedy v. State*, 172 Ga. App. 336, 323 S.E.2d 169 (1984); *Stewart v. State*, 254 Ga. 233, 326 S.E.2d 763 (1985); *Miller v. State*, 174 Ga. App. 703, 331 S.E.2d 616 (1985); *Laymac v. State*, 181 Ga. App. 737, 353 S.E.2d 559 (1987); *Flanders v. State*, 188 Ga. App. 98, 371 S.E.2d 918 (1988); *Fowler v. State*, 188 Ga. App. 873, 374 S.E.2d 805 (1988); *Stewart v. State*, 261 Ga. 654, 409 S.E.2d 663 (1991); *Polley v. State*, 203 Ga. App. 825, 418 S.E.2d 107 (1992); *Kirkland v. State*, 206 Ga. App. 27, 424 S.E.2d 638 (1992); *Moore v. State*, 220 Ga. App. 434, 469 S.E.2d 211 (1996); *Johnson v. State*, 223 Ga. App. 294, 477 S.E.2d 439 (1996); *Smith v. State*, 237 Ga. App. 852, 521

S.E.2d 7 (1999); *Bolick v. State*, 244 Ga. App. 567, 536 S.E.2d 242 (2000); *Sledge v. State*, 245 Ga. App. 488, 537 S.E.2d 753 (2000); *Atkins v. State*, 274 Ga. 103, 549 S.E.2d 356 (2001); *Dukes v. State*, 285 Ga. App. 172, 645 S.E.2d 664 (2007).

**Self-Defense**

**Statute is inapplicable to a homicide committed in self-defense.** *Curry v. State*, 148 Ga. 559, 97 S.E. 529 (1918) (see O.C.G.A. § 16-2-2).

**Self-defense not shown.** — When person, acting in self-defense, intentionally shoots at another, defense of accidental killing is not involved. *Dobbs v. State*, 132 Ga. App. 368, 208 S.E.2d 178 (1974).

**When one claims to be acting in self-defense**, defense of accidental killing is not involved. *Todd v. State*, 149 Ga. App. 574, 254 S.E.2d 894 (1979).

Defendant's testimony that defendant fired a weapon to defend self from codefendant and to scare the codefendant off did not invoke the legal defense of accident. *Berry v. State*, 267 Ga. 476, 480 S.E.2d 32 (1997).

**Lack of intent to kill.** — Voluntary manslaughter conviction upheld after evidence failed to show accident, despite claims that defendant lacked the intent to kill; defendant's act of choking the victim and not letting go, even though defendant had the chance to do so, placed the victim in a reasonable apprehension of bodily harm. *Blackford v. State*, 251 Ga. App. 324, 554 S.E.2d 290 (2001).

**No error in failing to instruct on self-defense.** — Trial court did not err in failing to instruct the jury on the affirmative defense of accident because there was no evidence to support the conclusion that defendant's act of striking the victim was an accident; rather, defendant testified that defendant struck the victim in self-defense. As the jury believed defendant to be guilty of malice murder, it could not have believed the victim's death to be the result of an act committed in the absence of criminal intent. *Hannah v. State*, 278 Ga. 195, 599 S.E.2d 177 (2004).

**Defenses of self-defense and accident inconsistent.** — Defenses of self-defense and justification do not deny the intent to inflict injury, but claim au-

thority for the act under the legal excuse of reasonable fear of immediate serious harm to oneself or another. Since an accident defense involves the lack of intent to do the act at all, the two defenses are inconsistent. *Fields v. State*, 167 Ga. App. 816, 307 S.E.2d 712 (1983).

Defenses of self-defense and accident are inconsistent. *Wilkerston v. State*, 183 Ga. App. 26, 357 S.E.2d 814 (1987).

Trial court correctly ruled that defendant's requested charge setting forth the affirmative defense of accident was inconsistent with defendant's claim that defendant stabbed the victim in self-defense. *Ray v. State*, 191 Ga. App. 881, 383 S.E.2d 364 (1989).

**Instructions on accident and justification authorized.** — When there is evidence of both justification and accident, and timely requests for instructions on both topics have been made, the trial court should instruct the jury as to both. *Koritta v. State*, 263 Ga. 703, 438 S.E.2d 68 (1994).

**Instruction on self-defense and accident authorized.** — In a murder case, the trial court did not err in charging the jury on both self-defense and accident because the evidence supported both charges. The defendant testified that the victim was threatening the defendant and that the defendant used a knife to force the victim to get back; the defendant also testified that the defendant did not mean to stab the victim and that the defendant did not understand how the knife became lodged in the victim's chest. *Hudson v. State*, 284 Ga. 595, 669 S.E.2d 94 (2008).

### Culpable Neglect or Unlawful Act

**Criminal negligence defined.** — Criminal negligence means not merely such negligence as might be foundation of damage suit, but reckless and wanton negligence and of such character as to show utter disregard for safety of others who might reasonably be expected to be injured thereby. *Keye v. State*, 136 Ga. App. 707, 222 S.E.2d 172 (1975).

**When homicide results from culpable neglect or unlawful act,** defense of accident is not involved. *Keye v. State*, 136 Ga. App. 707, 222 S.E.2d 172 (1975).

**Charge on accident not authorized when act was criminally negligent.** — When the defendant's act of shooting close to the victim in order to scare the victim was criminally negligent, a charge on accident was not authorized. *Moody v. State*, 244 Ga. 247, 260 S.E.2d 11 (1979).

Cocking and aiming a gun, which tends to fire at the slightest touch, at someone's face is an act in utter disregard for the safety of that person and constitutes criminal negligence. Therefore, the defense of accident is inapplicable. *New v. State*, 260 Ga. 441, 396 S.E.2d 486 (1990); *Campbell v. State*, 263 Ga. 824, 440 S.E.2d 5 (1994).

When the defendant hit patrol cars while making a U-turn and appeared to be in full control of the vehicle just prior to impact and when there was no evidence authorizing a finding that the collisions occurred absent criminal negligence, the court's refusal to give an instruction on accident was proper. *Black v. State*, 222 Ga. App. 80, 473 S.E.2d 186 (1996).

Defendant approached the victim's car with a pistol, demanded money, and reached inside and shot the victim when the victim attempted to drive away. Even if the defendant did not intentionally fire the pistol, defendant's acts constituted criminal negligence rendering the defense of accident inapplicable. *Griffeth v. State*, 224 Ga. App. 462, 480 S.E.2d 889 (1997).

An instruction on the law of accident is not warranted when a knife is used to place someone in reasonable apprehension of bodily injury and the victim is unintentionally injured with the knife, since the intentional use of the knife constituted, at the least, criminal negligence. *Davis v. State*, 269 Ga. 276, 496 S.E.2d 699 (1998).

After the defendant admitted in open court that the defendant armed with a revolver which was loaded because the defendant thought the defendant's significant other would see the gun and leave, and did not testify to believing to be in imminent danger of death or serious bodily injury, defendant showed utter disregard for the victim's safety as well as criminal negligence which precluded a charge to the jury on accident. *Johnson v. State*, 236 Ga. App. 61, 510 S.E.2d 918 (1999), overruled on other grounds by

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Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007).

Defendant was not entitled to a charge on accident because even if the defendant did not intentionally fire a shotgun, which injured the victim, the defendant's admitted acts in threatening the victim and another person and pointing a shotgun at the victim constituted criminal negligence. Arnold v. State, 303 Ga. App. 825, 695 S.E.2d 299 (2010).

**Homicide occurring during aggravated assault not accident.** — Evidence that defendant had cocked a gun and pointed it at her husband's head in order to scare him, and that the gun discharged when the victim struck it with his arm, was sufficient to authorize a conviction for felony-murder and the defense of "accident" was inapplicable. Stiles v. State, 264 Ga. App. 446, 448 S.E.2d 172 (1994).

**Theory of accident not supported.** — Evidence presented at trial did not support a theory of accident since the defendant pulled the hammer back on the pistol and pointed the pistol at the rape victim in order to get the victim to stop screaming, and in so doing the pistol discharged and the victim died. Brooks v. State, 262 Ga. 187, 415 S.E.2d 903 (1992).

In a prosecution for cruelty to children, where defendant's defense as to some of the injuries was that the child fell off a bunk bed, and where defendant had no knowledge of the origin of other injuries, the trial court did not err in failing to give a charge on the law of accident. Mansfield v. State, 214 Ga. App. 520, 448 S.E.2d 490 (1994).

**Failure to charge misfortune or accident is not error when crime resulted from unlawful act.** Herrington v. State, 31 Ga. App. 167, 120 S.E. 554 (1923).

**Homicide occurring by discharge of gun held by accused during attempted robbery.** — When it is shown by the evidence, and admitted in the defendant's statement, that the homicide occurred by the discharge of a gun held by the accused and used in an attempt to rob the deceased, even if the discharge of the

gun was unintentional, the offense is murder; and in no view of such facts does it involve homicide by accident, or involuntary manslaughter. Accordingly, the court properly declined to give the requested charges on accidental homicide and involuntary manslaughter. Ford v. State, 202 Ga. 599, 44 S.E.2d 263 (1947).

**Charge of aggravated assault for deliberately firing gun in direction of person.** — Deliberately firing gun in direction of human being in order to distract that person raises no issue of accident or misfortune when charge is aggravated assault. DeBerry v. State, 241 Ga. 204, 243 S.E.2d 864 (1978).

**Swinging knife blade among group of persons as criminal negligence.** — Fact that criminal scheme or undertaking, or intention may not have been directed toward decedent, would not absolve defendant of consequences of act, inasmuch as act of swinging knife blade among a group of persons in close proximity can be found to be criminal negligence or culpable neglect, especially where defendant had opportunity to leave scene and avoid further confrontation, but chose not to do so. Keye v. State, 136 Ga. App. 707, 222 S.E.2d 172 (1975).

**In prosecution for manslaughter resulting from battery, evidence of deceased's fall related to causation, not accident.** — When evidence adduced at trial of defendant charged with manslaughter resulting from battery to deceased showed that victim, prior to demise, fell down several steps, and further, that such fall could possibly result in a ruptured spleen and eventually, death, this evidence did not raise issue of accident or misfortune within meaning of statute; rather, it related solely to issue of causation. Newsome v. State, 149 Ga. App. 415, 254 S.E.2d 381 (1979).

**Evidence did not raise issue of accident or misfortune.** — See Mills v. State, 187 Ga. App. 79, 369 S.E.2d 283 (1988).

Evidence that defendant drove tractor-trailer truck at a high rate of speed through an area that had signs and indications that slow-moving traffic was nearby was sufficient to show that the victim's death, which resulted from defen-

dant's truck slamming into the back of the vehicle that the victim was in, was caused by culpable neglect or an unlawful act and was not the result of mere misfortune. *Wilkes v. State*, 254 Ga. App. 447, 562 S.E.2d 519 (2002).

**Failure to charge section not reversible error.** — Charge of accident or misfortune in the case of a defendant who voluntarily consumed alcohol after defendant may have accidentally inhaled alcohol fumes from paint was perhaps authorized since defendant was charged with driving under the influence of alcohol, but failure to give the charge was not reversible error. *Taylor v. State*, 190 Ga. App. 79, 378 S.E.2d 335, cert. denied, 190 Ga. App. 899, 378 S.E.2d 335 (1989).

**Instruction properly refused.** — Trial court properly refused to give a requested jury instruction on the defense of accident or misfortune, where defendant's own testimony showed that defendant was engaged in an attempt to commit an aggravated assault upon the victim when the pistol discharged and the victim was struck by a bullet. *Grude v. State*, 189 Ga. App. 901, 377 S.E.2d 731 (1989).

During a fight, the victim was burned when the defendant applied a hot iron to her neck and shoulder area, and the defendant denied knowing that the iron was hot, the trial court did not err in refusing to give as a jury instruction the defendant's incomplete statement of the law set forth in O.C.G.A. § 16-2-2. *Collier v. State*, 195 Ga. App. 380, 393 S.E.2d 509 (1990).

In a prosecution for aggravated assault with a deadly weapon, defendant was not entitled to an instruction on accident where defendant obtained a gun with intent to use it for intimidation, bravado or protection; if defendant used the gun for intimidation or bravado, the shooting was not an accident since defendant had the opportunity to leave the scene; if defendant shot the victim in self-defense, defendant was not entitled to the instruction because the defenses of self-defense and accident are inconsistent. *Sumner v. State*, 210 Ga. App. 856, 437 S.E.2d 855 (1993).

Because the defendant was charged with trafficking in methamphetamine in

violation of O.C.G.A. § 16-13-31(e), the claim that defendant thought that the defendant was delivering marijuana to an informant's girlfriend rather than methamphetamine, based on prior marijuana deliveries made by the defendant for a drug dealer, did not warrant a jury instruction on accident pursuant to O.C.G.A. § 16-2-2; the accident defense was unavailable to the defendant, who still thought that the defendant was committing a criminal act. *Dimas v. State*, 276 Ga. App. 245, 622 S.E.2d 914 (2005).

In a defendant's trial for reckless driving and driving under the influence of alcohol to the extent that it was less safe to drive, arising out of an incident in which the defendant's car spun out of control and struck another car, the trial court did not err in refusing to give a jury instruction on the defense of accident under O.C.G.A. § 16-2-2; the defendant was not entitled to a jury instruction on that affirmative defense because the defendant did not admit to driving recklessly or under the influence of alcohol to the extent that it was less safe to drive. *Rutland v. State*, 282 Ga. App. 728, 639 S.E.2d 628 (2006).

**Charge not authorized when defendant deliberately fired through window.** — When in a murder trial the defendant testified to deliberately firing through a glass window pane at a large figure, a charge on accident was not authorized. *Duke v. State*, 256 Ga. 671, 352 S.E.2d 561 (1987).

**Charges on accident and criminal negligence proper.** — Trial court did not err in charging the jury on the definition of criminal negligence in addition to including the bracketed "criminal negligence" language in the pattern instruction on accident as the jury was not confused by the charge and was not led to believe that it could substitute criminal negligence for malice; the trial court gave a complete charge on criminal intent and properly charged the jury on murder and malice. *Yeager v. State*, 281 Ga. 1, 635 S.E.2d 704 (2006).

**Jury authorized to convict defendant.** — Evidence supported a defendant's conviction for involuntary manslaughter as there was ample evidence

**Culpable Neglect or Unlawful Act (Cont'd)**

that the state disproved the defendant's accident defense since: (1) the defendant was hurt by the fact that the defendant's significant other had begun a relationship with the victim; (2) the defendant threatened to blow the victim's and the significant other's heads off a few weeks before the shooting; (3) defendant testified that the victim was standing in the defendant's way, that the defendant was searching for

a cell phone, and that the defendant pulled out several items, including a gun; (4) a door hit the defendant in the back, causing the gun to discharge into the victim's chest; (5) the defendant testified that the defendant was careless with the gun; and (6) a detective testified that after the detective Mirandized the defendant, the defendant stated that "(the defendant) put a shell in every chamber" and that "(the defendant) fired every shell, every round." *Noble v. State*, 282 Ga. App. 311, 638 S.E.2d 444 (2006).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 4.

**ALR.** — Criminal responsibility of druggist for death or injury in consequence of mistake, 55 ALR2d 714.

Homicide predicated on improper treatment of disease or injury, 45 ALR3d 114.

Homicide: burden of proof on defense that killing was accidental, 63 ALR3d 936.

### 16-2-3. Presumption of sound mind and discretion.

Every person is presumed to be of sound mind and discretion but the presumption may be rebutted. (Code 1933, § 26-606, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For article discussing the theory of insanity in criminal law, see 15 Mercer L. Rev. 399 (1964).

#### JUDICIAL DECISIONS

**Mental abnormality, unless it amounts to insanity, is not a defense to a crime.** *Hudson v. State*, 171 Ga. App. 181, 319 S.E.2d 28 (1984).

**Absent prior adjudication of insanity, presumption existing at time of trial is of sanity.** *Howard v. State*, 150 Ga. App. 356, 258 S.E.2d 39 (1979).

**Presumption of sanity returns upon discharge.** — Presumption of sanity prevails after release of accused previously committed to mental institution. *Jackson v. State*, 149 Ga. App. 253, 253 S.E.2d 874 (1979).

Although person may have been previously committed, presumption of sanity returns when person is discharged from institutional confinement. *Fulghum v. State*, 246 Ga. 184, 269 S.E.2d 455 (1980).

Even when an accused has initially

been found incompetent to stand trial, upon the accused being administratively released for trial, the rebuttable presumption of sanity applies. *Johncox v. State*, 189 Ga. App. 188, 375 S.E.2d 139 (1988).

**Defendant has burden**, once criminal intent has been shown, of illustrating defendant's insanity before state is required to rebut that showing beyond a reasonable doubt. *Moses v. State*, 245 Ga. 180, 263 S.E.2d 916, cert. denied, 449 U.S. 849, 101 S. Ct. 138, 66 L. Ed. 2d 60 (1980), overruled on other grounds, *Nagel v. State*, 262 Ga. 888, 427 S.E.2d 490 (1993).

**No evidence of incompetency.** — Children's challenges to changes in life insurance beneficiaries made by their parent just before the parent's death on mental competency grounds failed, as the children did not present sufficient evidence to

create a question of fact as to the decedent's mental competency at the time the parent executed the change of beneficiary forms; the children pointed the court to no evidence that they were present at the time the changes were made nor that they specifically observed the decedent's in an altered or confused state at or near the time the forms were executed. *State Farm Life Ins. Co. v. Carlyle*, No. 1:05-cv-1106-GET, 2006 U.S. Dist. LEXIS 64963 (N.D. Ga. Sept. 12, 2006).

**Burden is on defendant to prove insanity by preponderance of evidence.** — To overcome presumption of sanity, a defendant must show by a preponderance of the evidence that defendant was not criminally responsible at the time of commission of act. *Longshore v. State*, 242 Ga. 689, 251 S.E.2d 280 (1978).

When defendant in criminal case files general plea of insanity, i.e., argues that one is not guilty of crime by reason of being insane at time of the crime's commission, burden is on defendant to establish by a preponderance of the evidence that the defendant was insane. *Clark v. State*, 245 Ga. 629, 266 S.E.2d 466 (1980).

Insanity is an affirmative defense which the defendant must prove by a preponderance of the evidence. *Strozier v. State*, 254 Ga. 712, 334 S.E.2d 181 (1985); *Harris v. State*, 256 Ga. 350, 349 S.E.2d 374 (1986).

**Pretrial notice requirement has no effect on burden of proof.** — Procedural requirement of pretrial notice to the state of a defense which would generally require expert opinion to rebut has no effect on the burden of proof. The state must still prove criminal intent, but the notice does not add a new burden, that the state must prove sanity without the aid of the "presumption" of sanity in the state's case-in-chief. The state is merely entitled to prior notice that the state will have to present evidence in rebuttal to overcome the defendant's evidence of insanity. *Johncox v. State*, 189 Ga. App. 188, 375 S.E.2d 139 (1988).

**Presentation of evidence of insanity** does not automatically dissipate presumption of sanity which exists by law. *Jackson v. State*, 149 Ga. App. 253, 253 S.E.2d 874 (1979); *Moses v. State*, 245 Ga. 180, 263 S.E.2d 916, cert. denied, 449 U.S.

849, 101 S. Ct. 138, 66 L. Ed. 2d 60 (1980), overruled on other grounds, *Nagel v. State*, 262 Ga. 888, 427 S.E.2d 490 (1993); *Fulghum v. State*, 246 Ga. 184, 269 S.E.2d 455 (1980); *Dennis v. State*, 170 Ga. App. 630, 317 S.E.2d 874 (1984); *Loumakis v. State*, 179 Ga. App. 294, 346 S.E.2d 373 (1986).

Jurors are not bound by the opinions of expert witnesses regarding a defendant's sanity; instead, they may rely on the presumption of sanity in O.C.G.A. § 16-2-3 unless the proof of insanity is overwhelming. *Vanderpool v. State*, 244 Ga. App. 804, 536 S.E.2d 821 (2000), cert denied, 532 U.S. 996, 121 S. Ct. 1658, 149 L. Ed. 2d 640 (2001).

**Overwhelming proof of insanity.** — When the proof of insanity is overwhelming, juries may no longer rely solely on the presumption of sanity. *Stevens v. State*, 256 Ga. 440, 350 S.E.2d 21 (1986).

When proof of insanity is overwhelming, juries may not rely solely on the rebuttable presumption of sanity. It is a jury's function to determine the credibility of witnesses and the probative value of testimony, to weigh the evidence and not arbitrarily ignore it. Proof of insanity may be so clear and so overwhelming that a finding of sanity cannot be upheld. *Wilson v. State*, 257 Ga. 444, 359 S.E.2d 891 (1987).

**Evidence of insanity not overwhelming.** — Court was authorized to rely on the presumption of sanity in O.C.G.A. § 16-2-3 because the evidence of insanity was not overwhelming. *Stanley v. State*, 242 Ga. App. 597, 530 S.E.2d 506 (2000).

**Jury can view surrounding facts and circumstances** in making determination regarding appellant's sanity and in determining whether defendant could in fact distinguish right from wrong. *Moses v. State*, 245 Ga. 180, 263 S.E.2d 916, cert. denied, 449 U.S. 849, 101 S. Ct. 138, 66 L. Ed. 2d 60 (1980), overruled on other grounds, *Nagel v. State*, 262 Ga. 888, 427 S.E.2d 490 (1993).

**Rebutting presumption imposed by statute in civil matters.** — Plaintiffs' stated cognizable claims against a bishop arising out of a breach of fiduciary duty as evidence was presented that the bishop

abused the bishop's position of spiritual authority to coerce or seduce the married plaintiff female into consenting to a prolonged sexual relationship with the bishop. Plaintiffs also put forward evidence of the bishop's charismatic nature and the bishop's ability to control and coerce using the bishop's spiritual authority, all of which is evidence in rebuttal of the presumptions of "sound mind and discretion" relied upon by the trial court. *Brewer v. Paulk*, 296 Ga. App. 26, 673 S.E.2d 545 (2009).

**Sanity of defendant is presumed.** — Defendant's proffered testimony that defendant had a blackout during defendant's act of DUI was properly rejected. *Crossley v. State*, 261 Ga. App. 250, 582 S.E.2d 204 (2003).

**Instruction concerning presumption not unconstitutional.** — Trial court's charge to the jury that every person is presumed to be of sound mind and discretion, but that this presumption may be rebutted, was not unconstitutionally burden-shifting. *Thompson v. State*, 178 Ga. App. 723, 344 S.E.2d 696 (1986).

**Absent request, failure to charge burden of proof regarding sanity is not error.** — When charge of court includes instruction as to insanity but places burden of proof as to each essential element of crime, including intent, upon state beyond a reasonable doubt, it is not error for court not to instruct jury specifically, absent request, as to any burden of proof regarding sanity. *Howard v. State*, 150 Ga. App. 356, 258 S.E.2d 39 (1979).

**Charge on intent in murder trial** did not unconstitutionally shift the burden of proof. *Parker v. State*, 256 Ga. 363, 349 S.E.2d 379 (1986).

**Instruction reciting pattern charge upheld on appeal.** — Because the trial court's charge on presumption that "every person is presumed to be of sound mind and discretion, but the presumption may be rebutted" recited the pattern charge on presumption word for word, it was upheld on appeal. *May v. State*, 287 Ga. App. 407, 651 S.E.2d 510 (2007).

**"Guilty but mentally ill" and "not guilty by reason of insanity" distinguished.** — In a trial for murder of defendant's parents it was held that, construing

the evidence in a light most favorable to the guilty verdict, a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that defendant was insane at the time of the crime. This led to the conclusion that, also construing the evidence in a light most favorable to the verdict, a rational trier of fact could have found defendant guilty but mentally ill beyond a reasonable doubt. *Harris v. State*, 256 Ga. 350, 349 S.E.2d 374 (1986).

**Guilty, but mentally ill and not insane.** — Evidence of defendant's calm behavior after the crime, of the fact that defendant displayed no psychotic behavior, was not under medication during hospitalization after the crime, and that defendant denied hearing voices or having any special connection to God, supported the jury's decision that defendant was guilty but mentally ill, rather than insane at the time of the offense. *Barge v. State*, 256 Ga. App. 560, 568 S.E.2d 841 (2002).

**Evidence sufficient to support jury's finding defendant sane at time of crime.** — See *Murray v. State*, 253 Ga. 90, 317 S.E.2d 193 (1984).

Defendant failed to prove by a preponderance of the evidence that defendant was insane at the time of the crimes as the evidence showed that defendant wore a hat and gloves to the scene; defendant had change ready for the victim's use at pay telephones; defendant was aware of the time the victim arrived at work; and defendant even devised a plan to make the victim forget about the events that transpired; therefore, a rational trier of fact was authorized to rely on the presumption of defendant's sanity. *Guillen v. State*, 258 Ga. App. 465, 574 S.E.2d 598 (2002).

**Evidence insufficient for involuntary intoxication.** — Although the police officers who arrested a defendant provided some evidence that corroborated the defendant's affirmative defense of involuntary intoxication, testimony from the victim of a false imprisonment and aggravated assault that the victim had not injected the defendant with any drugs on the night of the assault was sufficient to support the jury's finding that the defendant was of sound mind and discretion when the defendant held the victim cap-

tive. *Stewart v. State*, 291 Ga. App. 846, 663 S.E.2d 278 (2008).

**Cited in** *Gilbert v. State*, 235 Ga. 501, 220 S.E.2d 262 (1975); *Thomas v. State*, 136 Ga. App. 165, 220 S.E.2d 736 (1975); *Durham v. State*, 239 Ga. 697, 238 S.E.2d 334 (1977); *Bowen v. State*, 241 Ga. 492, 246 S.E.2d 322 (1978); *C.H. v. State*, 148 Ga. App. 609, 252 S.E.2d 22 (1979); *Bowers v. State*, 153 Ga. App. 894, 267 S.E.2d 309 (1980); *Banks v. State*, 246 Ga. 178, 269 S.E.2d 450 (1980); *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980); *Slaughter v. State*, 162 Ga. App. 136, 290 S.E.2d 338 (1982); *Rauschenberg v. State*,

161 Ga. App. 331, 291 S.E.2d 58 (1982); *Brown v. State*, 250 Ga. 66, 295 S.E.2d 727 (1982); *Peek v. State*, 250 Ga. 50, 295 S.E.2d 834 (1982); *Dollar v. State*, 168 Ga. App. 726, 310 S.E.2d 236 (1983); *Davenport v. State*, 170 Ga. App. 667, 317 S.E.2d 895 (1984); *Adams v. State*, 254 Ga. 481, 330 S.E.2d 869 (1985); *Davis v. State*, 178 Ga. App. 357, 343 S.E.2d 140 (1986); *Nelson v. State Farm Life Ins. Co.*, 178 Ga. App. 670, 344 S.E.2d 492 (1986); *Jackson v. State*, 180 Ga. App. 774, 350 S.E.2d 484 (1986); *Heidler v. State*, 273 Ga. 54, 537 S.E.2d 44 (2000).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 66, 101, 114.

**Am. Jur. Proof of Facts.** — Defendant's Competency to Stand Trial, 40 POF2d 171.

**C.J.S.** — 22A C.J.S., Criminal Law, §§ 961, 962.

**ALR.** — Presumption of continuing insanity as applied to accused in criminal case, 27 ALR2d 121.

Counsel's right, in consulting with accused as client, to be accompanied by psychiatrist, psychologist, hypnotist, or similar practitioner, 72 ALR2d 1120.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 ALR3d 146.

## 16-2-4. Presumption that acts of sound person willful.

The acts of a person of sound mind and discretion are presumed to be the product of the person's will but the presumption may be rebutted. (Code 1933, § 26-603, enacted by Ga. L. 1968, p. 1249, § 1.)

## JUDICIAL DECISIONS

**Jury instruction quoting section held unconstitutional.** — Because a jury instruction which quoted O.C.G.A. § 16-2-4 in its entirety could have been understood by a reasonable juror as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent, and because the charge as a whole did not explain or cure the error, the jury charge violated the Due Process Clause requirement that the state prove every element of a criminal offense beyond a reasonable doubt. *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).

**It is not necessary that charge to**

**jury be in exact language of Code.** *Parks v. State*, 234 Ga. 579, 216 S.E.2d 804 (1975).

**Cited in** *Spencer v. State*, 231 Ga. 705, 203 S.E.2d 856 (1974); *Bentley v. State*, 131 Ga. App. 425, 205 S.E.2d 904 (1974); *Nunnally v. State*, 235 Ga. 693, 221 S.E.2d 547 (1975); *Bradley v. State*, 137 Ga. App. 670, 224 S.E.2d 778 (1976); *Gatlin v. State*, 236 Ga. 707, 225 S.E.2d 224 (1976); *Scott v. State*, 239 Ga. 46, 235 S.E.2d 522 (1977); *Lunsford v. State*, 145 Ga. App. 446, 243 S.E.2d 655 (1978); *Harris v. State*, 145 Ga. App. 675, 244 S.E.2d 620 (1978); *Tucker v. State*, 245 Ga. 68, 263 S.E.2d 109 (1980); *Moses v. State*, 245 Ga.

180, 263 S.E.2d 916 (1980); Thrift-Mart, Inc. v. Commercial Union Assurance Cos., 154 Ga. App. 344, 268 S.E.2d 397 (1980); Jackson v. State, 157 Ga. App. 580, 278

S.E.2d 152 (1981); Slaughter v. State, 162 Ga. App. 136, 290 S.E.2d 338 (1982); Whitsell v. State, 179 Ga. App. 358, 346 S.E.2d 130 (1986).

### RESEARCH REFERENCES

**ALR.** — Flight as evidence of guilt, 25 ALR 886.

Homicide: burden of proof on defense that killing was accidental, 63 ALR3d 936.

Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime, 1 ALR4th 481.

### 16-2-5. Presumption that sound person intends natural and probable consequences of acts.

A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. (Code 1933, § 26-604, enacted by Ga. L. 1968, p. 1249, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues involved, decisions under former Code 1933, § 26-202, as it read prior to revision of title by Ga. L. 1968, p. 1249, are included in the annotations for this Code section.

**Intent manifested by circumstances connected with perpetration of offense.** — Every crime consists in union or joint operation of act and intention. Sometimes intention can be proved, sometimes it can only be inferred or presumed; and general rule is that intention will be manifested by circumstances connected with perpetration of offense. Marzetta v. Steinman, 117 Ga. App. 471, 160 S.E.2d 590 (1968) (decided under former Code 1933, § 26-202).

**Jury instruction quoting section held unconstitutional.** — Because a jury instruction which quoted O.C.G.A. § 16-2-5 in its entirety could have been understood by a reasonable juror as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent, and because the charge as a whole did not explain or cure the error, the jury charge violates the Due Process Clause's requirement that the state prove every element of a criminal offense beyond a reasonable doubt.

Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).

**Inaccuracies in charge which do not mislead or obscure meaning** do not require new trial. Williams v. State, 159 Ga. App. 865, 285 S.E.2d 597 (1981).

**It is not necessary that charge to jury be in exact language of Code.** Parks v. State, 234 Ga. 579, 216 S.E.2d 804 (1975).

**Charge in accordance with statute** does not impermissibly shift burden of persuasion. Huffman v. State, 153 Ga. App. 203, 265 S.E.2d 603 (1980).

Charge in language of statute is not burden shifting. Simpson v. State, 159 Ga. App. 235, 283 S.E.2d 91 (1981).

**No conclusive presumption of intent is charged** when the jury is also adequately instructed that the presumption may be rebutted. Godfrey v. Francis, 251 Ga. 652, 308 S.E.2d 806 (1983).

**Failure to charge in homicide case that presumption is rebuttable.** — In charging the jury in a homicide case under statute, it is reversible error not to tell jury that presumption created may be rebutted. Lane v. State, 153 Ga. App. 101, 264 S.E.2d 569 (1980).

**Failure to include statutory language that presumption may be re-**

**butted** is not error. *Wilson v. State*, 233 Ga. 479, 211 S.E.2d 757 (1975). But see *Lane v. State*, 153 Ga. App. 101, 264 S.E.2d 569 (1980).

**Combining former Code 1933, §§ 26-604 and 26-605 (see O.C.G.A. §§ 16-2-5 and 16-2-6) in charge creates permissive presumption.** — Permissive presumption such as created by combining former Code 1933, §§ 26-604 and 26-605 (see O.C.G.A. §§ 16-2-5 and 16-2-6) in charge allows, but does not require, trier of fact to infer elemental fact from proof by prosecutor of basic one and that places no burden of any kind on defendant. *Skrine v. State*, 244 Ga. 520, 260 S.E.2d 900 (1979).

**Permissive presumptions are not inherently unconstitutional**, but are to be tested by the rational connection test under which the court asks if ultimate fact to be presumed is more likely than not to flow from the proved fact; and where former Code 1933, §§ 26-604 and 26-605 are combined in charge to create such presumption, the presumption is rational, as obviously it is more likely than not that a normal defendant intends the natural and probable consequences of acts. *Skrine v. State*, 244 Ga. 520, 260 S.E.2d 900 (1979) (see O.C.G.A. §§ 16-2-5 and 16-2-6).

**Instruction that recent possession of stolen property may establish criminal intent.** — In prosecution for receiving stolen property, judge's instruction to jury "that recent possession of stolen property without satisfactory explanation is sufficient to establish criminal intent" was error, despite proper instruction on burden of proving criminal intent, and required reversal. *Williams v. State*, 159 Ga. App. 865, 285 S.E.2d 597 (1981).

**Finding of specific intent to cause harm** may not be based on the rebuttable presumption that a person of sound mind and discretion is presumed to intend the natural and probable consequences of acts. *Wal-Mart Stores, Inc. v. Johnson*, 249 Ga. App. 84, 547 S.E.2d 320 (2001), overruled on other grounds, *Ferrell v. Mikula*, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

**Rebutting presumption imposed by statute in civil matters.** — Plaintiffs' stated cognizable claims against a bishop arising out of a breach of fiduciary duty as evidence was presented that the bishop abused the bishop's position of spiritual authority to coerce or seduce the married plaintiff female into consenting to a prolonged sexual relationship with the bishop. Plaintiffs also put forward evidence of the bishop's charismatic nature and the bishop's ability to control and coerce using the bishop's spiritual authority, all of which is evidence in rebuttal of the presumptions of "sound mind and discretion" relied upon by the trial court. *Brewer v. Paulk*, 296 Ga. App. 26, 673 S.E.2d 545 (2009).

Cited in *Bloodworth v. State*, 128 Ga. App. 657, 197 S.E.2d 423 (1973); *West v. State*, 129 Ga. App. 271, 199 S.E.2d 354 (1973); *Kramer v. State*, 230 Ga. 855, 199 S.E.2d 805 (1973); *Spencer v. State*, 231 Ga. 705, 203 S.E.2d 856 (1974); *Bentley v. State*, 131 Ga. App. 425, 205 S.E.2d 904 (1974); *Ford v. State*, 232 Ga. 511, 207 S.E.2d 494 (1974); *Nunnally v. State*, 235 Ga. 693, 221 S.E.2d 547 (1975); *Smith v. State*, 137 Ga. App. 576, 224 S.E.2d 534 (1976); *Bradley v. State*, 137 Ga. App. 670, 224 S.E.2d 778 (1976); *Gatlin v. State*, 236 Ga. 707, 225 S.E.2d 224 (1976); *Williamson v. State*, 138 Ga. App. 306, 226 S.E.2d 102 (1976); *Scott v. State*, 239 Ga. 46, 235 S.E.2d 522 (1977); *Washington v. State*, 142 Ga. App. 651, 236 S.E.2d 837 (1977); *Lunsford v. State*, 145 Ga. App. 446, 243 S.E.2d 655 (1978); *Harris v. State*, 145 Ga. App. 675, 244 S.E.2d 620 (1978); *Borgh v. State*, 146 Ga. App. 649, 247 S.E.2d 137 (1978); *Tucker v. State*, 245 Ga. 68, 263 S.E.2d 109 (1980); *Russell v. State*, 152 Ga. App. 693, 263 S.E.2d 689 (1979); *Moses v. State*, 245 Ga. 180, 263 S.E.2d 916 (1980); *Peacock v. State*, 154 Ga. App. 201, 267 S.E.2d 807 (1980); *Thrift-Mart, Inc. v. Commercial Union Assurance Cos.*, 154 Ga. App. 344, 268 S.E.2d 397 (1980); *Jackson v. State*, 157 Ga. App. 580, 278 S.E.2d 152 (1981); *Whitsell v. State*, 179 Ga. App. 358, 346 S.E.2d 130 (1986); *Adams v. State*, 293 Ga. App. 377, 667 S.E.2d 186 (2008).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 29 Am. Jur. 2d, Evidence, § 281.

**C.J.S.** — 22 C.J.S., Criminal Law, § 43.

**ALR.** — Homicide: burden of proof on defense that killing was accidental, 63 ALR3d 936.

### 16-2-6. Intention a question of fact.

A person will not be presumed to act with criminal intention but the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted. (Laws 1833, Cobb's 1851 Digest, p. 779; Code 1863, § 4189; Code 1868, § 4228; Code 1873, § 4298; Code 1882, § 4293; Penal Code 1895, § 32; Penal Code 1910, § 32; Code 1933, § 26-202; Code 1933, § 26-605, enacted by Ga. L. 1968, p. 1249, § 1.)

### JUDICIAL DECISIONS

#### ANALYSIS

##### GENERAL CONSIDERATION

##### APPLICATION

#### General Consideration

**Willful failure to discover truth on notice does not negate intent.** Rivers v. State, 118 Ga. 42, 44 S.E. 859 (1903).

**When otherwise relevant, state of mind can be proved as an independent fact.** Royce & Co. v. Gazan, 76 Ga. 79 (1885); Baxley v. Baxley, 117 Ga. 60, 43 S.E. 436 (1903); Alexander v. State, 118 Ga. 26, 44 S.E. 851 (1903).

**Intention with which an act is done is peculiarly a question of fact for determination by the jury,** and although a finding that the accused had the intent to commit the crime charged may be supported by evidence that is weak and unsatisfactory, the verdict will not be set aside on that ground. Mallette v. State, 119 Ga. App. 24, 165 S.E.2d 870 (1969).

**Intent manifested by circumstances connected with perpetration of offense.** — Every crime consists in union or joint operation of act and intention. Sometimes intention can be proved, sometimes it can only be inferred or presumed; and general rule is that intention will be manifested by circumstances connected with perpetration of offense. Marzetta v. Steinman, 117 Ga. App. 471,

160 S.E.2d 590 (1968); Mallette v. State, 119 Ga. App. 24, 165 S.E.2d 870 (1969).

State proved that defendant, while intoxicated, purposely drove repeatedly over the road's center line and defendant's proffered defense that defendant "blacked out" was properly rejected. Crossley v. State, 261 Ga. App. 250, 582 S.E.2d 204 (2003).

**Defendant's ignorance of violating the law** would not relieve defendant of criminal intent if defendant intended to do the act which the legislature prohibited. Wilson v. State, 57 Ga. App. 839, 197 S.E. 48 (1938).

**Knowledge, like intent, is a question of fact** which is seldom capable of proof by direct evidence. Johnson v. State, 158 Ga. App. 183, 279 S.E.2d 483 (1981).

**Whether requisite intent is manifested by circumstances is question for trier of fact,** and, on review, appellate court will not disturb factual determination unless it is contrary to evidence and clearly erroneous. Riddle v. State, 145 Ga. App. 328, 243 S.E.2d 607 (1978), overruled on other grounds, Adsitt v. State, 248 Ga. 237, 282 S.E.2d 305 (1981); Burden v. State, 187 Ga. App. 778, 371 S.E.2d

410, cert. denied, 187 Ga. App. 778, 371 S.E.2d 410 (1988).

Intent with which act is done is a question of fact for determination by jury. *Mallette v. State*, 119 Ga. App. 24, 165 S.E.2d 870 (1969); *M.J.W. v. State*, 133 Ga. App. 350, 210 S.E.2d 842 (1974).

**One is presumed to intend necessary and legitimate consequences of that which one knowingly does.** *M.J.W. v. State*, 133 Ga. App. 350, 210 S.E.2d 842 (1974).

**Presence, companionship and conduct before and after offense as relevant to intent.** — While mere presence at scene of commission of crime is not sufficient evidence to convict one of being party thereto, presence, companionship, and conduct before and after offense are circumstances from which one's participation in criminal intent may be inferred. *Kimbrow v. State*, 152 Ga. App. 893, 264 S.E.2d 327 (1980); *Parham v. State*, 166 Ga. App. 855, 305 S.E.2d 599 (1983); *Norris v. State*, 220 Ga. App. 87, 469 S.E.2d 214 (1996).

There was sufficient evidence of defendant's intent to participate in the robbery of a delivery man where the evidence showed that defendant was privy to the robbery plan, participated in the robbery, and convened with the codefendants after the robbery. *In the Interest of C.L.B.*, 267 Ga. App. 456, 600 S.E.2d 407 (2004).

**Inferences and deductions which flow naturally from facts proved** may be considered in determining intent. *Fears v. State*, 152 Ga. App. 817, 264 S.E.2d 284 (1979).

**Motive.** — Motive is only one of several things that may be considered in finding intent. *Ward v. State*, 239 Ga. 205, 236 S.E.2d 365 (1977).

**Evidence of knowledge.** — Evidence was sufficient to support the jury's verdict that a defendant knowingly possessed the methamphetamine concealed in the defendant's vehicle because the evidence established that the methamphetamine was located in an unmarked pill bottle within arm's reach on an open shelf behind the passenger's seat, in the console of the vehicle along with the defendant's personal possessions, and in the bedding area of the vehicle behind a panel having a

missing screw, and there were no other passengers in the vehicle. *Davis v. State*, 287 Ga. App. 478, 651 S.E.2d 750 (2007), cert. denied, 2008 Ga. LEXIS 179 (Ga. 2008).

**Permissive presumption is created by combining former Code 1933, §§ 26-604 and 26-605 (see O.C.G.A. §§ 16-2-5 and 16-2-6) in charge.** — Permissive presumption such as created by combining former Code 1933, §§ 26-604 and 26-605 (see O.C.G.A. §§ 16-2-5 and 16-2-6) in charge allows, but does not require, trier of fact to infer elemental fact from proof by prosecutor of basic one and that places no burden of any kind on defendant. *Skrine v. State*, 244 Ga. 520, 260 S.E.2d 900 (1979).

**Permissive presumptions are not inherently unconstitutional**, but are to be tested by the rational connection test under which the court asks if ultimate fact to be presumed is more likely than not to flow from proved fact; and where former Code 1933, §§ 26-604 and 26-605 (see O.C.G.A. §§ 16-2-5 and 16-2-6) are combined in charge to create such presumption, the presumption is rational as obviously it is more likely than not that a normal defendant intends the natural and probable consequences of defendant's acts. *Skrine v. State*, 244 Ga. 520, 260 S.E.2d 900 (1979).

**Statute need not be charged, absent request, where essential elements of crime are charged.** — Trial court is not required to charge intention as defined by statute in absence of a timely written request if the court has charged essential elements of crime with which defendant is charged, including necessity of intent to commit crime. *Whigham v. State*, 131 Ga. App. 261, 205 S.E.2d 467 (1974); *Carter v. State*, 137 Ga. App. 824, 225 S.E.2d 73 (1976) (see O.C.G.A. § 16-2-6).

**It is not necessary that charge to jury be in exact language of Code.** *Parks v. State*, 234 Ga. 579, 216 S.E.2d 804 (1975).

Failure to charge exact language of former Code 1933, §§ 26-604 and 26-605 (see O.C.G.A. §§ 16-2-5 and 16-2-6) is not reversible error absent request therefor when subject of intent was fully charged. *Smith v. State*, 139 Ga. App. 660, 229 S.E.2d 74 (1976).

**General Consideration (Cont'd)**

**Detailed definition of intent not necessary.** — Upright and intelligent jurors would have no difficulty in understanding meaning of a simple word like "intent," and no detailed definition need be given. *Powell v. State*, 130 Ga. App. 588, 203 S.E.2d 893 (1974).

**Charge that law presumes unlawful action is criminally intended** until contrary shown is error, as it is contrary to the express language of the statute. *Williams v. State*, 126 Ga. App. 454, 191 S.E.2d 100 (1972).

**Charging substance of section not burdenshifting.** — Trial court's charge to the jury stating the substance of O.C.G.A. § 16-2-6 was not improper or burdenshifting in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). *Quick v. State*, 198 Ga. App. 353, 401 S.E.2d 758 (1991).

**Sufficiency of evidence.** — Jury's finding with respect to intent is not set aside because evidence supporting it is exceedingly weak. *Mallette v. State*, 119 Ga. App. 24, 165 S.E.2d 870 (1969).

Evidence supported a conviction for child molestation where: (1) the victim testified that the defendant touched the victim's genitals from the outside of the victim's clothing while the victim sat in front of the defendant on a four-wheeler; (2) another witness testified that the defendant touched the witness the same day; and (3), the jury did not believe the defendant's explanation that if the touching occurred, it was accidental. *Collins v. State*, 276 Ga. App. 358, 623 S.E.2d 192 (2005).

When a deputy testified that the defendant resisted the deputy's efforts to break up a prison fight, then turned on the deputy, punched the deputy, and swung at the deputy repeatedly, injuring the deputy, there was sufficient evidence of mutiny in a penal institution and felony obstruction of an officer; the trial court was authorized under O.C.G.A. § 16-2-6 to infer from the circumstances that the defendant both knowingly and willfully obstructed the deputy by the use of violence and intended to cause the deputy serious bodily injury by striking the deputy with a

fist, and under O.C.G.A. § 24-4-8, it could rely solely on the deputy's account of the events. *Butler v. State*, 284 Ga. App. 802, 644 S.E.2d 898 (2007).

Cited in *Rowland v. State*, 124 Ga. App. 495, 184 S.E.2d 495 (1971); *Shields v. State*, 126 Ga. App. 544, 191 S.E.2d 448 (1972); *Taylor v. State*, 127 Ga. App. 692, 194 S.E.2d 627 (1972); *Daniels v. State*, 230 Ga. 126, 195 S.E.2d 900 (1973); *Bloodworth v. State*, 128 Ga. App. 657, 197 S.E.2d 423 (1973); *Phillips v. State*, 230 Ga. 444, 197 S.E.2d 720 (1973); *Pittman v. State*, 230 Ga. 448, 197 S.E.2d 722 (1973); *Bloodworth v. State*, 129 Ga. App. 40, 198 S.E.2d 341 (1973); *Murphy v. State*, 129 Ga. App. 28, 198 S.E.2d 344 (1973); *West v. State*, 129 Ga. App. 271, 199 S.E.2d 354 (1973); *Kramer v. State*, 230 Ga. 855, 199 S.E.2d 805 (1973); *James v. State*, 232 Ga. 834, 209 S.E.2d 176 (1974); *Bentley v. State*, 131 Ga. App. 425, 205 S.E.2d 904 (1974); *Wilson v. State*, 233 Ga. 479, 211 S.E.2d 757 (1975); *Franklin v. State*, 136 Ga. App. 47, 220 S.E.2d 60 (1975); *J.A.T. v. State*, 136 Ga. App. 540, 221 S.E.2d 702 (1975); *Littleton v. State*, 139 Ga. App. 511, 229 S.E.2d 20 (1976); *Ealey v. State*, 139 Ga. App. 604, 229 S.E.2d 86 (1976); *Dodson v. State*, 237 Ga. 607, 229 S.E.2d 364 (1976); *Bass v. State*, 237 Ga. 710, 229 S.E.2d 448 (1976); *Coleman v. State*, 137 Ga. App. 689, 224 S.E.2d 878 (1976); *Dodd v. State*, 236 Ga. 572, 224 S.E.2d 408 (1976); *Wiggins v. State*, 139 Ga. App. 98, 227 S.E.2d 895 (1976); *Robertson v. State*, 140 Ga. App. 506, 231 S.E.2d 367 (1976); *Harrison v. State*, 140 Ga. App. 296, 231 S.E.2d 809 (1976); *Jones v. State*, 141 Ga. App. 17, 232 S.E.2d 365 (1977); *Washington v. State*, 142 Ga. App. 651, 236 S.E.2d 837 (1977); *Baker v. State*, 143 Ga. App. 302, 238 S.E.2d 241 (1977); *Wells v. State*, 144 Ga. App. 841, 242 S.E.2d 752 (1978); *Jones v. State*, 145 Ga. App. 356, 243 S.E.2d 747 (1978); *Harris v. State*, 145 Ga. App. 675, 244 S.E.2d 620 (1978); *Dougherty v. State*, 145 Ga. App. 718, 244 S.E.2d 638 (1978); *Sheffield v. State*, 241 Ga. 245, 244 S.E.2d 869 (1978); *Spivey v. State*, 241 Ga. 477, 246 S.E.2d 288 (1978); *Hitchcock v. State*, 146 Ga. App. 470, 246 S.E.2d 477 (1978); *McCane v. State*, 147 Ga. App. 730, 250 S.E.2d 181 (1978); *Clary v. State*, 151 Ga. App. 301, 259 S.E.2d 697

(1979); Jackson v. State, 151 Ga. App. 296, 260 S.E.2d 565 (1979); J.E.T. v. State, 151 Ga. App. 836, 261 S.E.2d 752 (1979); Johnson v. State, 152 Ga. App. 6, 262 S.E.2d 214 (1979); Whisenhunt v. State, 152 Ga. App. 829, 264 S.E.2d 271 (1979); Tucker v. State, 245 Ga. 68, 263 S.E.2d 109 (1980); Bissell v. State, 153 Ga. App. 564, 266 S.E.2d 238 (1980); Green v. State, 155 Ga. App. 795, 272 S.E.2d 761 (1980); O'Bear v. State, 156 Ga. App. 100, 274 S.E.2d 54 (1980); Brewer v. State, 156 Ga. App. 468, 274 S.E.2d 817 (1980); Craft v. State, 158 Ga. App. 745, 282 S.E.2d 203 (1981); Simpson v. State, 159 Ga. App. 235, 283 S.E.2d 91 (1981); Ely v. State, 159 Ga. App. 693, 285 S.E.2d 66 (1981); Hardy v. State, 159 Ga. App. 854, 285 S.E.2d 547 (1981); Butler v. State, 161 Ga. App. 251, 288 S.E.2d 306 (1982); Billings v. State, 161 Ga. App. 500, 288 S.E.2d 622 (1982); Monteford v. State, 162 Ga. App. 491, 292 S.E.2d 93 (1982); McCormick v. State, 162 Ga. App. 267, 293 S.E.2d 35 (1982); Hall v. State, 162 Ga. App. 713, 293 S.E.2d 862 (1982); Gray v. State, 163 Ga. App. 720, 294 S.E.2d 697 (1982); Coker v. State, 163 Ga. App. 799, 295 S.E.2d 538 (1982); Talley v. State, 164 Ga. App. 150, 296 S.E.2d 173 (1982); Blalock v. State, 165 Ga. App. 257, 299 S.E.2d 919 (1983); Wilson v. Jones, 251 Ga. 23, 302 S.E.2d 546 (1983); McGahee v. State, 170 Ga. App. 227, 316 S.E.2d 832 (1984); Brown v. State, 173 Ga. App. 264, 326 S.E.2d 2 (1985); Smith v. State, 174 Ga. App. 744, 331 S.E.2d 91 (1985); Browning v. State, 174 Ga. App. 759, 331 S.E.2d 625 (1985); Lunz v. State, 174 Ga. App. 893, 332 S.E.2d 37 (1985); Colsson v. State, 177 Ga. App. 840, 341 S.E.2d 318 (1986); Daniel v. State, 179 Ga. App. 54, 345 S.E.2d 143 (1986); In re R.K.J., 179 Ga. App. 112, 345 S.E.2d 658 (1986); Worth v. State, 179 Ga. App. 207, 346 S.E.2d 82 (1986); Tucker v. State, 182 Ga. App. 625, 356 S.E.2d 559 (1987); Caldwell v. State, 183 Ga. App. 110, 357 S.E.2d 845 (1987); Carruth v. State, 183 Ga. App. 203, 358 S.E.2d 610 (1987); In re J.B., 183 Ga. App. 229, 358 S.E.2d 620 (1987); Smith v. State, 188 Ga. App. 415, 373 S.E.2d 97 (1988); Fowler v. State, 188 Ga. App. 873, 374 S.E.2d 805 (1988); Villa v. State, 190 Ga. App. 530, 379 S.E.2d 417 (1989); Cline v.

State, 199 Ga. App. 532, 405 S.E.2d 524 (1991); Loden v. State, 199 Ga. App. 683, 406 S.E.2d 103 (1991); Cole v. State, 200 Ga. App. 318, 408 S.E.2d 438 (1991); Griggs v. State, 208 Ga. App. 768, 432 S.E.2d 591 (1993); Andrew v. State, 216 Ga. App. 427, 454 S.E.2d 542 (1995); Massalene v. State, 224 Ga. App. 321, 480 S.E.2d 616 (1997); Wells v. State, 226 Ga. App. 172, 486 S.E.2d 390 (1997); Adams v. State, 239 Ga. App. 42, 520 S.E.2d 746 (1999); In re N.T.S., 242 Ga. App. 109, 528 S.E.2d 876 (2000); Brown v. State, 242 Ga. App. 858, 531 S.E.2d 409 (2000); In re G.J., 251 Ga. App. 299, 554 S.E.2d 269 (2001); Maynor v. State, 257 Ga. App. 151, 570 S.E.2d 428 (2002); Spickler v. State, 276 Ga. 164, 575 S.E.2d 482 (2003); Dupree v. State, 267 Ga. App. 561, 600 S.E.2d 654 (2004); Gant v. State, 291 Ga. App. 823, 662 S.E.2d 895 (2008); Port v. State, 295 Ga. App. 109, 671 S.E.2d 200 (2008).

### Application

**Unexplained possession of recently stolen goods** can be used in conjunction with other evidence to infer guilty knowledge, but standing alone it will not support the inference or authorize a conviction. *Storey v. State*, 162 Ga. App. 763, 292 S.E.2d 483 (1982).

**Instruction that recent possession of stolen property may establish criminal intent.** — In prosecution for receiving stolen property, judge's instruction to jury "that recent possession of stolen property without satisfactory explanation is sufficient to establish criminal intent" was error, despite proper instruction on burden of proving criminal intent, and required reversal. *Williams v. State*, 159 Ga. App. 865, 285 S.E.2d 597 (1981).

**Effect of testimony contradicting denial of intent.** — When defendant's posture is one of admitting presence and cooperation for one criminal purpose (stealing money from the cash register), but denying the intent of participating in an armed robbery, the matter thus essentially involves the credibility of the defendant; and if the defendant's explanation of the incident is contradicted by the testimony of the police officers, the hotel em-

**Application (Cont'd)**

ployee, and the victims, the jury is authorized to reject the explanation. *Parham v. State*, 166 Ga. App. 855, 305 S.E.2d 599 (1983).

**Flight as indication of sense of guilt.** — Act which constituted possession — flight from police with contraband — itself furnishes evidence of defendant's guilt and defendant's criminal intention to conceal incriminating evidence, just as evidence has been attempted to be concealed by such means as throwing it out of car windows. *Haire v. State*, 133 Ga. App. 12, 209 S.E.2d 681 (1974).

Flight upon seeing one whom accused has reason to believe may accuse him of specific crime may be shown as indication of sense of guilt. *Jarmello v. State*, 152 Ga. App. 741, 264 S.E.2d 34 (1979).

Defendant's attempts to interfere with the execution of search warrants, to flee, and to evade the police by hiding in a closet constituted evidence of defendant's consciousness of guilt and intention to exercise control over contraband. *Moody v. State*, 232 Ga. App. 499, 502 S.E.2d 323 (1998).

**Intent to arouse or satisfy sexual desires.** — In a prosecution for child molestation, where the evidence established that defendant exposed the defendant's genitals to a child under the age of 14, although defendant argued that the defendant had a different intention in exposing the defendant's genitals, it could be inferred from the act of exposure that the defendant did so with intent to arouse or satisfy the defendant's sexual desires. *Hathcock v. State*, 214 Ga. App. 188, 447 S.E.2d 104 (1994).

Intent, which is a mental attitude, is commonly detectable only inferentially, and the law accommodates this; the defendant's manual stimulation of the child victim's genitals allowed the jury to infer that the defendant acted with an improper intent, and the defendant's conviction for child molestation was affirmed. *Holloway v. State*, 268 Ga. App. 300, 601 S.E.2d 753 (2004).

**Prior act of driving under the influence** is relevant to prove bent of mind or course of conduct. *Tam v. State*, 231 Ga.

App. 15, 501 S.E.2d 51 (1998).

**Prior offenses of same sort, by themselves, fail to prove intent.** — If no modus operandi or other logical connection between prior offenses committed by defendant and case on trial is shown, mere fact that other offenses were of same sort as one for which defendant is on trial is not sufficient to prove intent. *Kent v. State*, 128 Ga. App. 132, 195 S.E.2d 770 (1973).

**Driving car into police officer.** — Evidence that defendant drove a car through a roadblock toward a uniformed officer who was clearly visible was sufficient to find the requisite intent for aggravated assault. *Thrasher v. State*, 225 Ga. App. 717, 484 S.E.2d 755 (1997).

**Evidence sufficient for shoplifting conviction.** — Evidence concerning defendant's conduct, evidencing intent to participate in theft, was sufficient for conviction of shoplifting. *Carter v. State*, 188 Ga. App. 464, 373 S.E.2d 277 (1988); *Watson v. State*, 214 Ga. App. 645, 448 S.E.2d 752 (1994).

Jury was authorized to find that the defendant acted with guilty knowledge and intent to commit credit card theft in violation of O.C.G.A. § 16-9-31(a)(1) because the evidence established that the defendant obtained unauthorized possession of the victim's credit card and there was circumstantial evidence from which an inference could be drawn that the defendant had knowledge that the defendant was accepting the credit card without authority and as part of an unlawful scheme; when the defendant was confronted by police officers, the defendant fled, and the defendant maintained unauthorized possession of a different credit card, along with additional items that could be used to engage in fraudulent credit transactions. *Amaechi v. State*, 306 Ga. App. 333, 702 S.E.2d 680 (2010).

**Intent in aggravated sodomy case.** — Trial judge was authorized to find beyond a reasonable doubt that the defendant acted with the criminal intent to commit the prohibited act of aggravated sodomy by placing the defendant's genitals in the victim's mouth with force and against the victim's will. Since there was no evidence that the trial court did not

make the requisite finding regarding criminal intent, the appellate court found no error. Sims v. State, 267 Ga. App. 572, 600 S.E.2d 613 (2004).

**Circumstances showing knowledge in possession of cocaine case.** — Evidence was sufficient to show that defendants knowingly possessed cocaine, as was required to support their convictions under O.C.G.A. § 16-13-31(a)(1)(C) for trafficking in cocaine; their criminal intention was shown by the fact that when stopped by a police officer for a traffic offense and a seat belt violation, their stories contradicted each other, their car smelled of air freshener, they could not explain who owned the car nor produce a vehicle registration for the vehicle that they were traveling in, and related circumstances from which a jury could infer that they knew about the large quantity of cocaine that was hidden in a secret compartment in their car, despite their claims that they did not know about the cocaine. Fernandez v. State, 275 Ga. App. 151, 619 S.E.2d 821 (2005).

**Circumstances showing trafficking in cocaine.** — Defendant's intent to be a party to the crime of trafficking in cocaine was established by evidence that the defendant was aware that an alleged drug dealer kept cocaine in the house where the defendant was arrested, that the dealer doled cocaine out to the defendant and others so that they could sell the cocaine, that the defendant had sold cocaine for the dealer in the past and had stated the intent to do so on the day the defendant was arrested, that cocaine found in defendant's possession had the same packaging as cocaine found in the basement of the house, and that when the police arrived to execute a search warrant, the defendant attempted to destroy the cocaine the defendant had in the defendant's physical possession. Riley v. State, 292 Ga. App. 202, 663 S.E.2d 835 (2008).

**Intention regarding drug trafficking.** — Evidence supported a jury's verdict that the defendants had access, power, and intention to exercise control or dominion over drugs found in a home the defendants did not rent or own, including evidence that defendants' belongings were in the home, that the defendants both had

keys to the home, and that one of the defendant's vehicle had been parked outside the home through several days of surveillance. Lott v. State, 303 Ga. App. 775, 694 S.E.2d 698 (2010).

**Evidence sufficient for possession of dangerous drugs conviction.** — Jury was authorized to conclude that the defendant intended to possess a dangerous drug in violation of the Dangerous Drug Act, O.C.G.A. § 16-13-72, even if the defendant was subjectively unaware of the precise chemical compound in the bottle and its regulated nature because there was evidence supporting an inference that the defendant used a dangerous drug to sedate the defendant's sexual battery victim, and that conduct demonstrated the defendant's knowledge of the harmful effect of the compound; the term "dangerous drug" was defined to include alkyl nitrite, which was the compound the defendant possessed. Serna v. State, 308 Ga. App. 518, 707 S.E.2d 904 (2011).

**Sufficient evidence of malicious intent.** — While a person was not presumed to act with criminal intent, the jury was entitled to conclude that defendant acted with malicious intent in wounding the victim since defendant admitted to wanting to confront the victim, defendant began verbal and physical altercations with the victim, defendant's demeanor and conduct were very hostile and violent during the confrontation, and defendant swung defendant's own hand at the victim's head several times, resulting in multiple cuts to the victim's head which required 30 staples to close. Campbell v. State, 258 Ga. App. 863, 575 S.E.2d 748 (2002).

Existence of general criminal intent necessary to support convictions for aggravated assault could be inferred from the defendant's acts in leaving the scene of the altercation the defendant had with the defendant's sibling, returning with a gun, and firing into a truck cab where the person who had broken up the altercation and the defendant's spouse were sitting as they prepared to leave the scene. Bishop v. State, 266 Ga. App. 129, 596 S.E.2d 674 (2004).

**Sufficient evidence of participation in robbery.** — Defendant's aggravated assault and robbery convictions were up-

**Application (Cont'd)**

held on appeal as evidence including the defendant's admission and flight from the scene authorized the jury to conclude that the defendant went to an apartment complex intending to participate in the robbery, and in fact participated in the robbery by acting as a lookout and an additional show of force; hence, the jury was authorized to infer criminal intent from the defendant's conduct before, during, and after the commission of the crime. *Millender v. State*, 286 Ga. App. 331, 648 S.E.2d 777 (2007), cert. denied, No. S07C1717, 2008 Ga. LEXIS 80 (Ga. 2008).

**Intent in aggravated assault case.**

— In a prosecution for aggravated assault, O.C.G.A. § 16-5-21(a)(2), the defendant argued that the evidence showed that the defendant did not intend to shoot the victim but acted in self-defense. This claim failed because under O.C.G.A. § 16-2-6 whether the defendant committed the act with criminal intent was a question of fact for the jury. *Gordon v. State*, 294 Ga. App. 908, 670 S.E.2d 533 (2008).

**Evidence of intent on charge of theft by conversion.** — Defendant's conviction of theft by conversion, O.C.G.A.

§ 16-8-4(a), was supported by sufficient evidence; evidence of defendant's failure to return a rented wood chipper, admitted lies regarding defendant's address and phone number, and defendant's flight after charges were filed was sufficient under O.C.G.A. § 16-2-6 for the jury to conclude that defendant fraudulently converted the chipper to defendant's own use. *Terrell v. State*, 275 Ga. App. 501, 621 S.E.2d 515 (2005).

**Sufficient evidence of intent to rob.**

— Trial court did not err in denying the defendant's motion for directed verdict of acquittal on the defendant's aggravated assault with intent to rob convictions because the jury was authorized to conclude that the defendant fired a gun at the victims to further a robbery and the indictment did not charge the defendant with a specific intent to rob the victims but only with a general intent to rob; the defendant approached the victims, pointed a gun toward the head of one of the victims, and demanded money, and after robbing that victim, the defendant fled and fired several shots at the porch where the victims had been standing and at the victims once the victims began chasing the defendant. *Johnson v. State*, 304 Ga. App. 371, 696 S.E.2d 396 (2010).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 29 Am. Jur. 2d, Evidence, §§ 281, 439 et seq. 75 Am. Jur. 2d, Trial, §§ 331, 333.

**C.J.S.** — 22 C.J.S., Criminal Law, §§ 41, 47 et seq.

**ALR.** — Criminal responsibility of one who acts as decoy to detect commission of crime, 120 ALR 1506.

Series of takings over a period of time as involving single or separate larcenies, 53 ALR3d 398.

Homicide: burden of proof on defense that killing was accidental, 63 ALR3d 936.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense, 88 ALR3d 8.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 ALR3d 1309.

**ARTICLE 2****PARTIES TO CRIMES****JUDICIAL DECISIONS**

**Allegations in accusation.** — Although the state must prove the applica-

ble provisions of O.C.G.A. Art. 2, T. 16 at trial against a criminal defendant, it is not

necessary that the state allege these provisions in the accusation. *State v. Military Circle Pet Ctr.* No. 94, Inc., 257 Ga. 388, 360 S.E.2d 248 (1987).

### RESEARCH REFERENCES

**ALR.** — Criminal responsibility of one who acts as decoy to detect commission of crime, 120 ALR 1506.

Mental or emotional condition as diminishing responsibility for crime, 22 ALR3d 1228.

### 16-2-20. When a person is a party to a crime.

(a) Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.

(b) A person is concerned in the commission of a crime only if he:

- (1) Directly commits the crime;
- (2) Intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity;
- (3) Intentionally aids or abets in the commission of the crime; or
- (4) Intentionally advises, encourages, hires, counsels, or procures another to commit the crime. (Code 1933, § 26-801, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For note discussing organized crime in Georgia with respect to the application of state gambling laws, and suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124

(1970). For note discussing the felony murder rule, and proposing legislation to place limitations on Georgia's felony murder statute, see 9 Ga. St. B.J. 462 (1973).

### JUDICIAL DECISIONS

#### ANALYSIS

##### GENERAL CONSIDERATION

##### CONSPIRACY

##### AIDING AND ABETTING

##### APPLICATION

1. IN GENERAL
2. CHILD ABUSE AND NEGLECT
3. DRUG RELATED OFFENSES
4. MURDER OR MANSLAUGHTER
5. OTHER CRIMES AGAINST THE PERSON
6. PROPERTY OFFENSES

#### General Consideration

**Editor's notes.** — In light of the similarity of the issues dealt with, decisions under former Penal Code 1910, § 45 and

former Code 1933, §§ 26-402, 26-601, as they read prior to revision of the title by Ga. L. 1968, p. 1249 are included in the annotations for this Code section.

**General Consideration (Cont'd)**

**Statute is not unconstitutionally vague, indefinite, and overbroad.** Wanzer v. State, 232 Ga. 523, 207 S.E.2d 466 (1974).

Evidence supported the defendant's conviction for armed robbery as an aider and abettor under O.C.G.A. § 16-2-20(b)(3) and (4) as a codefendant testified that the defendant had provided the gun used in the crime, which was corroborated by the defendant's admission that the defendant provided the shooter with the gun and that the defendant knew that the persons intended to use the gun to rob a place on the interstate. Terrell v. State, 268 Ga. App. 173, 601 S.E.2d 500 (2004).

**Law regarding accessories before the fact is to be treated as rider on other penal statutes,** describing possible relationship or status, and not creating separate offense. Chambers v. State, 194 Ga. 773, 22 S.E.2d 487, answer conformed to, 68 Ga. App. 338, 23 S.E.2d 545 (1942) (decided under former Code 1933, § 26-601).

**Person providing encouragement and promising to buy fruits of larceny (now theft) as party.** — One who counsels and encourages commission of misdemeanor by promising to buy fruits of larceny is guilty as a principal, although the person did not act as actual perpetrator of crime. Grant v. State, 47 Ga. App. 234, 170 S.E. 394 (1933) (decided under former Penal Code 1910, § 45).

**Participants need not be actual perpetrators.** — Participants to a crime may be convicted of a crime even though they are not the actual perpetrators. It matters not whether it was defendant or defendant's accomplice who actually fired the gun during the robbery which resulted in the death of the victim. Lobdell v. State, 256 Ga. 769, 353 S.E.2d 799 (1987); Heath v. State, 186 Ga. App. 655, 368 S.E.2d 346 (1988) (cocaine trafficking); Cunningham v. State, 240 Ga. App. 92, 522 S.E.2d 684 (1999) (child molestation).

**Merely driving vehicle sufficient.** — There was sufficient evidence to support the defendant's convictions of felony murder and aggravated assault resulting from

an incident when shots were fired from a van at the victims, who were riding in a car that had formerly belonged to a drug dealer; the defendant had argued with the drug dealer the day of the shooting, the defendant's wrecked car was found in the same place as the van, the surviving victim identified the defendant as the driver of the van, the van had been traded to the defendant's brother, and even if the defendant did not actually fire the shots, being the driver would authorize the defendant's conviction under O.C.G.A. § 16-2-20(a). Yancey v. State, 281 Ga. 664, 641 S.E.2d 524 (2007).

**Common criminal intent.** — Elements of proof that one is party or accomplice to a crime require proof of common criminal intent. Jones v. State, 250 Ga. 11, 295 S.E.2d 71 (1982), cert. denied, 459 U.S. 1176, 103 S. Ct. 827, 74 L. Ed. 2d 1022 (1983).

**It is appropriate to consider all circumstances surrounding incident** in determining whether defendant is a party. Moran v. State, 139 Ga. App. 274, 228 S.E.2d 216 (1976).

**Presence, companionship, and conduct before and after offense inferring participation.** — While mere presence at scene of commission of crime is not sufficient evidence to convict one of being a party thereto, presence, companionship, and conduct before and after offense are circumstances from which one's participation in criminal intent may be inferred. Kimbro v. State, 152 Ga. App. 893, 264 S.E.2d 327 (1980); Parham v. State, 166 Ga. App. 855, 305 S.E.2d 599 (1983); Lunz v. State, 174 Ga. App. 893, 332 S.E.2d 37 (1985); Stoe v. State, 187 Ga. App. 171, 369 S.E.2d 793 (1988); Simpson v. State, 265 Ga. 665, 461 S.E.2d 210 (1995); James v. State, 227 Ga. App. 907, 490 S.E.2d 556 (1997).

Intent may be proved by conduct, demeanor, and other circumstances connected with act for which defendant is being prosecuted. Brooks v. State, 151 Ga. App. 384, 259 S.E.2d 743 (1979); Parham v. State, 166 Ga. App. 855, 305 S.E.2d 599 (1983); Todd v. State, 189 Ga. App. 538, 376 S.E.2d 917 (1988).

**Presence and assistance in commission of crime.** — While an individual's

mere presence when a crime is committed is not sufficient to warrant conviction, if the individual is present and assists in the commission of the crime, the individual may be convicted as a party thereto. *Hicks v. State*, 211 Ga. App. 370, 439 S.E.2d 56 (1993).

Evidence was sufficient to sustain a defendant's conviction of two counts of aggravated assault and two counts of possession of a firearm during the commission of a crime in violation of O.C.G.A. §§ 16-5-21 and 16-11-106 because the defendant's admission that defendant was holding a rifle throughout the crimes' commission, along with evidence of the defendant's flight, authorized the jury to conclude that the defendant participated in the crimes by acting as a lookout. *Gant v. State*, 291 Ga. App. 823, 662 S.E.2d 895 (2008).

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of aggravated assault because, although it was unclear who fired first, the defendant admittedly fired the defendant's weapon; the jury could find that even if the victims were not hit by the defendant's bullets, the victims were struck when rap group members and supporters fired during a gun battle. *Emmanuel v. State*, 300 Ga. App. 378, 685 S.E.2d 361 (2009), cert. denied, No. S10C0301, 2010 Ga. LEXIS 301 (Ga. 2010).

**Presence at scene of crime.** — Mere presence at scene of crime or where criminal acts are committed, even when coupled with flight, is insufficient to authorize conviction. *Bogan v. State*, 158 Ga. App. 1, 279 S.E.2d 229 (1981).

Presence at scene of crime is not sufficient to show that defendant is party to crime. *Brown v. State*, 250 Ga. 862, 302 S.E.2d 347 (1983).

Presence at the scene of a crime, even when coupled with knowledge and approval not amounting to encouragement, is not sufficient to show that the defendant is a party. *Smith v. State*, 188 Ga. App. 415, 373 S.E.2d 97 (1988).

**Neither presence nor approval sufficient for participation.** — Presence at the scene of a crime is not sufficient to show that a defendant is a party to the

crime under O.C.G.A. § 16-2-20, and even approval of the act, if not amounting to encouragement, will not suffice. This is so because of the restrictions of O.C.G.A. § 24-4-6 as to a conviction on circumstantial evidence. *Ridgeway v. State*, 187 Ga. App. 381, 370 S.E.2d 216 (1988).

**Sufficiency of indictments.** — In two actions charging the defendant with being a party to the crime of aggravated assault allegedly committed with a codefendant, given that the first of two indictments failed to set out the elements of aggravated assault, and the state offered to nolle pros the same, the indictment was properly dismissed; however, a second and superseding indictment survived demurber, as the elements of aggravated assault were sufficiently set out therein, and the disjunctive way that the offense was charged was not fatally defective as to the defendant, but simply limited the state's option of proving at trial the manner in which the aggravated assault was committed. *State v. Daniels*, 281 Ga. App. 224, 635 S.E.2d 835 (2006).

**Indictment did not have to allege defendant's status as party to charged crimes.** — Although the state was required to prove that the defendant was a party to the charged crimes under O.C.G.A. § 16-2-20, the state was not required to allege these provisions in the indictment. Thus, the presentation to the jury of the theories of parties to the crime and conspiracy was not a constructive amendment to the indictment. *Elamin v. State*, 293 Ga. App. 591, 667 S.E.2d 439 (2008).

**Venue.** — After the crime is completed, a defendant may be convicted of the crime based on defendant's activities as a conspirator, even though conspiracy is not alleged in the indictment, and venue in such a case is properly laid in the county in which the substantive offense is committed, even though the defendant may never have entered that county. *Hernandez v. State*, 182 Ga. App. 797, 357 S.E.2d 131 (1987).

**Approval, not amounting to encouragement.** — Even if the defendant's statement could be construed as constituting approval of the codefendant's offense of selling marijuana, such approval, not

**General Consideration (Cont'd)**

amounting to encouragement, does not render the defendant party to the offense charged. *Parker v. State*, 155 Ga. App. 617, 271 S.E.2d 871 (1980).

Approval of the act, not amounting to encouragement, will not suffice to show that a defendant is a party to the crime. *Moore v. State*, 255 Ga. 519, 340 S.E.2d 888 (1986).

**Former definition of principal in second degree carries over to paragraph (b)(3) of section.** — Although terminology of parties to crime as principals in first and second degree has been abolished, the concept, as relating to criminal responsibility, remains constant. "Aid or abet" as used in former Code 1933, § 26-801(b)(3) should be given the same meaning as in defining principal in second degree as one "who is present, aiding, and abetting the act to be done." *Hannah v. State*, 125 Ga. App. 596, 188 S.E.2d 401 (1972) (see O.C.G.A. § 16-2-20(b)(3)).

**Where numerous persons are concerned in crime, language of section may be charged.** — By virtue of former Code 1933, §§ 26-801 and 26-802 (see O.C.G.A. §§ 16-2-20 and 16-2-21), if evidence in criminal case shows that two or more persons were concerned in commission of alleged crime, it is not harmful error for trial court to charge in the language of these provisions or to charge jury on law of conspiracy. *Battle v. State*, 231 Ga. 501, 202 S.E.2d 449 (1973).

**Charge under statute erroneous only when theory not supported by evidence.** — Charge under statute is error only if there is insufficient evidence, circumstantial or otherwise, to support theory. *Evans v. State*, 138 Ga. App. 460, 226 S.E.2d 303 (1976).

**Person need not be indicted under O.C.G.A. § 16-2-20 before state may prove that person's culpability for crime.** as a party to that crime. *Wright v. State*, 165 Ga. App. 790, 302 S.E.2d 706 (1983).

State's use of "party to a crime" theory to convict defendant when defendant was indicted for having directly committed the crimes was not in error; even though state was required to prove defendant was

party to the crimes under O.C.G.A. § 16-2-20, it was not required to allege those provisions in the indictment. *Trumpler v. State*, 261 Ga. App. 499, 583 S.E.2d 184 (2003).

**Acquittal of one party** does not bar separate, distinct prosecution and conviction of another party. *Eades v. State*, 232 Ga. 735, 208 S.E.2d 791 (1974).

**Instruction cured reading of wrong indictment.** — Because state presented sufficient evidence showing defendant's involvement in sale of cocaine and the sale of cocaine within 1,000 feet of a public housing project as a party to the crimes, and because the judge's instruction and explanation after reading the wrong indictment to the jury at trial cured any error, defendant's convictions were upheld on appeal, and mistrial based on the latter was properly denied; moreover, defendant was properly denied a new trial. *Walker v. State*, 290 Ga. App. 749, 660 S.E.2d 844 (2008), cert. dismissed, 2008 Ga. LEXIS 776 (Ga. 2008).

**Trier of fact determines level of involvement.** — With regard to a defendant's convictions for burglary, armed robbery, and aggravated assault, there was sufficient evidence to support the convictions based on the victim's testimony identifying defendant as one of the three perpetrators and the admissions by the defendant to aiding and abetting. Although the defendant claimed that the defendant's involvement was limited to trying to rescue a co-hort, there was evidence that the defendant was personally involved in the entire episode, and it was up to the trier of fact to determine what happened. *Yates v. State*, 298 Ga. App. 727, 681 S.E.2d 190 (2009).

**Acquittal of principal is relevant evidence** on the issue of the guilt or innocence of one charged as a party to the crime under O.C.G.A. § 16-2-20(a), (b)(3) and (b)(4). *White v. State*, 257 Ga. 236, 356 S.E.2d 875 (1987).

**Cited in** *Henderson v. State*, 227 Ga. 68, 179 S.E.2d 76 (1970); *Green v. State*, 124 Ga. App. 469, 184 S.E.2d 194 (1971); *Dutton v. State*, 228 Ga. 850, 188 S.E.2d 794 (1972); *Brooks v. State*, 125 Ga. App. 867, 189 S.E.2d 448 (1972); *Grey v. State*, 126 Ga. App. 357, 190 S.E.2d 557 (1972);

*Bradford v. State*, 126 Ga. App. 688, 191 S.E.2d 545 (1972); *Yeomans v. State*, 229 Ga. 488, 192 S.E.2d 362 (1972); *Montgomery v. State*, 128 Ga. App. 116, 195 S.E.2d 784 (1973); *Swarn v. State*, 230 Ga. 552, 198 S.E.2d 177 (1973); *Holiday v. State*, 128 Ga. App. 817, 198 S.E.2d 364 (1973); *Moye v. State*, 129 Ga. App. 52, 198 S.E.2d 514 (1973); *Simmons v. State*, 129 Ga. App. 107, 198 S.E.2d 718 (1973); *Jones v. State*, 129 Ga. App. 54, 198 S.E.2d 884 (1973); *Overton v. State*, 230 Ga. 830, 199 S.E.2d 205 (1973); *Singleton v. State*, 129 Ga. App. 644, 200 S.E.2d 507 (1973); *Gentry v. State*, 129 Ga. App. 819, 201 S.E.2d 679 (1973); *Lundy v. State*, 130 Ga. App. 171, 202 S.E.2d 536 (1973); *Perkins v. State*, 231 Ga. 680, 203 S.E.2d 854 (1974); *Freeman v. State*, 130 Ga. App. 718, 204 S.E.2d 445 (1974); *Strong v. State*, 232 Ga. 294, 206 S.E.2d 461 (1974); *Ford v. State*, 232 Ga. 511, 207 S.E.2d 494 (1974); *Hess v. State*, 132 Ga. App. 26, 207 S.E.2d 580 (1974); *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (1974); *Harvey v. State*, 233 Ga. 41, 209 S.E.2d 587 (1974); *Zinn v. State*, 134 Ga. App. 51, 213 S.E.2d 156 (1975); *Gaither v. State*, 234 Ga. 465, 216 S.E.2d 324 (1975); *Daniels v. State*, 234 Ga. 523, 216 S.E.2d 819 (1975); *Murray v. State*, 135 Ga. App. 264, 217 S.E.2d 293 (1975); *Payne v. State*, 135 Ga. App. 245, 217 S.E.2d 476 (1975); *Cunningham v. State*, 235 Ga. 126, 218 S.E.2d 854 (1975); *Rucker v. State*, 135 Ga. App. 468, 218 S.E.2d 146 (1975); *Welch v. State*, 235 Ga. 243, 219 S.E.2d 151 (1975); *Snell v. McCoy*, 135 Ga. App. 832, 219 S.E.2d 482 (1975); *Garland v. State*, 235 Ga. 522, 221 S.E.2d 198 (1975); *McNeese v. State*, 236 Ga. 26, 222 S.E.2d 318 (1976); *Clanton v. State*, 137 Ga. App. 376, 224 S.E.2d 58 (1976); *Coleman v. State*, 137 Ga. App. 689, 224 S.E.2d 878 (1976); *Carter v. State*, 137 Ga. App. 824, 225 S.E.2d 73 (1976); *Ballew v. State*, 138 Ga. App. 530, 227 S.E.2d 65 (1976); *Hickox v. State*, 138 Ga. App. 882, 227 S.E.2d 829 (1976); *Evans v. State*, 139 Ga. App. 607, 229 S.E.2d 88 (1976); *Loder v. State*, 140 Ga. App. 166, 230 S.E.2d 124 (1976); *Waldrop v. State*, 141 Ga. App. 58, 232 S.E.2d 395 (1977); *Lane v. State*, 238 Ga. 407, 233 S.E.2d 375 (1977); *First Nat'l Bank & Trust Co. v. State*, 141 Ga. App. 471, 233

S.E.2d 861 (1977); *Phillips v. State*, 238 Ga. 632, 235 S.E.2d 12 (1977); *Bostic v. State*, 239 Ga. 32, 235 S.E.2d 530 (1977); *Fuqua v. State*, 142 Ga. App. 632, 236 S.E.2d 685 (1977); *Nance v. State*, 239 Ga. 381, 236 S.E.2d 752 (1977); *Hendrix v. State*, 239 Ga. 507, 238 S.E.2d 56 (1977); *Jackson v. State*, 143 Ga. App. 406, 238 S.E.2d 752 (1977); *Sullens v. State*, 239 Ga. 766, 238 S.E.2d 864 (1977); *Freedman v. United States*, 437 F. Supp. 1252 (N.D. Ga. 1977); *Allen v. State*, 145 Ga. App. 426, 243 S.E.2d 626 (1978); *Peters v. State*, 241 Ga. 152, 243 S.E.2d 883 (1978); *Miller v. State*, 145 Ga. App. 653, 244 S.E.2d 608 (1978); *Hitchcock v. State*, 146 Ga. App. 470, 246 S.E.2d 477 (1978); *Key v. State*, 146 Ga. App. 536, 246 S.E.2d 723 (1978); *Mathis v. State*, 242 Ga. 761, 251 S.E.2d 305 (1978); *Dixon v. State*, 243 Ga. 46, 252 S.E.2d 431 (1979); *Davis v. State*, 242 Ga. 901, 252 S.E.2d 443 (1979); *Garrett v. State*, 243 Ga. 322, 253 S.E.2d 741 (1979); *Barraza v. State*, 149 Ga. App. 738, 256 S.E.2d 48 (1979); *Hughes v. State*, 150 Ga. App. 90, 256 S.E.2d 634 (1979); *Cantrell v. State*, 150 Ga. App. 259, 257 S.E.2d 351 (1979); *Crass v. State*, 150 Ga. App. 374, 257 S.E.2d 909 (1979); *Crosby v. State*, 150 Ga. App. 804, 258 S.E.2d 593 (1979); *Harrison v. State*, 151 Ga. App. 758, 261 S.E.2d 482 (1979); *Womack v. State*, 152 Ga. App. 325, 262 S.E.2d 598 (1979); *Pittman v. State*, 245 Ga. 453, 265 S.E.2d 592 (1980); *Jones v. State*, 245 Ga. 592, 266 S.E.2d 201 (1980); *Smith v. State*, 154 Ga. App. 258, 267 S.E.2d 863 (1980); *Whitaker v. State*, 246 Ga. 163, 269 S.E.2d 436 (1980); *McAllister v. State*, 246 Ga. 246, 271 S.E.2d 159 (1980); *Morrow v. State*, 155 Ga. App. 574, 271 S.E.2d 707 (1980); *Highfield v. State*, 246 Ga. 478, 272 S.E.2d 62 (1980); *Thomas v. State*, 246 Ga. 484, 272 S.E.2d 68 (1980); *Harper v. State*, 155 Ga. App. 764, 272 S.E.2d 736 (1980); *Murphy v. State*, 246 Ga. 626, 273 S.E.2d 2 (1980); *Smith v. State*, 156 Ga. App. 563, 275 S.E.2d 140 (1980); *Webb v. State*, 156 Ga. App. 623, 275 S.E.2d 707 (1980); *Walker v. State*, 247 Ga. 746, 280 S.E.2d 333 (1981); *Royal v. State*, 158 Ga. App. 405, 280 S.E.2d 427 (1981); *Stevens v. State*, 158 Ga. App. 656, 281 S.E.2d 629 (1981); *Koza v. State*, 158 Ga. App. 709, 282 S.E.2d 131 (1981);

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Tisdol v. State, 158 Ga. App. 852, 282 S.E.2d 411 (1981); Jenkins v. State, 159 Ga. App. 183, 283 S.E.2d 49 (1981); Smith v. State, 159 Ga. App. 468, 284 S.E.2d 21 (1981); Jackson v. State, 248 Ga. 480, 284 S.E.2d 267 (1981); Price v. State, 159 Ga. App. 662, 284 S.E.2d 676 (1981); Weathers v. State, 160 Ga. App. 581, 287 S.E.2d 565 (1981); Parrish v. State, 160 Ga. App. 601, 287 S.E.2d 603 (1981); Dawson v. State, 161 Ga. App. 121, 288 S.E.2d 247 (1982); Morgan v. State, 161 Ga. App. 67, 288 S.E.2d 836 (1982); Fleming v. State, 162 Ga. App. 112, 290 S.E.2d 214 (1982); Osborn v. State, 161 Ga. App. 132, 291 S.E.2d 22 (1982); Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982); Welch v. State, 163 Ga. App. 383, 294 S.E.2d 596 (1982); Fox v. State, 163 Ga. App. 601, 295 S.E.2d 563 (1982); Goins v. State, 164 Ga. App. 37, 296 S.E.2d 229 (1982); Ellis v. State, 164 Ga. App. 366, 296 S.E.2d 726 (1982); Johnson v. State, 165 Ga. App. 132, 299 S.E.2d 416 (1983); Moore v. State, 165 Ga. App. 207, 300 S.E.2d 543 (1983); Brooks v. State, 250 Ga. 739, 300 S.E.2d 810 (1983); Jackson v. State, 165 Ga. App. 444, 301 S.E.2d 661 (1983); Lucas v. State, 165 Ga. App. 468, 302 S.E.2d 121 (1983); Jackson v. State, 165 Ga. App. 737, 302 S.E.2d 611 (1983); Tolliver v. State, 167 Ga. App. 696, 307 S.E.2d 269 (1983); Thompson v. State, 168 Ga. App. 734, 310 S.E.2d 725 (1983); Barnes v. State, 168 Ga. App. 925, 310 S.E.2d 777 (1983); Campbell v. State, 169 Ga. App. 112, 312 S.E.2d 136 (1983); Whittington v. State, 252 Ga. 168, 313 S.E.2d 73 (1984); Brooks v. State, 169 Ga. App. 543, 314 S.E.2d 115 (1984); Graham v. State, 171 Ga. App. 242, 319 S.E.2d 484 (1984); Jones v. State, 174 Ga. App. 783, 331 S.E.2d 633 (1985); George v. State, 175 Ga. App. 229, 333 S.E.2d 141 (1985); Robinson v. State, 175 Ga. App. 769, 334 S.E.2d 358 (1985); Norris v. State, 176 Ga. App. 164, 335 S.E.2d 611 (1985); Wilcox v. State, 177 Ga. App. 596, 340 S.E.2d 243 (1986); Davis v. State, 255 Ga. 598, 340 S.E.2d 869 (1986); Bagby v. State, 178 Ga. App. 282, 342 S.E.2d 731 (1986); Barnett v. State, 178 Ga. App. 383, 343 S.E.2d 155 (1986); Wallace v. State, 178 Ga. App. 876, 344 S.E.2d 770 (1986); Lobdell v. State,

256 Ga. 769, 353 S.E.2d 799 (1987); Beck v. State, 181 Ga. App. 681, 353 S.E.2d 610 (1987); Sablon v. State, 182 Ga. App. 128, 355 S.E.2d 88 (1987); Wilcox v. Ford, 813 F.2d 1140 (11th Cir. 1987); In re C.D.L., 184 Ga. App. 412, 361 S.E.2d 527 (1987); Davis v. Kemp, 829 F.2d 1522 (11th Cir. 1987); Bostic v. State, 184 Ga. App. 509, 361 S.E.2d 872 (1987); Eaton v. State, 184 Ga. App. 652, 362 S.E.2d 455 (1987); Martin v. State, 185 Ga. App. 145, 363 S.E.2d 765 (1987); Jones v. State, 258 Ga. 25, 365 S.E.2d 263 (1988); King v. State, 185 Ga. App. 698, 365 S.E.2d 852 (1988); Scott v. State, 185 Ga. App. 887, 366 S.E.2d 196 (1988); Raines v. State, 186 Ga. App. 239, 366 S.E.2d 841 (1988); Dukes v. State, 186 Ga. App. 815, 369 S.E.2d 259 (1988); Lonchar v. State, 258 Ga. 447, 369 S.E.2d 749 (1988); Davis v. Williams, 258 Ga. 552, 372 S.E.2d 228 (1988); Van Huynh v. State, 258 Ga. 663, 373 S.E.2d 502 (1988); Willis v. State, 191 Ga. App. 251, 381 S.E.2d 416 (1989); Cordova v. State, 191 Ga. App. 297, 381 S.E.2d 436 (1989); Olsen v. State, 191 Ga. App. 763, 382 S.E.2d 715 (1989); Owens v. State, 192 Ga. App. 335, 384 S.E.2d 920 (1989); Howard v. State, 192 Ga. App. 813, 386 S.E.2d 667 (1989); Glover v. State, 192 Ga. App. 798, 386 S.E.2d 699 (1989); McMonagle v. State, 196 Ga. App. 300, 395 S.E.2d 821 (1990); Graham v. State, 197 Ga. App. 102, 397 S.E.2d 600 (1990); Fair v. State, 198 Ga. App. 437, 401 S.E.2d 626 (1991); Brown v. State, 198 Ga. App. 590, 402 S.E.2d 341 (1991); Haynes v. State, 199 Ga. App. 288, 404 S.E.2d 585 (1991); Williams v. State, 200 Ga. App. 84, 406 S.E.2d 498 (1991); Austin v. State, 261 Ga. 550, 408 S.E.2d 105 (1991); Sands v. State, 262 Ga. 367, 418 S.E.2d 55 (1992); Smith v. State, 205 Ga. App. 810, 424 S.E.2d 56 (1992); Bedford v. State, 263 Ga. 121, 429 S.E.2d 87 (1993); Ellis v. State, 211 Ga. App. 605, 440 S.E.2d 235 (1994); Griffin v. State, 214 Ga. App. 813, 449 S.E.2d 341 (1994); Lawton v. State, 218 Ga. App. 309, 460 S.E.2d 878 (1995); Gaskin v. State, 221 Ga. App. 142, 470 S.E.2d 531 (1996); Cody v. State, 222 Ga. App. 468, 474 S.E.2d 669 (1996); Bishop v. State, 223 Ga. App. 422, 477 S.E.2d 422 (1996); Johnson v. State, 223 Ga. App. 668, 478 S.E.2d 404 (1996); Leigh v. State, 223 Ga. App. 726,

478 S.E.2d 905 (1996); Taylor v. State, 226 Ga. App. 339, 486 S.E.2d 601 (1997); Dasher v. State, 229 Ga. App. 41, 494 S.E.2d 192 (1997); Tanner v. State, 230 Ga. App. 77, 495 S.E.2d 315 (1998); Johnson v. State, 269 Ga. 632, 501 S.E.2d 815 (1998); London v. State, 235 Ga. App. 30, 508 S.E.2d 247 (1998); Haney v. State, 234 Ga. App. 214, 507 S.E.2d 18 (1998); Smith v. State, 234 Ga. App. 586, 506 S.E.2d 406 (1998); Scott v. State, 238 Ga. App. 258, 518 S.E.2d 468 (1999); Evans v. State, 240 Ga. App. 297, 523 S.E.2d 103 (1999); York v. State, 242 Ga. App. 281, 528 S.E.2d 823 (2000); Jordan v. State, 242 Ga. App. 547, 528 S.E.2d 858 (2000); Spivey v. State, 243 Ga. App. 785, 534 S.E.2d 498 (2000); In re E.G.W., 244 Ga. App. 119, 534 S.E.2d 869 (2000); Granados v. State, 244 Ga. App. 153, 34 S.E.2d 886 (2000); Chambers v. State, 244 Ga. App. 138, 534 S.E.2d 879 (2000); Carter v. State, 249 Ga. App. 354, 548 S.E.2d 102 (2001); Darns v. State, 2001 Ga. App. LEXIS 481 (Apr. 17, 2001); Ricarte v. State, 249 Ga. App. 50, 547 S.E.2d 703 (2001); Vaughns v. State, 274 Ga. 13, 549 S.E.2d 86 (2001); Scott v. State, 251 Ga. App. 510, 554 S.E.2d 513 (2001); Tesfaye v. State, 275 Ga. 439, 569 S.E.2d 849 (2002); Coggins v. State, 275 Ga. 479, 569 S.E.2d 505 (2002); Bennett v. State, 266 Ga. App. 502, 597 S.E.2d 565 (2004); Petty v. Smith, 279 Ga. 273, 612 S.E.2d 276 (2005); Morris v. State, 276 Ga. App. 775, 624 S.E.2d 281 (2005); Kelley v. State, 279 Ga. App. 187, 630 S.E.2d 783 (2006); Oree v. State, 280 Ga. 588, 630 S.E.2d 390 (2006); Duggan v. State, 285 Ga. App. 273, 645 S.E.2d 733 (2007); Williams v. State, 287 Ga. App. 361, 651 S.E.2d 768 (2007); Dean v. State, 292 Ga. App. 695, 665 S.E.2d 406 (2008); Powell v. State, 293 Ga. App. 442, 667 S.E.2d 213 (2008); Burton v. State, 293 Ga. App. 822, 668 S.E.2d 306 (2008); Stinson v. State, 294 Ga. App. 184, 668 S.E.2d 840 (2008); Driscoll v. State, 295 Ga. App. 5, 670 S.E.2d 824 (2008); Rayshad v. State, 295 Ga. App. 29, 670 S.E.2d 849 (2008); State v. Corhen, 306 Ga. App. 495, 700 S.E.2d 912 (2010); Herbert v. State, 288 Ga. 843, 708 S.E.2d 260 (2011).

### Conspiracy

**Statute does not alter principle that conspirators are responsible for probable consequences of execution of their design.** Burke v. State, 234 Ga. 512, 216 S.E.2d 812 (1975).

**While statute does not use word "conspiracy," it embodies that theory insofar as it renders one not directly involved in commission of crime responsible as a party thereto.** Scott v. State, 229 Ga. 541, 192 S.E.2d 367 (1972); McGinty v. State, 134 Ga. App. 399, 214 S.E.2d 678 (1975); Davis v. State, 134 Ga. App. 750, 216 S.E.2d 348 (1975); Burke v. State, 234 Ga. 512, 216 S.E.2d 812 (1975); Jerdine v. State, 137 Ga. App. 811, 224 S.E.2d 803 (1976); Townsend v. State, 141 Ga. App. 743, 234 S.E.2d 368 (1977); Hoerner v. State, 246 Ga. 374, 271 S.E.2d 458 (1980); Hamby v. State, 158 Ga. App. 265, 279 S.E.2d 715 (1981); Grant v. State, 198 Ga. App. 357, 401 S.E.2d 761 (1991) (see O.C.G.A. § 16-2-20).

**Conspiracy may be proved, although not alleged in indictment or accusation.** Hamby v. State, 158 Ga. App. 265, 279 S.E.2d 715 (1981).

An indictment that accused a defendant and a codefendant of acting together as parties to the crime to commit the offense of possession of cocaine with intent to distribute accused the defendant in a manner that included a conspiracy offense. As the evidence was sufficient to allow the jury to conclude that the defendant conspired with the codefendant to possess the cocaine without actually reaching the point of possession, the defendant's sentence for a conviction of the lesser-included offense of conspiracy to possess cocaine with intent to distribute was not void, even though that offense was not charged in the indictment. King v. State, 295 Ga. App. 865, 673 S.E.2d 329 (2009).

**Where conspiracy is shown, act of one becomes the act of all and each is as fully responsible for acts of the other in carrying out common purpose as if that person, personally, had committed the act.** Painter v. State, 237 Ga. 30, 226 S.E.2d

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578 (1976); Smith v. State, 142 Ga. App. 810, 237 S.E.2d 216 (1977).

It is well settled that when individuals associate themselves in an unlawful enterprise, any act done in pursuance of the conspiracy by one of the conspirators is the act of all, subject to the qualification that each is responsible for the acts of the others only so far as such acts are naturally or necessarily done pursuant to or in furtherance of the conspiracy. Shehee v. State, 167 Ga. App. 542, 307 S.E.2d 54 (1983).

Since the evidence was undisputed that the conspirators to a scheme to rob for drugs came into possession of drugs, if the jury found that the defendant was a member of that conspiracy, then the defendant was also guilty of the completed crime pursuant to O.C.G.A. § 16-2-20, and the trial court's omission to charge on conspiracy was proper. Garcia v. State, 279 Ga. App. 75, 630 S.E.2d 596 (2006).

Because Georgia abolished the inconsistent verdict rule, and despite the fact that the jury found that the defendant did not commit armed robbery, this did not preclude the trial judge from finding the defendant guilty of possessing a firearm while a convicted felon, given evidence that: (1) the defendant's status as a convicted felon was not contested; and (2) the defendant was in constructive possession of the firearm used by another to commit the crimes charged and conspired to possess the firearm as a party to the crime. Davis v. State, 287 Ga. App. 783, 653 S.E.2d 107 (2007).

**If crime has in fact been committed, coconspirators are guilty as parties to commission of crime.** Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979); Byram v. State, 189 Ga. App. 627, 376 S.E.2d 909 (1988); Day v. State, 197 Ga. App. 875, 399 S.E.2d 741 (1990).

**Conspirator must have been accessory before the fact.** — To be guilty as a conspirator to a crime pursuant to O.C.G.A. § 16-2-20 one must be an accessory before the fact. Grant v. State, 227 Ga. App. 243, 488 S.E.2d 763 (1997).

**Error in charge to jury harmless.** — Where the state proceeded against defen-

dant as a party to the crime of murder with the defendant's co-indictee, any possible error by the trial court in charging conspiracy was harmless since there was sufficient evidence to support a charge on parties to a crime, and the state did not attempt to use statements of the co-indictee against defendant under the conspiracy hearsay exception. Drane v. State, 265 Ga. 255, 455 S.E.2d 27 (1995).

**Charge on conspiracy appropriate.** — Evidence of defendant's gang membership showed motive, was outside the experience of the average juror, and authorized the trial court's charge on conspiracy. Edge v. State, 275 Ga. 311, 567 S.E.2d 1 (2002).

**Aiding and Abetting**

**Meaning of "aid or abet."** — "Aid or abet" as used in O.C.G.A. § 16-2-20(b)(3) should be given the same meaning as in former Code 1933, § 26-501 defining a principal in the second degree as one "who is present, aiding and abetting the act to be done". Thus, to be guilty as a party to a crime as an aider or abettor, a defendant must be an accessory before the fact. Grant v. State, 227 Ga. App. 243, 488 S.E.2d 763 (1997).

**Actions as aider and abettor support conviction despite lack of alleged personal involvement.** — Although the indictment specifically alleged the personal involvement of the defendant and there was no evidence of such involvement at trial, the defendant's actions as an aider and abettor in the commission of the crime allow defendant to be convicted of the crime. Carter v. State, 168 Ga. App. 177, 308 S.E.2d 438 (1983).

When the defendant initiated the contact with the victim and her brother, forced her to give the defendant her earrings, fondled her, held the gun on her brother while the codefendants brutally sodomized her, and counted the money the victim surrendered, such evidence authorized the rejection of any claim that the defendant was a victim. Ramey v. State, 235 Ga. App. 690, 510 S.E.2d 358 (1998).

Circumstantial evidence supported the defendant's convictions for aggravated assault, burglary, armed robbery, cruelty to children, theft by receiving stolen prop-

erty, and possession of a firearm as: (1) the defendant was driving a stolen car that the defendant knew was not the defendant's own; (2) the defendant returned to the victims' house, which the defendant had left only a short time before, slowly circling the victims' residence, pointing at the house; (3) the defendant appeared to let the codefendants out of the car for a specific purpose, since the defendant saw them enter the victims' home and waited for them, demonstrating that the defendant knew they would return shortly; (4) when the codefendants ran back to the car and jumped in, the defendant drove off in response to their rapid return; and (5) shortly thereafter, the defendant abandoned the stolen car. *Parnell v. State*, 260 Ga. App. 213, 581 S.E.2d 263 (2003).

Evidence was sufficient to adjudicate a juvenile a delinquent for aggravated assault with intent to murder when: (1) the juvenile was willingly present when the victim was beaten and stabbed; (2) the juvenile was part of a group carrying bricks, sticks, and bats on a mission of revenge; and (3) the juvenile fled the crime scene and gave police false information moments after the incident, because, under O.C.G.A. § 16-2-20, whether the juvenile actually stabbed the victim was not controlling, as the juvenile was an accomplice of those who did, and it could be inferred from the juvenile's conduct before and after the crime that the juvenile shared the perpetrators' criminal intent. *In the Interest of N.L.G.*, 267 Ga. App. 428, 600 S.E.2d 401 (2004).

When the defendant sat in a stolen would-be getaway car while an accomplice murdered a victim, and then the defendant and the accomplice abandoned that car and fled the scene, a jury could find, under O.C.G.A. § 16-2-20(a), that the defendant participated in the accomplice's crimes and could be held criminally liable therefor. *Jackson v. State*, 274 Ga. App. 279, 617 S.E.2d 249 (2005).

Fact that a codefendant did not personally use a bat to beat an assault victim did not absolve the codefendant of criminal liability because the codefendant was a party to and guilty of the crime by intentionally aiding the commission of the assault. *Roberson v. State*, 277 Ga. App. 557, 627 S.E.2d 161 (2006).

In light of the juvenile's companionship and conduct before, during, and after the alleged crimes of kidnapping, impersonating an officer, robbery, terroristic threats, and simple battery, the juvenile's overt participation in the overall attack on the three victims sufficed to sustain an adjudication of delinquency based on that conduct as a party to the crimes involving all three victims. *In the Interest of B.M.*, 289 Ga. App. 214, 656 S.E.2d 855 (2008).

**Evidence sufficient as to aiding and abetting armed robbery.** — Evidence was amply sufficient to authorize a reasonable trier of fact to rationally find therefrom proof of guilt beyond a reasonable doubt, both as to the direct commission of the crime of armed robbery by defendant and as to the intentional aiding and abetting of it under O.C.G.A. § 16-2-20. *Graves v. State*, 180 Ga. App. 446, 349 S.E.2d 519 (1986).

Since there was ample evidence to show that the defendant aided, abetted, encouraged, advised, and counseled another participant in a robbery and shooting, it made no difference that the other man fired the gun that injured a victim because all that the state had to prove was that the defendant and others were acting in concert. *Culberson v. State*, 236 Ga. App. 482, 512 S.E.2d 367 (1999).

Person who intentionally aids or abets the commission of the crime, or intentionally advises, encourages, hires, counsels, or procures another to commit the crime, may be convicted of the crime as a party to the crime. Even if there was no direct evidence that the defendant actively participated in robbing the victim at gunpoint, there was ample evidence to support the defendant's guilt as a party to the crime of armed robbery because the defendant participated in a discussion concerning retaliation against the victim, and when a witness saw the defendant pointing a gun at the victim. *Drake v. State*, 266 Ga. App. 463, 597 S.E.2d 543 (2004).

Even had the first defendant not waived the issue of the trial court's not severing the defendant's trial from that of the second defendant, the first defendant's conviction for armed robbery was proper, as the first defendant had confessed to involvement in the robbery at a minimum as

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the getaway driver; since the defendant was a party to the crime, defendant could not show that the defendant was prejudiced regarding the severance ruling. *Bennett v. State*, 266 Ga. App. 502, 597 S.E.2d 565 (2004).

Evidence was sufficient to find that the defendant was at least a party to the crime of burglary and guilty of burglary beyond a reasonable doubt, in violation of O.C.G.A. § 16-7-1, as the defendant's own statements established that the codefendant intended to commit an underlying offense of armed robbery when telling the defendant that they should go rob someone in order to get drinking money, and that the codefendant had a handgun; the evidence supported a finding that the defendant was present and assisted in the commission of the crime, such that the defendant was liable as an aider and abettor under a party to the crime theory pursuant to O.C.G.A. § 16-2-20. *Moyer v. State*, 275 Ga. App. 366, 620 S.E.2d 837 (2005), overruled on other grounds, *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008).

Defendant's conviction for armed robbery, in violation of O.C.G.A. § 16-8-41(a), was supported by sufficient evidence, as the defendant and two other persons, with their faces covered and while wielding a gun and a box cutter, entered a convenience store, made the two employees sit on the floor, and took their jewelry as well as other property and cash; although the defendant claimed that the defendant participated under duress and was threatened at gunpoint, it was up to the jury to determine the believability of that claim, and the defendant was found to have participated in the crime as an aider and abettor under O.C.G.A. § 16-2-20(b)(3). *Spradley v. State*, 276 Ga. App. 842, 625 S.E.2d 106 (2005).

Sufficient evidence supported convictions arising from the defendant's participation in a robbery which resulted in the death of a store clerk where, knowing that the cousin was going to commit a robbery, the defendant voluntarily went with the cousin, saw that the cousin had a gun, agreed to "stand over" the scene, and

joined the cousin in using the victim's credit cards afterwards; contrary to the defendant's assertions, testimony showed that the defendant was not intimidated by the cousin. *Scott v. State*, 280 Ga. 466, 629 S.E.2d 211 (2006).

Testimony of a defendant's accomplice implicating the defendant in several armed robberies was sufficiently corroborated based on the defendant's admission, eyewitnesses confirming that two persons participated, and the defendant's use of the victims' bank cards after the robberies. Thus, the defendant's participation as an accessory was sufficiently corroborated by evidence other than from the accomplice. *Epps v. State*, 296 Ga. App. 92, 673 S.E.2d 608 (2009).

Evidence was sufficient to enable the jury to find the defendant guilty beyond a reasonable doubt of armed robbery in violation of O.C.G.A. § 16-8-41(a) because although the defendant did not actually use a weapon, defendant's accomplice's use of a weapon could be attributed to the defendant because under O.C.G.A. § 16-2-20, one who intentionally aided or abetted the commission of a crime by another was a party to the crime and equally guilty with the principal; the defendant aided and abetted the accomplice by telling the accomplice to pull into an apartment complex after they saw the potential victims, giving the accomplice the defendant's gun, and then taking the victims' wallets from the victims while the accomplice pointed the gun at the victims. *Barber v. State*, 304 Ga. App. 453, 696 S.E.2d 433 (2010).

**Coercion defense to armed robbery rejected.** — There was sufficient evidence to support a defendant's conviction for armed robbery and the trial court properly denied the defendant's motion for a new trial since the state disproved the defendant's coercion defense that the defendant was forced to participate in the robbery of a restaurant because the defendant's cohorts had threatened to take the defendant's children away as the defendant never drove away from the scene of the crime while waiting outside of the restaurant, the defendant actually entered the restaurant during the crime, and the defendant never indicated a need

for protection for the children once apprehended. *Engrisch v. State*, 293 Ga. App. 810, 668 S.E.2d 319 (2008).

**By holding the victim while defendant's brother beat the victim,** the defendant was clearly an aider and abettor in the beating. As an aider and abettor, the act of one party was the act of the other person in the commission of the assault. When this fist fight turned into a knife fight, both parties became guilty of aggravated assault. *Johnson v. State*, 188 Ga. App. 411, 373 S.E.2d 93 (1988).

**Aid in assault by engaging in fistfight.** — Person who engages another in a fistfight while the other is simultaneously being beaten with an object by the person's confederate necessarily "aids and abets" the confederate in the assault upon the other, and is therefore a party to the crime committed by the confederate. *Moore v. State*, 216 Ga. App. 450, 454 S.E.2d 638 (1995).

**Mother's participation in daughter's rape.** — Sufficient evidence existed to convict mother of aiding and abetting the statutory rape and child molestation of her daughter by two men when the evidence showed that mother encouraged the men to have sexual intercourse with her daughter and that mother ordered daughter to have sexual intercourse. *Hixon v. State*, 251 Ga. App. 27, 553 S.E.2d 333 (2001).

There was sufficient evidence to support the finding that a defendant parent aided and abetted, pursuant to O.C.G.A. § 16-2-20(b), the other parent's rape of their child in violation of O.C.G.A. § 16-6-1(a)(1); defendant told the child to take the child's clothes off and was present when the other parent had sex with the child. *Zepp v. State*, 276 Ga. App. 466, 623 S.E.2d 569 (2005), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

**Criminal responsibility for all injuries.** — When the evidence showed that the defendant participated in the group attack on the victim, the defendant was criminally responsible for the injuries inflicted by all parties to the crime, even if the defendant personally delivered only one blow. *Cox v. State*, 242 Ga. App. 334, 528 S.E.2d 871 (2000).

#### Evidence sufficient for conviction.

— Because the defendant, the parent of the codefendant who had shot into a house in retaliation for an incident in which the parent was called a name by someone inside the house, had an angry attitude about the name-calling, had encouraged the codefendant and another to shoot at the house, went with the shooters to the scene of the shooting, and later bragged about the shooting, the evidence was sufficient to convict the defendant of murder and aggravated assault of the shooting victims in the house. *Bolden v. State*, 278 Ga. 459, 604 S.E.2d 133 (2004).

Sufficient evidence was introduced to support the defendant's convictions for felony murder and burglary despite the defendant's claims that the defendant was not sufficiently involved in the crimes to be convicted on those charges. *Joyner v. State*, 280 Ga. 37, 622 S.E.2d 319 (2005).

Because the defendant promised, — orally and in writing, — to use the victims' money to acquire tire hauling containers, but instead used it for other purposes, the jury was entitled to infer criminal intent and to find the defendant guilty of theft by taking under O.C.G.A. § 16-8-2 or as a party to the crime of theft by taking under O.C.G.A. § 16-2-20. *Matthiessen v. State*, 277 Ga. App. 54, 625 S.E.2d 422 (2005).

Because the defendant acted as lookout and immediately alerted an unidentified driver to the presence of a police officer, resulting in the unidentified driver's escaping, the evidence was sufficient to convict the defendant of aiding or abetting the unidentified driver in the crime of theft by receiving, in violation of O.C.G.A. §§ 16-2-20, 16-8-7(a). *Dixon v. State*, 277 Ga. App. 656, 627 S.E.2d 406 (2006).

Evidence was sufficient to authorize a trial court to find defendant delinquent for being a party to a homicide, pursuant to O.C.G.A. § 16-2-20(b)(3), and thus, defendant's motion for a directed verdict of acquittal was properly denied; defendant's intent could be inferred easily from the fact that the defendant stood and watched while a friend beat the victim and defecated on the victim, never leaving to call for help. *In the Interest of K.B.T.*, 279 Ga. App. 350, 631 S.E.2d 412 (2006).

Delinquency finding for acts constitut-

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ing party to the crimes of aggravated assault and batter was supported by sufficient evidence showing that the appellant was one of a group of youths who punched, kicked, and struck one victim with a shotgun, and participated in the attack; the appellant also knocked another victim to the ground and hit that victim during the fracas. *In the Interest of E.R.*, 279 Ga. App. 423, 631 S.E.2d 458 (2006).

Sufficient evidence supported the defendant's conviction of aggravated assault under O.C.G.A. § 16-5-21(a)(2) after the defendant's companions used metal knuckles, a metal pipe, and a gun to beat the victim; the defendant was a party to the offense under O.C.G.A. § 16-2-20(a), as the victim, whose testimony was sufficient to establish a fact under O.C.G.A. § 24-4-8, testified that, during the incident, the defendant summoned the companions to help beat the victim, and the defendant and the companions repeatedly warned the victim not to testify in court in the defendant's criminal case. *Souder v. State*, 281 Ga. App. 339, 636 S.E.2d 68 (2006), cert. denied, No. S07C0113, 2007 Ga. LEXIS 97 (Ga. 2007).

Defendant's malice murder conviction, as a party to the crime, was upheld on appeal as sufficient evidence was adduced at trial of the defendant's participation in the crime, including eyewitness testimony that the defendant encouraged the shooter to shoot the victim, that the defendant had recently threatened to shoot the victim in the head, and testimony that the defendant joined the shooter and the co-defendant in the confrontation and fled with them after the shooting. *Sims v. State*, 281 Ga. 541, 640 S.E.2d 260 (2007).

Because evidence existed that the defendant was present when the crimes charged were committed, and the jury could infer a shared criminal intent with that of the actual perpetrator from the defendant's conduct before and after the crimes were committed, the evidence was sufficient to authorize the defendant's convictions as a party to those crimes. *Hill v. State*, 281 Ga. 795, 642 S.E.2d 64 (2007).

Given sufficient evidence of the defen-

dant's involvement in the common objective of fighting with a rival gang member as a party to the crimes, the defendant's convictions on three counts of aggravated assault were upheld on appeal. *Garcia v. State*, 290 Ga. App. 164, 658 S.E.2d 904 (2008).

There was sufficient evidence supporting a conviction for theft by deception under O.C.G.A. § 16-8-3. The defendant drove an accomplice to a store, got a slipcover, obtained the sticker necessary to return the slipcover for a refund, and transferred the slipcover to the accomplice, directing the accomplice to present it for a refund; therefore, the defendant directly committed acts in furtherance of the crime and aided in the crime's commission under O.C.G.A. § 16-2-20. *Bruster v. State*, 291 Ga. App. 490, 662 S.E.2d 265 (2008).

That a defendant aided and abetted in the commission of kidnapping, rape, armed robbery, and the use of a firearm in the commission of a crime was supported by evidence that defendant and the armed accomplice were willing companions; that they stopped to pick up the victim; that they intended to rob the victim; that defendant assisted the accomplice by driving the car while the accomplice was raping the victim; and that the defendant then swapped places with the accomplice so defendant could have sexual intercourse with the victim. *Davis v. State*, 292 Ga. App. 782, 666 S.E.2d 56 (2008).

Evidence of the defendant's shooting a victim, striking the victim's companion with a motorcycle helmet, the defendant's sibling's pointing a gun at the companion, and the sibling's pointing a gun at the victim and pulling the trigger was sufficient to convict the defendant of four counts of aggravated assault, O.C.G.A. § 16-5-21(a)(2), as the defendant was responsible for the sibling's acts as an aider and abettor under O.C.G.A. § 16-2-20(b)(3). *Serchion v. State*, 293 Ga. App. 629, 667 S.E.2d 624 (2008).

Juvenile court properly denied a juvenile's motion for a new trial with regard to the juvenile's delinquency adjudication finding the juvenile guilty for aggravated assault, criminal property damage, cruelty to children, and reckless conduct aris-

ing from the shooting of a BB gun at a passing car. The juvenile was the only Caucasian identified in the group of youth; the juvenile admitted to hiding the BB gun; the juvenile did not dispute that the juvenile encouraged another youth to shoot the gun; and the judge was the final arbiter of the credibility and witness issues and had the province to reject the testimony of the juvenile and a parent that the juvenile did not shoot the gun. *In the Interest of A.A.*, 293 Ga. App. 827, 668 S.E.2d 323 (2008).

Evidence was sufficient to convict the defendant of armed robbery, kidnapping, aggravated assault, and possession of a firearm during the commission of a felony as a party under O.C.G.A. § 16-2-20(b)(3). It was undisputed that the defendant's sibling committed the acts in question, and the evidence showed that the defendant drove with the sibling to the place the sibling planned to rob, waited for the sibling at the sibling's instructions until the sibling returned with the fruits of the crime and the weapon, and then tried to drive away. *McGordon v. State*, 298 Ga. App. 161, 679 S.E.2d 743 (2009).

Evidence was sufficient to support the defendant's conviction for interference with government property because the defendant was a party to the act of damaging the locks to the water meter for the rental home in which the defendant was staying since the testimony of the rental company's principal and the meter reader established that the locks were damaged and removed by someone living in the house for the purpose of accessing the water meter, and according to an eyewitness, the defendant was in the yard while another person who also lived in the house was "messing with the meter"; since there was evidence that the defendant was present when the crime was committed, and the jury could infer from the defendant's conduct before, during, and after the crime that the defendant shared the criminal intent of the actual perpetrators, the evidence was sufficient to authorize the defendant's conviction as a party to the crime. *Jackson v. State*, 301 Ga. App. 406, 687 S.E.2d 666 (2009).

Although the uncorroborated testimony of a codefendant was insufficient to con-

vict defendant under O.C.G.A. § 24-4-8, there was other evidence, including defendant's statements to police that defendant urged the codefendant to kill the victim, to show that defendant aided and abetted and counseled another to commit the crimes under O.C.G.A. § 16-2-20(b)(3) and (b)(4). *Lucky v. State*, 286 Ga. 478, 689 S.E.2d 825 (2010).

**Participant in armed robbery as aiding and abetting assault during robbery.** — When appellant was a participant in armed robbery, and aggravated assault occurred during course of robbery, appellant's actions could be construed as aiding and abetting in the crime. *Jackson v. State*, 163 Ga. App. 526, 295 S.E.2d 206 (1982).

**Party to armed robbery by furnishing gun.** — By helping another plan a kidnapping and providing that person with a gun for that purpose, one is a party to the crime of armed robbery. However, a jury's verdict of guilty of armed robbery is not inconsistent with its verdict of not guilty of other charges, e.g., burglary, assault, kidnapping. The jury could very well believe that the gun was used only in commission of the armed robbery, and where the defendant's only criminal act as an aider and abettor was to furnish the gun, defendant was only guilty of the offense in which the gun was actually used. *Shehee v. State*, 167 Ga. App. 542, 307 S.E.2d 54 (1983).

**Party to armed robbery by retrieving loot.** — Defendant's testimony that defendant stood by as third party robbed victim at gunpoint and that defendant picked up victim's discarded cash upon instruction by the third party was sufficient for conviction of armed robbery as an aider and abettor. *Dowdy v. State*, 209 Ga. App. 95, 432 S.E.2d 827 (1993).

Evidence that defendant witnessed the victim with a roll of money and then later accompanied the victim and the codefendant in the victim's car, after the codefendant showed defendant that the codefendant had a handgun in the codefendant's possession, and then took the victim's money after the codefendant shot the victim was sufficient to show that defendant was a party to and an active participant in the armed robbery of the victim. Drum-

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mer v. State, 264 Ga. App. 617, 591 S.E.2d 481 (2003).

**Planning robbery and driving getaway car** were sufficient to sustain defendant's conviction of armed robbery, even though defendant did not enter the victim's home and participate in the actual robbery. Pryor v. State, 179 Ga. App. 293, 346 S.E.2d 104 (1986).

**Officer guilty of aiding and abetting robbery.** — Evidence was sufficient to convict defendant of several crimes, including crimes arising out of the robbery of a business even though defendant did not directly participate in that crime, as the evidence showed that defendant aided and abetted in the commission of the crime; defendant, a police officer, was aware that the crime was going to occur before it happened and did not report the crime, defendant made calls to the people involved in the robbery, defendant met with the people who committed the crime afterwards and advised and counseled them, and defendant asked if defendant could receive money from the robbery even if defendant did not participate in it. Greene v. State, 257 Ga. App. 837, 572 S.E.2d 382 (2002).

**One acting as look-out during burglary is as guilty as active participants.** — One who acts as look-out during commission of burglary is participating in commission of that crime within meaning of O.C.G.A. § 16-2-20 and is as guilty as active participants. DeLoach v. State, 142 Ga. App. 666, 236 S.E.2d 904 (1977).

**Felony murder conviction based on participation in aggravated assault.** — Evidence that defendant was seen making notes at the crime scene the day of the shooting, that the defendant accompanied the coconspirator knowing that the coconspirator intended to rob a cab driver, and that the defendant drove the coconspirator away after the shooting of the cab driver authorized the jury to find the defendant was a party to the crime of aggravated assault committed with a deadly weapon, and hence to felony murder. Brown v. State, 278 Ga. 724, 609 S.E.2d 312 (2004).

**Intermediary in drug sale.** — Even if defendant was not treated as the actual

seller but merely the conduit or intermediary by which the sale took place, defendant was guilty of selling cocaine, because defendant aided and abetted the sale as a party to the crime. Lawrence v. State, 227 Ga. App. 70, 487 S.E.2d 608 (1997).

While mere presence at the scene of a crime or even approval of another's criminal conduct was not sufficient to authorize a conviction, defendant's actions went far beyond mere presence and authorized the jury to find that defendant actively facilitated the drug sale as defendant aided and abetted the seller in the sale by informing the undercover drug agent about where to obtain the cocaine, by taking the agent to that location, and by intentionally procuring the seller to sell the cocaine; that evidence was sufficient to enable a rational trier of fact to find defendant guilty beyond a reasonable doubt of being a party to the sale of cocaine. Jackson v. State, 259 Ga. App. 108, 576 S.E.2d 85 (2003).

Evidence was sufficient to convict the defendant because the defendant aided and abetted the sale of cocaine to the undercover officer pursuant to O.C.G.A. § 16-2-20; the defendant approached an undercover officer, the defendant took money from the officer and went into a hotel room, and the defendant later returned and gave the officer cocaine. Ware v. State, 308 Ga. App. 24, 707 S.E.2d 111 (2011).

**Defendant was properly convicted for trafficking in marijuana** since the defendant owned the farm used by defendant's son to grow marijuana, the defendant helped to construct the building used to grow marijuana, and the defendant helped acquire necessary support devices to put the building into operation; this evidence authorized the jury to find that defendant's son had actual possession of the marijuana and that defendant had constructive possession by aiding and abetting the son's possession. Lang v. State, 171 Ga. 368, 320 S.E.2d 185 (1984).

Defendant's conviction for trafficking in marijuana was authorized because the defendant, a roommate, and an accomplice were willing participants in the drug offenses, and the defendant had agreed to accept delivery of the package of mari-

juana at the defendant's residence in exchange for \$200 and an ounce of marijuana for the defendant's personal consumption; whether the defendant had physical possession of the cocaine, the defendant aided and abetted the marijuana's actual physical possession and was guilty of the offense of trafficking under O.C.G.A. § 16-13-31(c) and under O.C.G.A. § 16-2-20 as a party to the crime because the defendant admitted that the defendant was aiding the accomplice's efforts to commit the trafficking offense by giving the accomplice a safe haven and a means to avoid law enforcement detection. Park v. State, No. A10A1799, 2011 Ga. App. LEXIS 265 (Mar. 23, 2011).

**When defendant who had been hired to pick up marijuana from plane** had, at time of arrest, succeeded in opening only the upper portion of the door to the plane, defendant's conviction for possession of marijuana could be supported on theory of defendant being an aider and abettor of drug conspirators who were in constructive possession. State v. Lewis, 249 Ga. 565, 292 S.E.2d 667 (1982).

**Aiding another in escape from confinement.** — O.C.G.A. § 16-10-53(a) (knowingly aiding another in escaping from any place of lawful confinement) preempts O.C.G.A. § 16-2-20(b)(3) (aiding and abetting the commission of an offense), insofar as escape from confinement is concerned. Harden v. State, 184 Ga. App. 371, 361 S.E.2d 696 (1987); Roberts v. State, 257 Ga. 180, 356 S.E.2d 871 (1987).

**Arranging for victim to be present, and filming crime.** — Evidence that defendant had arranged for the victim to be present at a party and that defendant actively engaged in videotaping an act of sodomy between the roommate and the victim authorized a finding that defendant was guilty of the offense of sodomy as an aider and abettor and was guilty of the offense of exploitation of children as either a principal or as an aider and abettor. Parker v. State, 190 Ga. App. 126, 378 S.E.2d 503 (1989).

**Accessory to theft by taking.** — To be guilty as a party to a crime as an aider or abettor pursuant to O.C.G.A.

§ 16-2-20(b)(3), a defendant must be an accessory before the fact, and where no evidence was presented that defendant was an accessory to the commission of the crime of theft by taking of school district funds, conviction for stealing these monies was not warranted. Purvis v. State, 208 Ga. App. 653, 433 S.E.2d 58 (1993).

**Evidence sufficient as to aiding and abetting felony shoplifting.** — There was sufficient evidence to support the jury's verdict, finding defendant guilty of aiding and abetting in felony shoplifting, in violation of O.C.G.A. §§ 16-8-14(a)(1) and 16-2-20(b)(3), because employees in a store were alerted to a shoplifting in progress, and they followed the alleged shoplifter out to a car, which defendant got into and drove away; defendant was positively identified by an employee who was on the driver's side of the car, the owner of that car had loaned the car to defendant and defendant never returned it, and defendant simply contended that the car had been stolen and did not report the theft because defendant intended to get the car back. Patterson v. State, 272 Ga. App. 675, 613 S.E.2d 200 (2005).

**When defendants were charged in accusation with directly committing specific acts of shoplifting,** but neither was specifically accused of being a party to the other's commission of the offense, there was no error in charging the jury under the language of both O.C.G.A. § 16-2-20(b)(1) (direct commission of crime) and O.C.G.A. § 16-2-20(b)(3) (intentionally aiding or abetting in commission of crime). Jenkins v. State, 172 Ga. App. 715, 324 S.E.2d 491 (1984).

**Even though defendant was not charged as anything other than a direct perpetrator** in a prosecution for aggravated assault, an instruction that defendant could be convicted under a theory of indirect concern was proper since defendant had notice of the testimony of a defense witness authorizing the jury to find that defendant was an aider and abettor. Upshaw v. State, 221 Ga. App. 655, 472 S.E.2d 484 (1996).

**Instigating gang attack supported aiding and abetting conviction.** — There was sufficient evidence to convict one defendant of malice murder under

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O.C.G.A. § 16-5-1 based upon defendant's actions of instigating the gang attack on the victim and participating in the attack by knocking down the victim and shooting a gun; even though that defendant did not actually fire the shot that killed the victim, defendant was criminally responsible under O.C.G.A. § 16-2-20 for the shot that killed the victim. *Ros v. State*, 279 Ga. 604, 619 S.E.2d 644 (2005).

**Evidence sufficient for conviction of financial transaction card fraud.** — Because the evidence showed the defendant's family participated in a scheme whereby they obtained credit cards in the names of non-existent businesses and used the cards to buy goods for their own use with no intention of repayment, even though the defendant did not personally sign for these purchases, a jury could conclude that the defendant aided and abetted the fraudulent use of the card in light of evidence showing the defendant agreed to the step-child's offer to obtain one of the fictitious business credit cards for the defendant's use, that the defendant was aware of a scheme to commit fraud through the use of credit cards, and that the defendant was seen often in the store where the fraudulent purchases occurred. *Stuart v. State*, 267 Ga. App. 463, 600 S.E.2d 629 (2004).

**Jury instructions.** — In a prosecution for robbery, a charge to the jury was not confusing or prejudicial which, in part, authorized finding that defendant was a party to the crime if the defendant "had knowledge of the commission of the offense and after the act drove the car in a precipitous manner," and the charge did not invade the province of the jury. *Carter v. State*, 224 Ga. App. 445, 481 S.E.2d 238 (1997).

Regarding the principle of parties to a crime, the trial court's substitution of "helps" for "aids or abets" in its charge was not improper since aiding and abetting encompasses the concept of helping in the commission of a crime. *Sharpe v. State*, 272 Ga. 684, 531 S.E.2d 84, cert. denied, 531 U.S. 948, 121 S. Ct. 350, 148 L. Ed. 2d 282 (2000).

Jury instruction about "parties to a

crime" that stated defendant could be charged as a party, or aider or abettor, to the offense of possession of a firearm during the commission of a crime properly stated the law, and the charge was adjusted to the evidence. *Wade v. State*, 261 Ga. App. 587, 583 S.E.2d 251 (2003).

Defendant's claim that the court erred by charging O.C.G.A. § 16-2-20, on parties to a crime, in its entirety is without merit. When the entire Code section is charged even though a portion may be inapplicable under the facts in evidence, it is usually not cause for a new trial. *Maness v. State*, 265 Ga. App. 239, 593 S.E.2d 698 (2004).

Jury was properly instructed on conspiracy and parties, even though the defendant's indictment alleged that the defendant directly committed the offenses and did not specify that the defendant was only a party to or coconspirator in the criminal acts. *Michael v. State*, 281 Ga. App. 289, 635 S.E.2d 790 (2006).

Because the trial court properly instructed the jury on both the crimes of armed robbery and theft by taking, and expressly stated that in the event that the jury did not believe that the defendant was guilty of armed robbery beyond a reasonable doubt, the jury could convict on the lesser offense of theft by taking, given that the evidence was sufficient to authorize a finding of guilt on the armed robbery charge, the jury was authorized to reject the defendant's claim that the victim knowingly assisted in the planning and perpetration of the crime. *Hester v. State*, 287 Ga. App. 434, 651 S.E.2d 538 (2007).

**Failure to give circumstantial evidence charge was error.** — Circumstantial evidence against a defendant in a cocaine trafficking case under O.C.G.A. § 16-13-31(a)(1) was sufficient to convict the defendant as a party to the crime: defendant drove the defendant's sibling, who arranged the drug sale, to the designated place for the transaction and patrolled the parking lot, and, when the defendant saw a police officer, fled the scene. *Martinez v. State*, 303 Ga. App. 71, 692 S.E.2d 737 (2010).

**Evidence insufficient.** — There was insufficient evidence to convict the defen-

dants, both of whom had been passengers in a vehicle they knew had been stolen, of theft by receiving stolen property in violation of O.C.G.A. § 16-8-7(a); there was no evidence that the defendants did anything other than allow themselves to be transported in the vehicle or that they intentionally aided or abetted the commission of a crime under O.C.G.A. § 16-2-20(b). *Cooper v. State*, 281 Ga. App. 882, 637 S.E.2d 480 (2006).

Evidence was insufficient to show that the defendant intentionally aided, abetted, or encouraged the commission of aggravated battery, O.C.G.A. § 16-5-24, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106; the defendant had a fight earlier in the afternoon at a different location with several of the people who were at the scene of the shooting, and the evidence showed that the defendant had motive and intent to do harm, that the defendant was upset, that the defendant drove by the scene of the shooting before the shooting occurred, and that the defendant's brother gave the defendant a gun at least three days before the crime occurred, but the state failed to adduce evidence that the defendant intentionally aided, abetted, or encouraged the commission of the crimes of which the defendant was convicted. Thus, what the evidence produced by the state did not show were the essential links between the defendant's proven behavior and the crimes charged. *Gresham v. State*, 298 Ga. App. 136, 679 S.E.2d 344 (2009).

Except as to one incident, the evidence was insufficient to show that a mother aided and abetted her husband's sexual abuse of their twin daughters when they were between four and eight years old, because the record showed that the mother had no knowledge of seven of the eight incidents until she took the children to therapy, and the prosecution's circumstantial evidence—including the fact of the family's nudist lifestyle, the existence of pornographic movies in the home, and the fact that, during therapy, the mother advised the girls to not talk about their father—was insufficient to prove aiding and abetting beyond a reasonable doubt. *Naylor v. State*, 300 Ga. App. 401, 685 S.E.2d 383 (2009).

**Convictions as aider and abettor proper despite lack of personal involvement.** — Despite the defendant's contention that the crimes against a stabbing victim were solely committed by the codefendant, pursuant to O.C.G.A. § 16-2-20(a), there was ample evidence to conclude that the defendant either committed the crimes or was a party to the crimes, including that both the defendant and the codefendant drove to the stabbing victim's home, that the victim was stabbed to death, and that the victim's wallet and checkbook were stolen so that both defendants could have money to buy more drugs. *Odom v. State*, 279 Ga. 599, 619 S.E.2d 636 (2005).

**Evidence sufficient on one count of aiding and abetting, but insufficient on another.** — With regard to a juvenile's adjudication as delinquent on two counts for acts, which if committed by an adult, would constitute the crimes of criminal attempt to hijack a motor vehicle, insufficient evidence existed to find that the juvenile was a party to the criminal attempt to hijack on one count because the charge showed only that the juvenile was standing by the side of the road with the two other persons who were parties to the action and remained on the side of the road when another approached the victims' motor vehicle with a handgun and attempted to take the car by force and intimidation; mere presence, association, or suspicion, without any evidence to show further participation in the commission of the crime was insufficient to authorize a conviction. However, with regard to criminal attempt to hijack a motor vehicle, sufficient evidence existed to establish that the juvenile had knowledge of what was going to take place based on the prior attempt to hijack since: (1) the juvenile stood directly in front of the victim's vehicle; (2) the juvenile assisted one of the cohorts after that person fell; and (3) an investigating officer testified to the juvenile's own admission that the juvenile fled the scene in an attempt to elude the police, which authorized the juvenile court to infer that the juvenile was a participant and not merely a bystander in the second attempted hijacking. *In the Interest of C.L.*, 289 Ga. App. 377, 657 S.E.2d 301 (2008).

**Application****1. In General**

**Corporate officer not shielded from criminal responsibility for acts in corporation's behalf.** — Officer or agent of corporation cannot assert that criminal acts, in form corporate acts, were not the officer's acts merely because carried out by the officer through instrumentality of the corporation which the officer controlled and dominated in all respects and which the officer employed for that purpose. Williams v. State, 158 Ga. App. 384, 280 S.E.2d 365 (1981).

**One hindering apprehension or punishment of criminal.** — One guilty of violating former Code 1933, § 26-2503 (see O.C.G.A. § 16-10-50) would be classified as an accomplice after the fact at common law, and such an offender is not considered an accomplice within the meaning of former Code 1933, § 38-171 (see O.C.G.A. § 24-4-8), or party to the crime under former Code 1933, § 26-801 (see O.C.G.A. § 16-2-20). Moore v. State, 240 Ga. 210, 240 S.E.2d 68 (1977).

Since one may not be convicted of murder as a party to that crime and also be convicted of not being a party to the crime, but only as an accessory after the fact, defendant's conviction for hindering the apprehension of a criminal was set aside. Jordan v. State, 272 Ga. 395, 530 S.E.2d 192 (2000).

Conviction as a party to the crime was reversed where the appellate court concluded that the evidence was insufficient to establish that defendant intentionally aided, abetted, advised, encouraged, counseled, hired, or procured others to commit the crimes; the evidence, at most, established that defendant found out about the crimes after they were committed and did everything defendant could to help the others avoid prosecution. James v. State, 260 Ga. App. 350, 579 S.E.2d 750 (2003).

**An accessory after the fact** is not considered an accomplice to the underlying crime itself, but is guilty of a separate, substantive offense in nature of obstruction of justice. Moore v. State, 240 Ga. 210, 240 S.E.2d 68 (1977).

**Presence and observation of crime may establish one as party.** — Jury

question was presented where evidence showed that plaintiff was in presence of, and talking with, other party who removed hat from counter, tore out price tag, and placed it on plaintiff's head. Dixon v. S.S. Kresge, Inc., 119 Ga. App. 776, 169 S.E.2d 189 (1969).

**Fact that defendant lived with person who committed offense.** — Fact that defendant lived with person who committed offense did not support guilty verdict of defendant, since mere presence in and of itself will not justify conviction. Parker v. State, 155 Ga. App. 617, 271 S.E.2d 871 (1980).

**Mere presence at scene and flight from authority are insufficient to support a criminal conviction.** Estep v. State, 154 Ga. App. 1, 267 S.E.2d 314 (1980).

**When a party possessed a firearm during the commission of a felony,** an accomplice who is concerned in the commission of the crime under O.C.G.A. § 16-2-20 is likewise guilty of both offenses. Anderson v. State, 237 Ga. App. 595, 516 S.E.2d 315 (1999).

Although the trial court might not have been presented with evidence that the defendant was in physical possession of a firearm during the hijacking of the victim's car, because the evidence that was presented authorized a finding that the defendant was a party to that crime, and that all those involved were joint conspirators, the trial court did not err in denying the defendant a new trial on grounds that the indictment charging possession of a firearm during the commission of a felony was at fatal variance with the proof presented at trial. Davis v. State, 287 Ga. App. 786, 653 S.E.2d 104 (2007).

**When ownership not shown, equal access proves all defendants guilty of possession of drugs.** — When the state did not show the indicia giving rise to a presumption of ownership or exclusive control of a vehicle, no presumption arose and, therefore, there was no triggering of the equal access defense, but by showing circumstantially that each of the defendants had equal access to the drugs, the state was able to support its theory that all of the defendants were parties to the crime and thus guilty of joint constructive

possession of the drugs. Castillo v. State, 166 Ga. App. 817, 305 S.E.2d 629 (1983).

**Collusion among relatives established by slight circumstances.** — When transactions involving relatives are under review, slight circumstances are often sufficient to induce belief that there was collusion among parties. Heard v. State, 142 Ga. App. 703, 236 S.E.2d 911 (1977).

**Effect of contradictory testimony on defendant's denial of intent to participate.** — Where defendant's posture is one of admitting presence and cooperation for one criminal purpose (stealing money from the cash register), but denying the intent of participating in an armed robbery, the matter thus essentially involves the credibility of the defendant; and if the defendant's explanation of the incident is contradicted by the testimony of the police officers, the hotel employee, and the victims, the jury is authorized to reject the explanation. Parham v. State, 166 Ga. App. 855, 305 S.E.2d 599 (1983).

**Even though codefendants' testimony conflicted,** their testimony with regard to defendant's aid to them was sufficiently corroborative to establish that defendant was a party to the burglary. Allen v. State, 224 Ga. App. 324, 480 S.E.2d 328 (1997).

**Codefendant's trial should have been severed.** — Trial court erred in denying a codefendant's motion to sever the trial from the defendant's trial because the codefendant was not allowed to introduce the exculpatory portions of the statements that explained the excerpted admissions introduced by the state, which supported the codefendant's antagonistic defense that the codefendant was present at the robberies due to coercion by the defendant. To avoid potential Bruton issues, the state introduced only those portions of the codefendant's 9-1-1 calls or custodial statements made establishing that the codefendant was at the scene of two robberies, that the codefendant's vehicles were used, and that the codefendant sent police to a motel room to investigate the robberies, but refused the additional portions of the statements that tended to support the codefendant's defense that the codefendant was coerced

into participating in the crimes. Bowe v. State, 288 Ga. App. 376, 654 S.E.2d 196 (2007), cert. dismissed, sub. nom., State v. Baker, No. S08C0548, 2008 Ga. LEXIS 318 (Ga. 2008).

**Medicaid fraud.** — Even assuming defendant could not be considered a "provider," the wide range of activities performed by defendant, combined with defendant's supervisory role in the medical office, made the defendant a party to the crime of Medicaid fraud. Bullard v. State, 242 Ga. App. 843, 530 S.E.2d 265 (2000).

**Evidence sufficient to support residential mortgage fraud conviction.** — Evidence that the defendant, a loan officer who handled the closing on a codefendant's home, was a party to a scheme whereby the defendant gave the codefendant money for the downpayment before closing, the codefendant falsely stated in the loan application that the codefendant had not borrowed the down payment, and later defaulted on the loan was sufficient to convict the defendant of residential mortgage fraud as a party to that crime. Gilford v. State, 295 Ga. App. 651, 673 S.E.2d 40 (2009), cert. denied, No. S09C0827, 2009 Ga. LEXIS 258 (Ga. 2009).

**Inference that defendant tampered with evidence.** — When the defense to a tampering with evidence charge was that no one saw defendant pull up and destroy marijuana plants, but the police officers saw the defendant on the property with the plants, advised the defendant not to remove the plants, returned in two hours to find the plants missing, and saw no one else around the premises at either time, the jury could reasonably infer that the defendant at the very least participated in the destruction and that in itself would justify conviction. Parrish v. State, 182 Ga. App. 247, 355 S.E.2d 682 (1987).

**Possession of firearm during commission of crime.** — Evidence which was sufficient to authorize a conviction of defendant's codefendant of possession of a firearm during the commission of a crime combined with evidence which was sufficient to authorize defendant's conviction of the crime during the commission of which the gun was possessed was also sufficient to sustain defendant's guilt of

**Application (Cont'd)**  
**1. In General (Cont'd)**

the possession of a firearm during the commission of a crime. Roberts v. State, 167 Ga. App. 38, 306 S.E.2d 43 (1983).

Defendant may properly be convicted of possession of a firearm during the commission of a crime on the ground that defendant was a party or aider or abettor to the offense. Perkins v. State, 194 Ga. App. 189, 390 S.E.2d 273 (1990).

In a prosecution for armed robbery and burglary, where evidence showed that a gun was used, that defendant at one point had possession of the gun, and that defendant disposed of the gun, defendant was guilty of armed robbery, and the court did not err in failing to instruct on lesser included offenses of robbery and theft by taking. Hopkins v. State, 227 Ga. App. 567, 489 S.E.2d 368 (1997).

**Juvenile delinquency and weapons charges.** — Adjudication of delinquency for giving a false name to a law enforcement officer, carrying a concealed weapon, and possession of a pistol by a person under the age of 18 was proper when juvenile defendant who was driving a relative's vehicle had free run of the relative's property while the relative was deployed overseas; also, defendant was in the vehicle the morning of and night before a traffic stop, defendant directed the other juvenile where to drive, neither gun was registered to the relative, defendant seemed to know about the guns' existence, and defendant gave a deputy false information about the defendant's identity. *In the Interest of C.M.*, 290 Ga. App. 788, 661 S.E.2d 598 (2008).

**Evidence sufficient to support finding of participation.** — Evidence of actor's conduct before, during, and after offenses sufficient to support finding that the actor was participant. *In re J.S.S.*, 168 Ga. App. 340, 308 S.E.2d 855 (1983); *In re K.B.*, 223 Ga. App. 105, 476 S.E.2d 875 (1996).

When the defendant was identified as the person who demanded an admission fee from everyone who entered a cock fighting area and, when captured, still had \$256 in cash in defendant's pants pocket, defendant was a direct participant

in the criminal enterprise, and thus chargeable with both cruelty to animals and commercial gambling under O.C.G.A. § 16-2-20. *Morgan v. State*, 195 Ga. App. 52, 392 S.E.2d 715 (1990).

**Evidence sufficient for participation in crime of possessing weapon by felon.** — Convicted felon's conviction for possession of a shotgun was authorized, even though the shotgun was not in the felon's immediate possession, since the evidence supported a finding that the felon was a party to the crime of burglary and the felon and the felon's codefendant were coconspirators. *Coursey v. State*, 196 Ga. App. 135, 395 S.E.2d 574 (1990).

**Nature of fear and threats which will relieve one aiding commission of crime from liability.** — One who aids and assists in commission of a crime, or in measures taken to conceal it, is not relieved from criminality as an accomplice on account of fear excited by threats or menaces, unless the danger be to life or member, or unless that danger be present and immediate, touching fear under the influence of which perjury is committed. *Whitus v. State*, 216 Ga. 284, 116 S.E.2d 205 (1960), cert. denied, 365 U.S. 831, 81 S. Ct. 718, 5 L. Ed. 2d 708 (1961) (decided under former Code 1933, § 26-402).

**2. Child Abuse and Neglect**

**Evidence sufficient for conviction of child abuse.** — See *Porter v. State*, 243 Ga. App. 498, 532 S.E.2d 407 (2000).

**Child cruelty.** — Jury was authorized to conclude that the defendant participated in a pattern of child cruelty over the course of several months, and aided and abetted in the malicious acts that caused the death of the child victim where, among other things, the defendant, the parent of the child, regularly beat the child with a belt, the defendant was aware that the child had experienced seizures before the night in question, the defendant observed the child in extreme distress that night but offered no assistance, and the defendant realized that the child's condition had worsened during the night but still took no action to procure medical care until the next morning. *Delacruz v. State*, 280 Ga. 392, 627 S.E.2d 579 (2006).

**Aided and abetted in child sexual abuse.** — Evidence was sufficient to show that a mother aided and abetted her husband's sexual abuse of their twin daughters when they were between four and eight years old, but only as to one charged incident, because one daughter told a therapist that she told her mother about this incident, and the record showed that the mother knew about and saw this offense and that she also lent her approval to her husband's conduct. *Naylor v. State*, 300 Ga. App. 401, 685 S.E.2d 383 (2009).

**Evidence sufficient to show defendant was party to acts of aggravated child molestation.** — See *Wyatt v. State*, 243 Ga. App. 882, 534 S.E.2d 431 (2000).

Because sufficient evidence as to venue and of the remaining elements of the crime was presented by the child victim, via both recorded and trial testimony, the child molestation convictions entered against both the defendants under both O.C.G.A. §§ 16-2-20 and 16-6-4 were upheld. *Newman v. State*, 286 Ga. App. 353, 649 S.E.2d 349 (2007).

Trial court properly denied a defendant's motion under O.C.G.A. § 17-9-1(a) for an acquittal in the defendant's trial for aiding and abetting a housemate in committing acts of aggravated child molestation against the defendant's children because there was ample evidence that the defendant acquiesced in and encouraged the acts of child molestation by forcing the children to sleep in the same room with the housemate, although the children objected. *Valentine v. State*, 301 Ga. App. 630, 689 S.E.2d 76 (2009).

**Rule of lenity did not apply to multiple convictions involving children.** — In a criminal trial on charges that the defendant allowed the repeated rapes of the defendant's 11-year-old child, the rule of lenity did not require that the defendant's felony convictions for being a party to rape and cruelty to children should be subsumed by the misdemeanor conviction for contributing to the deprivation of children because different facts were necessary to prove the offenses; the rape conviction required proof under O.C.G.A. §§ 16-2-20 and 16-6-1(a)(1) that the defendant took affirmative steps to aid the rapist, the cruelty to children conviction

required proof under O.C.G.A. § 16-5-70(b) that the defendant caused excessive mental pain to the child, and the conviction for contributing to the deprivation of a minor required proof under O.C.G.A. §§ 15-11-2(8)(A) and 16-12-1(b)(3) that the defendant failed to provide the child with proper care necessary for the child's health, which the state proved by showing that the defendant failed to seek prenatal care for the child even though the defendant knew that the child was pregnant. *Johnson v. State*, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

### 3. Drug Related Offenses

**Employer guilty where employees sold controlled substances at employer's direction.** — Evidence was sufficient to support defendant's convictions of selling and delivering controlled substances where, even though defendant, who operated a limousine service, was not physically present when any of the transactions took place, the deliveries in question were made by two of defendant's employees, and those employees testified that they had been acting at defendant's direction at the time. *Walker v. State*, 196 Ga. App. 741, 397 S.E.2d 28 (1990).

**Trafficking in cocaine.** — When the evidence authorized the conclusion that defendant "fronted" the cocaine to another (via a third person) with the expectation that the other would sell the cocaine and pay defendant the proceeds, the evidence was sufficient to enable a rational trier of fact to find defendant guilty beyond a reasonable doubt of the offense of trafficking in cocaine in the county. *Hernandez v. State*, 182 Ga. App. 797, 357 S.E.2d 131 (1987).

Evidence held insufficient as matter of law to sustain defendant's conviction for trafficking in cocaine. *Crenshaw v. State*, 183 Ga. App. 527, 359 S.E.2d 419 (1987).

Whether defendant had physical possession of the cocaine, the defendant aided and abetted its actual physical possession and was guilty of the offense of trafficking under O.C.G.A. § 16-13-31 and under O.C.G.A. § 16-2-20, as a party to the crime. *Barrett v. State*, 183 Ga. App. 729, 360 S.E.2d 400 (1987), overruled on other

**Application (Cont'd)****3. Drug Related Offenses (Cont'd)**

grounds, Gonzalez v. Abbott, 262 Ga. 671, 425 S.E.2d 272 (1993).

Evidence sufficient for conviction of trafficking in cocaine as "party thereto." Williams v. State, 199 Ga. App. 566, 405 S.E.2d 716 (1991); Brown v. State, 245 Ga. App. 706, 538 S.E.2d 788 (2000).

Defendant's quick trip to a known drug supply area, and defendant's participation in a false report about who was driving the car in which cocaine was found, was sufficient evidence to convince a rational trier of fact that defendant was a party to the enterprise of trafficking in cocaine. Banks v. State, 200 Ga. App. 378, 408 S.E.2d 484 (1991); Woods v. State, 210 Ga. App. 172, 435 S.E.2d 464 (1993).

Evidence was sufficient to find defendant constructively possessed more than 28 grams of cocaine and was guilty as a party to the crime of trafficking in cocaine. Stevens v. State, 245 Ga. App. 237, 537 S.E.2d 688 (2000).

Evidence that defendant's companion showed a bag of cocaine to an undercover officer while defendant stood nearby in a manner the officer described as a "show of force," and that the companion's car contained another 16 ounces of cocaine, was sufficient for a jury to find that defendant was guilty beyond a reasonable doubt of trafficking in cocaine as either a principal in the transaction or as a party to the crime. Martinez v. State, 259 Ga. App. 402, 577 S.E.2d 82 (2003).

Trial court properly denied a defendant's motion for a directed verdict as there was sufficient evidence to support the defendant's conviction for trafficking in cocaine based on the observations of the police watching the defendant and codefendants engaging in suspicious behavior in a high-crime area; the contents of the backpack, which contained 377.45 grams of 50.7 percent pure cocaine heavily wrapped in saran wrap, with a street value between \$8,000 and \$10,000 in powder form or as much as \$15,000 if cut with an agent and compressed into rocks of crack cocaine; the drugs found in the trunk of the defendant's rental vehicle; and the rental of a motel room by the

defendant. Mosley v. State, 296 Ga. App. 746, 675 S.E.2d 607 (2009), cert. denied, No. S09C1188, 2009 Ga. LEXIS 322 (Ga. 2009).

**Evidence sufficient to sustain conviction of possession of cocaine and marijuana with intent to distribute.**

— There was sufficient evidence to support a defendant's conviction of being a party to the crimes of possession of marijuana and cocaine with intent to distribute in violation of O.C.G.A. §§ 16-2-20(b)(3) and 16-13-30, because the defendant was holding large quantities of drugs for an accomplice in a running car outside a hotel with knowledge that the accomplice was at the hotel to make a sale. Haywood v. State, 301 Ga. App. 717, 689 S.E.2d 82 (2009).

**Evidence sufficient to show possession of cocaine.** — See Green v. State, 187 Ga. App. 373, 370 S.E.2d 348, cert. denied, 187 Ga. App. 907, 370 S.E.2d 348 (1988); McGee v. State, 191 Ga. App. 172, 381 S.E.2d 80 (1989).

Although the defendant never had physical possession of cocaine and marijuana in the cab from which the cocaine was delivered, defendant aided and abetted its actual physical possession and is guilty of trafficking under O.C.G.A. §§ 16-2-20 and 16-13-31, as a party to the crime. The "actual possession" required by § 16-13-31 to authorize a conviction for trafficking refers not merely to physical custody but to actual active participation in the possession of such substances so as to be a party to the crime of trafficking. Holder v. State, 194 Ga. App. 790, 391 S.E.2d 808 (1990).

**Evidence sufficient to sustain conviction for selling cocaine.** — See Stevens v. State, 210 Ga. App. 355, 436 S.E.2d 82 (1993); Height v. State, 221 Ga. App. 647, 472 S.E.2d 485 (1996); Douglas v. State, 228 Ga. App. 368, 491 S.E.2d 821 (1997); Jones v. State, 229 Ga. App. 63, 493 S.E.2d 224 (1997); Davis v. State, 244 Ga. App. 33, 535 S.E.2d 10 (2000).

Defendant who told undercover officer of ability to procure crack cocaine, took officer's money, and attempted to procure the cocaine could be reasonably found to have been a party to the sale. Little v. State, 230 Ga. App. 803, 498 S.E.2d 284 (1998).

**Delivery and distribution of marijuana.** — Prior inconsistent statement by marijuana dealer charged with selling marijuana in violation of O.C.G.A. § 16-13-30(j)(1) that defendants were involved in selling marijuana, and evidence that defendants were in close proximity to seized marijuana did not establish that defendants were party to crime of violating O.C.G.A. § 16-13-30(j)(1). Oldwine v. State, 184 Ga. App. 173, 360 S.E.2d 915 (1987).

**Trafficking in methamphetamine.** — Evidence that the defendant helped direct a witness to a police informant's home in order to buy a pound of methamphetamine, combined with the defendant's previous contact with the informant, showed more than mere presence, and, at a minimum, showed that the defendant was guilty as a party to the offense of trafficking in methamphetamine. Lopez v. State, 281 Ga. App. 623, 636 S.E.2d 770 (2006).

Sufficient corroboration existed to support a defendant's conviction for trafficking in methamphetamine when a police informant testified that the defendant appeared to be involved in the deal and the state also offered testimony that a person would not simply tag along to a drug transaction involving over 400 grams of methamphetamine. Casanova v. State, 285 Ga. App. 554, 646 S.E.2d 754 (2007).

Evidence authorized a finding that defendant was guilty as a party to trafficking methamphetamine and was not merely a passenger in the codefendant's truck since the codefendant testified that defendant obtained methamphetamine from a third party and was the supplier for the deal, defendant admitted that defendant had previously purchased methamphetamine from the third party and knew what was going on when defendant and codefendant met with the third party, and defendant remained in the truck when the codefendant took the methamphetamine and got into an agent's vehicle to make the sale. Russell v. State, 289 Ga. App. 789, 658 S.E.2d 400 (2008).

Trial court properly denied a defendant's motion for a directed verdict of acquittal and the defendant's motion for a new trial

with regard to the defendant's conviction for trafficking in methamphetamine as the defendant failed to rebut the presumption that finding the defendant in possession of such a large amount of drugs was sufficient to establish trafficking. Even absent the presumption of possession, the evidence was sufficient to convict the defendant as a party to the crime of trafficking in methamphetamine since the evidence established that the defendant was one of two persons expected to engage in the undercover transaction and methamphetamine was found on the defendant's person. Navarro v. State, 293 Ga. App. 329, 667 S.E.2d 125 (2008).

Trial court erred in convicting the defendant of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e)(3) because although the evidence raised grave suspicions of the defendant's guilt, the state failed to establish that the defendant had both the power and the intention at the time of the defendant's arrest to exercise dominion or control over the drugs and failed to show that other people did not have equal access to the house and the items within the house; all of the evidence was circumstantial with regard to the defendant's constructive possession of the contraband, there was nothing in the case linking the defendant to the drugs or manufacturing equipment in the house, and several other people with access to the house were unaccounted for and were not charged. Aquino v. State, 308 Ga. App. 163, 706 S.E.2d 746 (2011).

Codefendant's conviction for trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e) could not be upheld on the ground that the codefendant was a party to the crime of trafficking in methamphetamine because the state failed to adduce evidence that the codefendant intentionally caused another to commit the crime, aided or abetted in the commission of the crime, or advised or encouraged another to commit the crime; thus, the state's evidence did not show essential links between the codefendant's proven behavior and the drug trafficking charge. Flores v. State, 308 Ga. App. 368, 707 S.E.2d 578 (2011).

**Evidence sufficient for conviction of sale of marijuana.** — See Wimberly v.

**Application (Cont'd)****3. Drug Related Offenses (Cont'd)**

State, 205 Ga. App. 818, 423 S.E.2d 728 (1992); Madge v. State, 245 Ga. App. 848, 538 S.E.2d 907 (2000).

**Evidence sufficient for conviction of constructive possession of marijuana.** — When there was more evidence to connect defendant to the marijuana than that of mere spatial proximity or presence as the marijuana was hidden during the transport in the patrol vehicle to the station by one of the three codefendants, defendant admitted to knowing the owner of the marijuana, although defendant refused to identify such person and there was evidence that marijuana had been used in defendant's vehicle and that defendant had recently used marijuana; under these circumstances, there was sufficient evidence to find defendant guilty of joint constructive possession, or at least as a party to the crime. Harvey v. State, 212 Ga. App. 632, 442 S.E.2d 478 (1994).

Evidence supported a defendant's conviction of bringing stolen property to Georgia, eluding an officer, and possessing marijuana as a party, if not as a conspirator, since: (1) the defendant discussed with the defendant's love interest what would happen if they were apprehended by the police; (2) the love interest gave the defendant a handgun after the love interest stole a new gun and the defendant packed two guns with the defendant's personal items and the ski masks; (3) the defendant suspected that the truck was stolen, refused to ask about its origin, saw the stolen gun on the seat of the truck, observed two gas drive-offs, ate stolen food, smoked shared marijuana repeatedly, and sat next to the glove compartment where the marijuana lay; and (4) the defendant was silent during the police pursuits, saw the defendant's love interest retrieve a stolen handgun just prior to an assault of a police officer, did not hinder the love interest or warn the police, lied to the police to cover up the matter, and referred to the entire affair as having "fun for a minute." Michael v. State, 281 Ga. App. 289, 635 S.E.2d 790 (2006).

**Common design evidenced by alcohol provided to minor.** — Evidence that

defendant gave the minor, a 14-year-old, alcohol and keys to defendant's car and stood by silently as the minor got behind the wheel was sufficient to allow a jury to have reasonably concluded that defendant and the minor had a common design to allow the minor to drive after drinking alcohol. Guzman v. State, 262 Ga. App. 564, 586 S.E.2d 59 (2003).

**Evidence sufficient for participation in drug offenses.** — Evidence that defendant approached a police officer, asked what the officer wanted, and then introduced the officer to the man who actually passed the contraband and collected the money is sufficient proof of guilt under O.C.G.A. § 16-2-20. Gay v. State, 221 Ga. App. 263, 471 S.E.2d 49 (1996).

**Evidence sufficient for participation in drug trafficking.** — Evidence was sufficient to support a conviction of attempted trafficking in marijuana. A co-defendant's testimony at the codefendant's trial and the codefendant's statement to the police were admissible as prior inconsistent statements and constituted substantive evidence of the defendant's participation in the attempted drug trafficking; furthermore, the codefendant's statements were sufficiently corroborated under O.C.G.A. § 24-4-8 by the testimony of a case agent that a loaded pistol was found at the defendant's feet and that a bag containing the currency used in the drug transaction was found within arm's reach of the defendant. Green v. State, 298 Ga. App. 17, 679 S.E.2d 348 (2009).

There was sufficient evidence to support a defendant's conviction for possession of methamphetamine with the intent to distribute with regard to the police finding the contraband in the defendant's vehicle, despite the defendant's contention that the state failed to show that the defendant was in possession of the drug and failed to show an intention to distribute, based on the defendant's intentional use of the vehicle. Further, there was testimony from a witness that the witness had recently ingested methamphetamine that was procured from the defendant and the codefendants and that the defendant provided the transportation that facilitated the procurement of the methamphetamine that

was ingested. *Armstrong v. State*, 298 Ga. App. 855, 681 S.E.2d 662 (2009).

**Informant's information reliable and admissible.** — In defendant's drug case, a court erred by granting a motion to suppress where an informant's information was allegedly unreliable because, by admitting the informant's presence during the making of methamphetamine, the informant was making statements against the informant's own penal interest. *State v. Graddy*, 262 Ga. App. 98, 585 S.E.2d 147 (2003), aff'd, 277 Ga. 765, 596 S.E.2d 109 (2004).

#### 4. Murder or Manslaughter

**Party to malice murder.** — Where both brothers planned the armed robbery and carried it out, even if the defendant did not know that the brother intended to kill any potential witnesses, the evidence supports the verdicts against defendant for the malice murder of the victims because as a party to the crime, defendant could be convicted of the crime even though defendant was not the actual perpetrator. *Cargill v. State*, 256 Ga. 252, 347 S.E.2d 559 (1986).

Where a party has committed armed robbery and possession of a firearm during commission of a felony, an accomplice who is concerned in the commission of those crimes is likewise guilty of both offenses, notwithstanding the fact that the accomplice did not have actual possession of the firearm. *Howze v. State*, 201 Ga. App. 96, 410 S.E.2d 323 (1991).

Since defendant's conduct before, during, and after the fatal shooting supported the finding that even if defendant was not the trigger man, defendant intentionally aided and abetted the victim's murder. Whether a person is a party to a crime may be inferred from that person's presence, companionship, and conduct before, during, and after the crime. *Hewitt v. State*, 277 Ga. 327, 588 S.E.2d 722 (2003).

Evidence was sufficient to convict the defendant of malice murder where the defendant drove the defendant's sibling to a rendezvous with the victim, then drove while the sibling shot the victim to death in the defendant's car; thus, the defendant's life sentence was affirmed. *Brown v. State*, 277 Ga. 623, 593 S.E.2d 343 (2004).

Evidence that two defendants who were tried together chased a victim after an argument and that the victim died after one defendant shot the victim five times was sufficient to sustain both defendants' convictions for malice murder and other crimes. *Jackson v. State*, 278 Ga. 235, 599 S.E.2d 129 (2004).

There was sufficient evidence to show that a defendant was a party under O.C.G.A. § 16-2-20(b)(3) to malice murders where: there was testimony that the defendant had previously acted violently toward the victims and had expressed the desire that the first victim die; that the defendant participated in at least one conversation planning the murders; that the defendant was present at the murder scene; that the defendant washed brown stains off the defendant's shirt after the murders; and that the defendant told two people of the murders before the bodies were discovered. *Conway v. State*, 281 Ga. 685, 642 S.E.2d 673 (2007).

The evidence was sufficient to support a malice murder conviction as a party under O.C.G.A. § 16-2-20. The defendant confessed that the defendant was in a car when the car's occupants targeted the victim, that the defendant accompanied the shooter to the victim's vehicle, and that the defendant was present when the shooter killed the victim, and the defendant's story was consistent with an eyewitness's, who did not identify the individuals involved but noted that the distinctive tire rims on the car in which the defendant was riding matched those on the getaway car. *Boseman v. State*, 283 Ga. 355, 659 S.E.2d 364 (2008).

In a malice murder case, there was no merit to a defendant's argument that the evidence established only the defendant's mere presence at the scene; at the very least, the defendant was a party to the crime under O.C.G.A. § 16-2-20(a). While it was not established that the defendant actually committed the physical act of stabbing the victim, the state presented evidence that the defendant took part in another murder the night before the victim was killed, that the victim threatened to disclose the earlier murder to police, that the victim was killed to silence the victim, and that the defendant assisted

**Application (Cont'd)****4. Murder or Manslaughter (Cont'd)**

the codefendants in removing the victim from the trunk of a car and dragging the body into the woods. *Metz v. State*, 284 Ga. 614, 669 S.E.2d 121 (2008).

Evidence was sufficient to support the defendant's conviction for malice murder as a party to the crime under O.C.G.A. § 16-2-20(b)(3) as the defendant accompanied the defendant's son on two occasions to the victim's apartment, the defendant lied to gain entry into the victim's apartment, the defendant was present when the victim was fatally shot, and the defendant fled after the incident. *Ashe v. State*, 285 Ga. 359, 676 S.E.2d 194 (2009).

Evidence that a defendant, who was in an antagonistic relationship with a murder victim, assisted the victim's shooter (the defendant's best friend) by purchasing a handgun that was registered to the shooter and keeping the handgun following the shooting, was sufficient to convict the defendant of aiding and abetting the murder under O.C.G.A. § 16-2-20. *Johnson v. State*, 287 Ga. 767, 700 S.E.2d 346 (2010).

**Murder and armed robbery.** — Although defendant was not the person who pulled the trigger, where there was evidence which authorized findings that defendant was present with the person who pulled the trigger for over two hours prior to the murder; that defendant drove the person who pulled the trigger to the victim's house; that defendant was present in the room when the victim was shot; that the victim was shot with a gun of the same model and caliber that defendant owned; and that defendant destroyed evidence, assisted in the disposal of the decedent's body, fled from the jurisdiction where the crimes were committed, reaped benefits from the armed robbery, and at no time made any attempt to disassociate from the criminal enterprise, a rational trier of fact could have found the defendant guilty of the crimes of murder and armed robbery beyond a reasonable doubt. *Tho Van Huynh v. State*, 257 Ga. 375, 359 S.E.2d 667 (1987).

**Murder, aggravated assault, aggravated battery and armed robbery.** —

Defendant was concerned in the commission of murder, aggravated assault, aggravated battery and armed robbery where the evidence indicated that defendant remained outside at the door of the robbed store during the commission of the criminal acts; had communicated with one of defendant's companions who employed violence inside the store moments prior to the commission of the criminal acts; and had been found the following morning walking with one of these companions along a dirt road near the abandoned get-away vehicle with a significant amount of assorted loose currency. *Grace v. State*, 262 Ga. 746, 425 S.E.2d 865 (1993).

**Party to murder.** — Where the evidence is sufficient to show that the defendant was a part of the conspiracy to murder a specific individual and in fact the murder did occur according to the plan of the coconspirators, the evidence supports a finding of guilt for being a party to the crime. *Owens v. State*, 251 Ga. 313, 305 S.E.2d 102 (1983).

Even though there was sufficient direct evidence that the defendant was guilty of concealing the death of another, there was neither direct evidence nor sufficient circumstantial evidence that defendant was a party to murder. Therefore, the evidence was insufficient as a matter of law to convict defendant as a party to the crime of murder. *Bullard v. State*, 263 Ga. 681, 436 S.E.2d 647 (1993).

When the evidence revealed that the defendant and others returned to a parking lot with the specific intent of ambushing a group of people who had earlier told the defendant not to speed and had thrown a beer bottle at the defendant's car, and when the defendant was found to be an accomplice of one who possessed a gun and fatally shot someone, there was sufficient evidence pursuant to the "party to a crime" law under O.C.G.A. § 16-2-20 to convict the defendant of felony murder in violation of O.C.G.A. § 16-5-1 and simple battery in violation of O.C.G.A. § 16-5-23.1. *Smith v. State*, 277 Ga. 95, 586 S.E.2d 629 (2003).

Sufficient evidence supported a defendant's convictions for felony murder and possession of a firearm during the com-

mission of a crime because, although another person actually attempted to rob the victim and delivered the fatal gunshot, the defendant gave the shooter cocaine to rob the victim and the handgun used in the crime. The defendant was therefore a party to the crime under O.C.G.A. § 16-2-20. Nelson v. State, 285 Ga. 838, 684 S.E.2d 613 (2009).

**Person was not an accomplice to murder** since the person did not know who the intended victim was or when the attempt on the victim's life was to be made, and the person did not in any way participate in or encourage the murder. Kilgore v. State, 251 Ga. 291, 305 S.E.2d 82 (1983).

**Providing weapon sufficient.** — Participation in mutual combat by providing a weapon to one of the other parties is sufficient to support a conviction for voluntary manslaughter as a party to the crime. Steele v. State, 216 Ga. App. 276, 454 S.E.2d 590 (1995) (but see Kennebrew v. State, 1996 Ga. Lexis 917 (1996) and Davis v. State, 235 App. 256, 510 S.E.2D 537 (1998)).

**Providing ammunition sufficient.** — Providing ammunition for a weapon to a combatant, thereby enhancing the weapon's lethal capacity, was sufficient to support a voluntary manslaughter conviction. Mitchell v. State, 225 Ga. App. 26, 482 S.E.2d 419 (1997).

**Charge regarding O.C.G.A. § 16-2-20 warranted.** — In a murder prosecution, the court did not err in charging the substance of O.C.G.A. § 16-2-20 where the evidence supported a finding that a codefendant fired the fatal shot, and that the defendant aided or abetted in the commission of the crime, or intentionally advised, encouraged, hired, counseled, or procured another to commit the crime. Rogers v. State, 251 Ga. 408, 306 S.E.2d 652 (1983).

Evidence in case authorized court's charge concerning "parties to a crime." Ellis v. State, 168 Ga. App. 31, 308 S.E.2d 45 (1983); Holland v. State, 205 Ga. App. 695, 423 S.E.2d 694 (1992); Crumpton v. State, 213 Ga. App. 358, 444 S.E.2d 847 (1994).

Evidence sufficient to authorize charge utilizing language of O.C.G.A. § 16-2-20.

King v. State, 168 Ga. App. 123, 308 S.E.2d 240 (1983); Hildebrand v. State, 209 Ga. App. 507, 433 S.E.2d 443 (1993).

**Evidence sufficient for participation in murder.** — Defendant was guilty of murder and assault, as a participant to the crimes, when, after hearing at least five shots, defendant grabbed the black bag that usually held money, fumbled to unlock the door, left with the shooter, and there was evidence that defendant knew the shooter. Williams v. State, 262 Ga. 677, 424 S.E.2d 624 (1993).

Evidence established more than the mere presence of the defendant during the commission of the offense of aggravated assault and felony murder predicated on aggravated assault: (1) the defendant assaulted the victim during the drive to the murder scene; (2) the defendant participated in a plot to burn the victim's body and stood lookout while the body was buried; (3) the defendant did not attempt to report the crime; and (4) the defendant watched as another person stabbed the victim before attempting to intervene. Navarrete v. State, 283 Ga. 156, 656 S.E.2d 814 (2008), cert. denied, 129 S. Ct. 104, 172 L.Ed.2d 33 (2008).

**Evidence sufficient to sustain conviction for felony-murder.** — See Jones v. State, 253 Ga. 640, 322 S.E.2d 877 (1984); Roberts v. State, 257 Ga. 180, 356 S.E.2d 871 (1987); Lark v. State, 263 Ga. 573, 436 S.E.2d 1 (1993); Royal v. State, 266 Ga. 165, 465 S.E.2d 662 (1996).

In a prosecution for armed robbery, defendant was not entitled to a jury charge on lesser included offenses of theft by taking or robbery by intimidation where robberies were perpetrated by the use of a weapon in the possession of defendant's accomplice. Jones v. State, 233 Ga. App. 362, 504 S.E.2d 259 (1998); Woods v. State, 232 Ga. App. 367, 501 S.E.2d 832 (1998).

Sufficient evidence supported a felony murder conviction because ample evidence, including the defendant's admission, showed more than a mere presence at the crime scene, and that the defendant participated in the felony murder of the victim as a party to the crime while in the commission of an armed robbery. Moreover, the defendant did not have to fire the

**Application (Cont'd)****4. Murder or Manslaughter (Cont'd)**

fatal shot in order to be guilty as a principal because the offense of felony murder was accomplished when a defendant caused the death of another human being while in the commission of the underlying felony. Curinton v. State, 283 Ga. 226, 657 S.E.2d 824 (2008).

Sufficient evidence supported a felony murder conviction because ample evidence, including defendant's admission, showed more than a mere presence at the crime scene, and that the defendant participated in the felony murder of the victim as a party to the crime while in the commission of an armed robbery. Moreover, defendant did not have to fire the fatal shot in order to be guilty as a principal because the offense of felony murder was accomplished when a defendant caused the death of another human being while in the commission of the underlying felony. Curinton v. State, 283 Ga. 226, 657 S.E.2d 824 (2008).

**Evidence sufficient for conviction of felony-murder, aggravated assault, and possession of a firearm during the commission of a crime.** — See Burks v. State, 268 Ga. 504, 491 S.E.2d 368 (1997).

**Evidence sufficient for conviction of felony murder, aggravated assault, and burglary.** — See Parks v. State, 272 Ga. 353, 529 S.E.2d 127 (2000).

**Evidence sufficient for conviction of felony murder, aggravated assault, false imprisonment, and theft by taking.** — See Perkinson v. State, 273 Ga. 814, 546 S.E.2d 501 (2001).

**Evidence sufficient for conviction of malice murder, armed robbery, and hijacking.** — See Eckman v. State, 274 Ga. 63, 548 S.E.2d 310 (2001).

**Evidence sufficient to sustain verdict of malice murder.** — Proof of defendant's presence at shooting of victim, the use of defendant's gun, and defendant's fleeing were enough to sustain the guilty verdict of malice murder. Amerson v. State, 259 Ga. 484, 384 S.E.2d 392 (1989).

Coconspirator's testimony concerning the defendant's involvement in the murder of the defendant's spouse, corroborated by the testimony of witnesses who overheard defendant's desire to have the defendant's spouse killed and by the tape-recorded statements of defendant was sufficient evidence of defendant's participation in the crime to permit a rational trier of fact to find the defendant guilty beyond a reasonable doubt of the malice murder of the defendant's spouse. Gambrel v. State, 260 Ga. 197, 391 S.E.2d 406 (1990); Chapman v. State, 263 Ga. 393, 435 S.E.2d 202 (1993).

Even assuming defendant did not fire any shots, there was sufficient evidence that defendant intentionally aided or abetted the commission of murder, or that defendant intentionally advised, encouraged, or procured another to commit murder. Mize v. State, 269 Ga. 646, 501 S.E.2d 219 (1998), cert. denied, 525 U.S. 1078, 119 S. Ct. 817, 142 L. Ed. 2d 676 (1999).

**Evidence sufficient for conviction of felony murder, armed robbery, kidnapping, and aggravated assault.** — Following evidence was sufficient to support the defendant's convictions as a party or perpetrator of felony murder, armed robbery, kidnapping, and aggravated assault: (1) the defendant and two codefendants robbed four occupants of a duplex at gunpoint; (2) a codefendant hit a victim in the head with a gun; (3) the defendant and codefendants moved the victims into another room; and (4) a codefendant fatally shot a delivery person who entered the duplex. Henderson v. State, 285 Ga. 240, 675 S.E.2d 28 (2009).

**5. Other Crimes Against the Person**

**Evidence sufficient to support conviction for being party to crime of simple battery.** Waddell v. State, 224 Ga. App. 172, 480 S.E.2d 224 (1996).

**In a prosecution for kidnapping with bodily injury,** it was not necessary to prove that defendant actually touched the victim if the defendant aided and abetted the commission of the crime by acting as a lookout. Brown v. State, 224 Ga. App. 241, 480 S.E.2d 276 (1997).

**Evidence sufficient for conviction of armed robbery, kidnapping, false imprisonment, burglary, and aggravated assault with a deadly weapon.** — Evidence was sufficient to sustain the

defendant's convictions as a party to the offenses of armed robbery, kidnapping, false imprisonment, burglary, and aggravated assault with a deadly weapon, in violation of O.C.G.A. §§ 16-5-21, 16-5-40, 16-5-41, 16-7-1, and 16-8-41, because: (1) the defendant received information from the defendant's love interest, about the victims' house, the location of safes, where money was located, and about the alarm system; (2) the day after the home invasion the defendant's love interest saw the defendant and the defendant showed the defendant's love interest a stack of cash, and said it might be the victim's money; and (3) an FBI informant met with the defendant and the defendant told the informant that the defendant had been shorted money from the robbery, and that the defendant got the layout of the house from the defendant's love interest. *Pope v. State*, 266 Ga. App. 658, 598 S.E.2d 48 (2004).

**Aggravated assault.** — After defendant-A hijacked a victim's car at gunpoint, defendant-B's actions in punching the victim in the face while defendant-A waited in the car constituted aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(1), as defendant-B aided and abetted the commission of the carjacking pursuant to O.C.G.A. § 16-2-20(b)(3) for purposes of the aggravated nature of the assault conviction. *Johnson v. State*, 279 Ga. App. 182, 630 S.E.2d 778 (2006).

Aggravated assault convictions were upheld on appeal based on the defendant's act of deliberately firing a gun in the direction of another; moreover, the fact that one of the defendant's cohorts also fired a weapon in the direction of the shooting victims was sufficient for the defendant to be guilty as a party to said criminal acts. *Thompson v. State*, 281 Ga. App. 627, 636 S.E.2d 779 (2006).

Evidence supported a conviction of aggravated assault with a knife when two codefendants repeatedly struck the victim, the defendant struck the victim and threatened the victim's life, the defendant and the first codefendant entered a pharmacy to buy duct tape, and while alone with the victim, the second codefendant held a knife on the victim where the

second codefendant could reach the knife and where the victim could see the knife; this authorized the conclusion that the second codefendant committed aggravated assault and that the defendant was a party. *Rhines v. State*, 288 Ga. App. 128, 653 S.E.2d 500 (2007).

Trial court properly convicted defendant for aggravated assault of a witness through the use of a knife as the evidence established that the defendant gave the codefendant a knife, which was used to search the witness for weapons and for money that the witness had and defendant then shared the spoils of the crimes with the codefendant. The evidence of events occurring before, during, and after the crime was sufficient to show that defendant was a party to the crime of aggravated assault. *Duncan v. State*, 283 Ga. 584, 662 S.E.2d 122 (2008).

Evidence was sufficient to convict a defendant as a party to the crime of aggravated assault as the defendant did not have to possess the gun that was used and inferences gathered from the defendant's action in removing personal items from the trunk of the car before the victim was forced inside the trunk was sufficient to establish that the defendant was a party to the crime. *Cornette v. State*, 295 Ga. App. 877, 673 S.E.2d 531 (2009).

Evidence was sufficient to support a defendant's convictions for aggravated assault because the defendant was involved with other members of a rap group in settling a previous altercation with a rival rap group, the defendant and others drove into an assigned park where the meeting was to be held, the defendant admitted to firing gunshots, and although others also had guns and fired shots, the defendant was liable under O.C.G.A. § 16-2-20 for injuries and a death to bystanders; the defendant could not assert self-defense under O.C.G.A. § 16-3-21(b)(3) because the defendant was the aggressor. *Taylor v. State*, 296 Ga. App. 212, 674 S.E.2d 81 (2009).

**Party to kidnapping.** — Based on the evidence provided by a codefendant that: (1) the defendant and others severely beat the victim over a drug debt; (2) the victim wanted a ride back to a bar, but the codefendants would not allow it; (3) the

**Application (Cont'd)****5. Other Crimes Against the Person (Cont'd)**

defendant's former love interest testified that the defendant admitted to killing the victim; and (4) the State introduced similar transaction evidence that the defendant stood by while a codefendant savagely beat another person, the defendant's kidnapping conviction was upheld on appeal and the jury was authorized to find that the victim was involuntarily held, and that the defendant was a party to that crime. *Reagan v. State*, 281 Ga. App. 708, 637 S.E.2d 113 (2006).

**Party to rape.** — Rape conviction is proper even though a defendant does not have sexual intercourse with the victim if the evidence shows that the defendant held down the victim while defendant's companions raped the victim. *Ceaser v. State*, 184 Ga. App. 599, 362 S.E.2d 156 (1987).

Jury could find the defendant guilty of rape as a party because the defendant did not object when the codefendant had carnal knowledge of the victim in defendant's presence. *Cole v. State*, 279 Ga. App. 219, 630 S.E.2d 817 (2006).

Defendant was properly convicted of being a party to rape under O.C.G.A. §§ 16-2-20 and 16-6-1(a)(1), because evidence that the defendant knew that the defendant's 11-year-old child was being raped, told the child to lie to investigators, failed to prevent the rapist from having contact with the child, helped the rapist get out of jail, and allowed the rapist to move in with the defendant and the child showed that the defendant affirmatively encouraged and was a party to the rapes. *Johnson v. State*, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

**Motion for directed verdict on aggravated sodomy charge properly denied.** — Denial of a motion for a directed verdict on a charge of aggravated sodomy was proper because the defendant and the codefendant sexually assaulted three victims during an armed robbery, including one instance in which the defendant and the codefendant took turns raping one victim, and the aggravated sodomy was committed during the sexual assaults; the

jury could reasonably find that the defendant and the codefendant had a common criminal intent to commit the sexual assaults and the defendant could be found guilty of the act performed by the codefendant. *Coley v. State*, 272 Ga. App. 446, 612 S.E.2d 608 (2005).

**Charge not warranted.** — There was no evidence to support a charge on O.C.G.A. § 16-2-20(b)(2), (4), and contrary to the defendant's contention, the failure to charge the jury on these subsections was proper, where the victim of an aggravated assault had seen only the defendant prior to the moment when the victim was shot, but had seen a second individual at the scene and had not actually seen the defendant with the gun, but only heard it cock. *Waddell v. State*, 277 Ga. App. 772, 627 S.E.2d 840 (2006), cert. denied, 127 S. Ct. 731, 2006 U.S. LEXIS 9304, 166 L.Ed.2d 567 (2006).

In a prosecution for aggravated assault, the trial court did not err in denying the defendant's requested jury instruction on a "parties to a crime" issue, as the overall jury charge the trial court gave, which included the applicable portions of the pattern instruction on parties to a crime, and generally tracked the statutory language of O.C.G.A. § 16-2-20, as well as the entire pattern instruction on "mere presence," substantially covered the principles necessary. *Morales v. State*, 281 Ga. App. 18, 635 S.E.2d 325 (2006).

**Evidence sufficient for participation in false imprisonment.** — Jury was authorized to find that the defendant was a party to the crime of false imprisonment, and the conviction was affirmed, since the evidence demonstrated that the defendant, along with two other codefendants, took an active role in confining and/or detaining the victims; the victims testified that the defendant was positioned at the foot of their bed, participated in tying the victims up, and, despite the defendant's claim that the defendant was a reluctant participant acting out of fear, that the defendant never seemed afraid or intimidated. *Adcock v. State*, 269 Ga. App. 9, 603 S.E.2d 340 (2004).

**Evidence sufficient for participation in sexual assault.** — Evidence was sufficient to support a juvenile court's

finding that a minor had committed aggravated assault under O.C.G.A. § 16-5-21 because the evidence showed that the minor blocked the victim's flight, assisted the friend in pushing the victim into the bedroom, and committed sexual battery, all while the friend remained armed with the gun that the friend had pointed at the victim's head; the defendant could be convicted under O.C.G.A. § 16-2-20. *In the Interest of A.J.*, 273 Ga. App. 51, 614 S.E.2d 159 (2005).

**Evidence sufficient for participation in aggravated assault.** — In a case involving a defendant's cohort shooting a man at a gas station, the evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt as a party to the crime of aggravated assault with a deadly weapon and possession of a firearm during the commission of a felony since the evidence showed that the defendant willingly drove the cohort to the gas station, waited in a stolen truck while armed with an assault rifle as the cohort pulled the victim out of the victim's car and then shot the victim, and then rescued the injured cohort and fled the police; the defendant's criminal intent was properly inferred from the defendant's conduct before, during, and after the commission of the crime. *McClendon v. State*, 287 Ga. App. 238, 651 S.E.2d 165 (2007).

**Evidence sufficient for participation in battery, aggravated assault, kidnapping, and other offenses.** — Defendant's convictions for simple battery, aggravated assault, aggravated battery, and kidnapping with a bodily injury were supported by sufficient evidence as the evidence showed that the defendant helped the codefendant tie up the victim, kicked the victim, and helped the codefendant zip the victim into a sleeping bag and load the victim into the back of the codefendant's pickup truck. Thus, the defendant was criminally responsible under O.C.G.A. § 16-2-20(a) as a party to the crimes. *Wilkinson v. State*, 298 Ga. App. 190, 679 S.E.2d 766 (2009).

**Evidence insufficient to support finding of participation in false imprisonment and robbery.** — With regard to a jail escape wherein the night

jailer was overtaken by at least two inmates, the defendants' convictions for false imprisonment and robbery were reversed on appeal as the state failed to present evidence that either intentionally advised, encouraged, hired, counseled, or procured anyone to commit the crimes since the state presented evidence that only two inmates attacked the night jailer, none of which included the defendants. Under the circumstances presented, the state failed to present evidence which excluded every other reasonable hypothesis save that of the defendants' guilt. *Shearin v. State*, 293 Ga. App. 794, 668 S.E.2d 300 (2008).

**Evidence insufficient to support finding of participation in aggravated assault case.** — Evidence that the defendant drove a codefendant away from the crime scene in a subdivision after the codefendant shot the victim and that a box of bullets was found in the defendant's car when the defendant was later arrested did not support the defendant's convictions of aggravated assault and of possession of a firearm during the commission of a felony. The defendant's possession of a box of bullets of the same caliber as those used in the murder weapon in no way proved the defendant's possession of the weapon during the commission of the assault; driving the codefendant away with knowledge that the codefendant had committed the crime did not, in and of itself, render the defendant guilty as a party to the crime under O.C.G.A. § 16-2-20; and to the extent that the evidence that the defendant's car had been parked at some point with the car's front end facing in the direction going out of the subdivision constituted circumstantial evidence of guilt, the evidence did not exclude every other reasonable hypothesis, as required by O.C.G.A. § 24-4-6. *Ratana v. State*, 297 Ga. App. 747, 678 S.E.2d 193 (2009).

**Evidence sufficient to support conviction of kidnapping and hijacking.** — There was ample evidence from which the jury could have concluded that the defendant was more than "merely present" when defendant's cohorts committed the offenses of kidnapping and hijacking a motor vehicle since: (1) the defendant made no attempt to distance

**Application (Cont'd)****5. Other Crimes Against the Person (Cont'd)**

self from the hijacking while it was occurring and did not offer the victim any help whatsoever after a coperpetrator pulled a gun on the victim; and (2) there was evidence that the defendant drove the stolen vehicle for a full month before defendant was finally arrested, remained with an associate for some time after the hijacking, made a concerted effort to hide the vehicle's true identity and lied to an officer about the vehicle's ownership. Williams v. State, 236 Ga. App. 790, 513 S.E.2d 757 (1999).

**Evidence sufficient for conviction of aggravated assault.** — See Glore v. State, 241 Ga. App. 646, 526 S.E.2d 630 (1999), overruled on other grounds, Miller v. State, 285 Ga. 285, 676 S.E.2d 173 (2009); Johnson v. State, 276 Ga. 368, 578 S.E.2d 885 (2003).

Evidence supported defendant's conviction for aggravated assault under O.C.G.A. § 16-2-20 as: (1) defendant and the codefendant tried to convince a victim to participate in a fake armed robbery; (2) defendant told the victim that they would take the bullets out of the gun if it would make the victim feel better; (3) defendant watched over the victim while the codefendant retrieved the gun; (4) defendant informed the victim that the victim would not get hurt if the victim cooperated with codefendant; and (5) defendant left in the car with codefendant. Broome v. State, 273 Ga. App. 273, 614 S.E.2d 807 (2005).

Defendant's conviction as a party for aggravated assault and aggravated battery was affirmed as: (1) the defendant drove a car knowing a gun was inside; (2) the defendant extinguished the headlights and drove slowly past a crowded corner as a passenger opened fire; (3) the defendant stopped the car next to a prone victim while the passenger continued shooting; and (4) the defendant told the police that the defendant did not care who had been shot. Ford v. State, 280 Ga. App. 580, 634 S.E.2d 522 (2006).

Jury was entitled to find the defendant guilty of aggravated assault, charged in the indictment "with the intent to rob,"

based on the corroboration of the defendant's admission to going on a "lick," which meant to go find someone to rob, and that the defendant knew what a passenger was going to do when that passenger reached out of the car window in an attempt to snatch the elderly victim's purse, resulting in the victim being struck by the car and falling to the ground; hence, the trial court did not err in denying the defendant's amended motion for a new trial. Jackson v. State, 281 Ga. App. 506, 636 S.E.2d 694 (2006).

**Evidence sufficient for aggravated assault on a police officer.** — Fact that the defendant did not fire a gun used by another defendant to shoot a police officer did not preclude the defendant's conviction for aggravated assault on a peace officer; the defendant was with the other defendant in a truck when the officer was shot and drove the truck from the scene of the crime. Grace v. State, 210 Ga. App. 718, 437 S.E.2d 485 (1993); Shorter v. State, 239 Ga. App. 625, 521 S.E.2d 684 (1999).

**Evidence sufficient to convict for hijacking.** — Victim's testimony as to defendant's hijacking of the victim's car with the aid of defendant's accomplice, the arresting officer's testimony as to how the officer spotted defendant and the stolen vehicle minutes after hearing a police dispatch report, and the testimony of the detective who interrogated the accomplice all sufficiently corroborated the testimony of the accomplice at trial. Boykin v. State, 264 Ga. App. 836, 592 S.E.2d 426 (2003).

## 6. Property Offenses

**Evidence sufficient for conviction of shoplifting.** — See Carter v. State, 188 Ga. App. 464, 373 S.E.2d 277 (1988); Watson v. State, 214 Ga. App. 645, 448 S.E.2d 752 (1994); Brown v. State, 228 Ga. App. 281, 491 S.E.2d 488 (1997); Butler v. State, 240 Ga. App. 559, 524 S.E.2d 251 (1999); Stewart v. State, 243 Ga. App. 860, 534 S.E.2d 544 (2000).

**Accepting stolen goods and harboring robbers.** — Evidence that the defendant, who was convicted of armed robbery but who did not "directly commit" the offense and was not present at the crime, accepted stolen coins and attempted to

hide the robbery participants was constitutionally insufficient to support a conviction. *Tenner v. Wallace*, 615 F. Supp. 40 (S.D. Ga. 1985).

**Evidence sufficient to support robbery conviction.** — Even if the defendant did not ever have physical possession of the money bag, there was sufficient evidence to support a robbery conviction under O.C.G.A. § 16-2-20 as: (1) after a struggle, the victim's money bag was taken by an assailant wearing a sweatshirt; (2) the victim identified the truck used in the robbery, the money bag, and the sweatshirt worn by the assailant; (3) the truck fled from police and then the suspects fled on foot; (4) defendant and codefendant were apprehended after a foot chase; and (5) the money bag was found in a nearby bush. *Robertson v. State*, 277 Ga. App. 231, 626 S.E.2d 206 (2006).

Appeals court rejected a contention that the defendant lacked any prior knowledge that the defendant's vehicle was being used to commit armed robberies, and that at most, the evidence could only characterize defendant as an accessory after the fact and not a party to the crime, given that the state's evidence tended to show that the codefendant informed the defendant for the first time that the codefendant had just committed an armed robbery using the car and convinced the defendant to call the police and lie about the car being stolen, all within three minutes after said robbery occurred; further, an additional robbery was committed using the car after the defendant reported it stolen. *Lee v. State*, 281 Ga. App. 479, 636 S.E.2d 547 (2006).

Evidence was sufficient to convict defendant of aiding and abetting a burglary because, knowing that her husband and another person were removing portable items from the home of an unknown person, she asked her husband to take specific items from the victim's home. *Green v. State*, 301 Ga. App. 866, 689 S.E.2d 132 (2010).

Rational trier of fact was authorized to find the defendant guilty beyond a reasonable doubt of being a party to the crime of robbery in violation of O.C.G.A. §§ 16-2-20 and 16-8-40 because the defen-

dant's admission that the defendant was present at the scene of the robbery, in conjunction with the defendant's possession of the recently stolen item, which the jury could find was unsatisfactorily explained by defendant, was sufficient to support the defendant's robbery conviction; the jury was entitled to reject the defendant's version of events because although the defendant contended that defendant's videotaped police interview and defendant's trial testimony created a reasonable hypothesis of innocence, defendant's interview and trial testimony were not consistent with one another in all material respects, and defendant's statements also were inconsistent with the testimony of the pursuing patrol officers. *Boggs v. State*, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Evidence was sufficient to allow the jury to find all defendants guilty of armed robbery beyond a reasonable doubt because the victim testified that one of the defendants had a knife during the attack and that all three defendants struck and kicked the victim while taking the victim's necklaces and money. *Cruz v. State*, 305 Ga. App. 805, 700 S.E.2d 631 (2010).

**Party to armed robbery.** — The defendant was a party to armed robbery, at a minimum, even though defendant was unarmed, where defendant's participation with codefendants in a violent argument with the victim resulted in the victim being shot and killed by a codefendant, after which the defendant left the scene with the codefendants in the victim's car. *Hudson v. State*, 234 Ga. App. 895, 508 S.E.2d 682 (1998).

Evidence was sufficient to support defendant's conviction for armed robbery under O.C.G.A. §§ 16-8-41(a), 16-2-20(a), and 16-2-20(b)(3) because defendant: (1) flagged the victims down; (2) was present during the crime; (3) fled with an accomplice; and (4) was apprehended while in the company of the accomplice. Furthermore, defendant could not argue on appeal that defendant was a mere bystander, surprised by the crime when defendant testified at trial that a crime never occurred. *Lowery v. State*, 264 Ga. App. 655, 592 S.E.2d 102 (2003).

Evidence supported defendant's convic-

**Application (Cont'd)****6. Property Offenses (Cont'd)**

tion for robbery as a party under O.C.G.A. § 16-2-20(a) as it was defendant's idea to rob a store; the statements of defendant's three accomplices corroborated each other and there was additional evidence to corroborate those statements, including defendant's admissions that the defendant entered the store to see how many people were inside and reported it to the others and that the defendant divided the proceeds and kept a portion personally. *Moore v. State*, 274 Ga. App. 432, 618 S.E.2d 122 (2005).

Because: (1) the testimony of the defendant's two accomplices adequately described the defendant's involvement in an armed robbery of a restaurant; (2) the defendant later told one cohort not to speak if caught; (3) the same handgun that the defendant used in the prior and subsequent robberies was used to rob the restaurant; and (4) all three robberies were performed in the same manner and on the same day, sufficient evidence was presented to support the defendant's armed robbery conviction as a party to the crime. *Boone v. State*, 282 Ga. App. 67, 637 S.E.2d 795 (2006).

Evidence overwhelmingly established that a defendant was a party to an armed robbery; the defendant made inculpatory admissions at trial, the defendant met the physical description given by witnesses, and the gun and proceeds from the armed robbery were on the defendant's person when the defendant was arrested. *Hawkins v. State*, 292 Ga. App. 76, 663 S.E.2d 406 (2008).

While a defendant was assaulting and raping a victim at gunpoint, the defendant's accomplice was robbing the residence. As the defendant was legally responsible for the acts of the accomplice under O.C.G.A. § 16-2-20, the evidence was sufficient to convict the defendant of armed robbery. *Williams v. State*, 295 Ga. App. 9, 670 S.E.2d 828 (2008).

In an armed robbery case, as the victim identified the defendant as the driver of a car and the codefendant as the passenger who robbed the victim at gunpoint, and the pistol used in the robbery was found in

the car's locked glove compartment, to which only the defendant had the key, the evidence was sufficient to establish that the defendant aided and abetted the codefendant in the robbery under O.C.G.A. § 16-2-20 and sufficiently corroborated the codefendant's accomplice testimony under O.C.G.A. § 24-4-8. *Bailey v. State*, 295 Ga. App. 480, 672 S.E.2d 450 (2009).

Evidence that a defendant discussed robbing a store, drove two robbers there, drove the getaway car evasively while being chased by police, fled after crashing the car, and took a share of the stolen money was sufficient to convict the defendant of armed robbery as a party under O.C.G.A. § 16-2-20(a). *Dorsey v. State*, 297 Ga. App. 268, 676 S.E.2d 890 (2009).

**Evidence sufficient for conviction of theft by receiving and possessing firearm during crime.** — While an assailant pointed a handgun to the victim's neck, the defendant and another assailant held and searched the victim and took the victim's cell phone and cash; the armed assailant, who had stolen the handgun, displayed the handgun to the others before the crimes were committed. Under O.C.G.A. § 16-2-20, the evidence was sufficient to convict defendant as an accomplice of theft by receiving and possession of a firearm during the commission of a crime. *Simpson v. State*, 293 Ga. App. 760, 668 S.E.2d 451 (2008).

**Possession of burglary tools by one conspirator is possession by all.** — When two or more persons enter into a conspiracy to commit burglary, and in attempting to carry out such felonious design either of the people have possession of burglary tools, such possession is the possession of all, and each is guilty of a violation of O.C.G.A. § 16-7-20, prohibiting and punishing the possession of such tools. *Solomon v. State*, 180 Ga. App. 636, 350 S.E.2d 35 (1986).

**Merger of multiple counts of possession of firearm during commission of crime.** — Trial court properly refused to merge the two arms possession counts for sentencing purposes because those charges were based on the defendants' possession of two guns during the burglary; the acts were separate crimes involving multiple defendants, separate

crimes for which each defendant bore individual responsibility as either a principal or an accessory. *Dunbar v. State*, 273 Ga. App. 29, 614 S.E.2d 472 (2005).

**Variance in indictment and proof at trial was not fatal.** — Defendant's convictions were upheld on appeal because a variance in the indictment and the proof at trial was not fatal: (1) the names subject to the alleged variance in fact referred to the same person; and (2) the testimony of a codefendant, when combined with the defendant's post-arrest admissions, sufficiently proved the defendant's commission of an armed robbery and possession of a firearm during the commission of a crime as a party to the crimes. *Brown v. State*, 289 Ga. App. 421, 657 S.E.2d 322 (2008).

**Evidence sufficient for participation in robbery.** — Jury was authorized to infer from defendant's physical position during the robbery, defendant's flight with the robbers immediately afterward, and defendant's attempt to hide from the police that defendant was a participant in the crime and not merely a bystander. *Cummings v. State*, 227 Ga. App. 564, 489 S.E.2d 370 (1997).

Finding that defendant aided and abetted in the crimes of aggravated assault, kidnapping, and armed robbery was shown by evidence that defendant supplied the suggested target, the weapon, and transportation, and by defendant's admission to discussing the robbery with an accomplice. *Howard v. State*, 230 Ga. App. 437, 496 S.E.2d 532 (1998).

Defendant's participation in armed robbery was shown by evidence that defendant was present during discussion of the robbery, called to confirm that victim was home, and benefited from the proceeds. *Brown v. State*, 233 Ga. App. 195, 504 S.E.2d 35 (1998).

Evidence supported the defendant's convictions as a party to robbery by intimidation and false imprisonment as the defendant lured the victim to the defendant's apartment where the codefendant struck the victim in the back of the head and robbed the victim at gunpoint. *Smith v. State*, 269 Ga. App. 133, 603 S.E.2d 445 (2004).

Despite the defendant's claim of innocence, convictions for armed robbery and

two counts of aggravated assault were upheld on appeal, given sufficient evidence showing that the defendant waited at the scene of the robbery and then assisted the codefendants in an attempted escape; hence, the defendant was not entitled to a directed verdict of acquittal and the state was not required to exclude every reasonable hypothesis except guilt, as required by O.C.G.A. § 24-4-6. *Jordan v. State*, 281 Ga. App. 419, 636 S.E.2d 151 (2006).

As the evidence provided by the state at defendants' criminal trial demonstrated that based on information from defendant-B regarding a large quantity of marijuana possessed by a victim, defendant-A and another man forcibly entered the victim's residence while defendant-A was armed, pushed the victim to the ground, demanded to know where the marijuana was, and a physical struggle resulted, the evidence supported defendants' convictions for burglary, armed robbery, and aggravated assault; defendant-B was convicted as a party to the crimes under O.C.G.A. § 16-2-20(4). *Garland v. State*, 283 Ga. App. 622, 642 S.E.2d 320 (2007), rev'd on other grounds, 282 Ga. 201, 657 S.E.2d 842 (2008).

In a case where four persons riding in a stolen car robbed a cab driver at gunpoint, the evidence was sufficient to sustain the defendant's convictions as a party to the crimes of armed robbery and possession of a weapon during the commission of a crime; the defendant led a detective to the gun the defendant possessed and admitted being in the stolen vehicle on the date in question, and a witness testified that the witness saw the defendant holding a gun and approaching the cab driver. *Jones v. State*, 285 Ga. App. 866, 648 S.E.2d 183 (2007).

**Evidence sufficient for participation in burglary.** — Evidence was sufficient to show that defendant was actively involved in a common scheme with others to secure money with which to buy illegal drugs; that defendant knew or should have known that the criminal acts were being committed; that defendant actively participated in the burglary; that defendant failed to prevent or to render aid after the remaining crimes; and that de-

**Application (Cont'd)****6. Property Offenses (Cont'd)**

fendant enthusiastically shared in the proceeds resulting from the criminal acts. *Peppers v. State*, 242 Ga. App. 416, 530 S.E.2d 34 (2000).

**Evidence sufficient for participation in armed robbery.** — There was sufficient evidence to show that defendant aided, abetted, advised, and counseled the codefendants in the commission of the crimes against the victim. It made no difference that defendant was not the one who shot the victim as the state only needed to prove that defendant was acting in concert with the others. *Arrington v. State*, 244 Ga. App. 529, 536 S.E.2d 212 (2000).

Evidence that defendant devised a plan for another person to rob a store, advised and encouraged that other person, provided the other person with a weapon, and aided the other person in the commission of the crimes was sufficient to support defendant's conviction of aggravated assault and criminal attempt to commit armed robbery. *Davis v. State*, 249 Ga. App. 579, 548 S.E.2d 678 (2001).

**Evidence sufficient for participation in armed robbery and kidnapping.** — Because the defendant participated in a carjacking, drove the victim's car from the scene of a murder, asked the defendant's love interest to lie about the defendant's whereabouts, and lied repeatedly to the police about what happened, a jury was free to conclude that the defendant participated in an armed robbery and kidnapping as an accomplice under O.C.G.A. §§ 16-2-20, 16-5-40(a), and 16-8-41(a); thus, the trial court did not err in denying a directed verdict. *Owens v. State*, 263 Ga. App. 478, 588 S.E.2d 265 (2003).

**Evidence sufficient for participation in robbery by snatching.** — Sufficient evidence supported the defendant's conviction for robbery by snatching under O.C.G.A. § 16-8-40(a) as: (1) the evidence was sufficient to convict the codefendant of the same crime, so it was sufficient to convict defendant as a party to that crime, under O.C.G.A. § 16-2-20(b)(3); and (2) the claim that no one saw the defendant

with the victim's wallet or with the codefendant was inapposite as the victim saw the two of them in the same vicinity simultaneously. *Barker v. State*, 275 Ga. App. 213, 620 S.E.2d 457 (2005).

Evidence that the defendant intentionally struck the victim with a stick and that either the defendant or one of the other parties to the assault intentionally struck the victim with their fists and a concrete block supported an aggravated assault conviction; further, although the victim was the only person who testified about having been hit with a concrete block, and was not sure which of the attackers struck that blow, this testimony was sufficient to establish that the victim was hit with a concrete block because it made no difference whether an accomplice, and not the defendant, assaulted the victim in the manner alleged in the indictment. *Oliver v. State*, 278 Ga. App. 425, 629 S.E.2d 63 (2006).

Defendant's motion for a new trial on the defendant's aggravated assault and possession of a firearm during the aggravated assault charges was properly denied as the defendant's actions before, during, and after a friend's aggravated assault and firearm possession crimes at a home showed not only that the defendant was a party to those crimes, but that the defendant was a fellow conspirator in the assault against the victim as the defendant: (1) forced the victim at gunpoint to drive to the home; (2) stayed in the nearby living room while the friend shot a gun and threatened the victim (and defendant looked into the bedroom after the gun was fired); (3) accompanied the friend and the handcuffed the victim in the vehicle following the incident while the friend searched for the victim's love interest's residence; (4) encouraged the friend to kill the victim; and (5) did not protest any of the friend's actions throughout the evening. *Sapp v. State*, 280 Ga. App. 592, 634 S.E.2d 523 (2006).

**Evidence sufficient for participation in armed robbery, aggravated assault, and other offenses.** — There was sufficient evidence to support a defendant's convictions of armed robbery, aggravated assault, burglary, false imprisonment, and possession of a firearm

during the commission of a felony when the state showed that the defendant intentionally aided and abetted a home invasion in which the home was burglarized and the homeowner's teenage child was detained and robbed by use of a handgun. Even in the absence of evidence sufficient to show that the defendant directly committed the charged offenses, there was sufficient evidence that the defendant was a party to the offenses in that the defendant and a person armed with a gun loaded a truck with property stolen from the home during the two-hour home invasion, the defendant was present speaking with the armed person during the home invasion, and the defendant confirmed that the child was home alone. *Whitley v. State*, 293 Ga. App. 605, 667 S.E.2d 447 (2008).

**Evidence sufficient for participation in home invasion robbery.** — Although a defendant's accomplice in a home invasion robbery was the one who beat and choked the victim, left the victim for dead, and set the house on fire to conceal the evidence, causing the unconscious victim to die of smoke inhalation, the defendant helped plan the robbery, was aware that the accomplice was choking the victim, took the victim's wallet and disposed of the wallet, and returned to see the burning house. Accordingly, the defendant was a party to the crimes under O.C.G.A. § 16-2-20. *Cooper v. State*, 286 Ga. 66, 685 S.E.2d 285 (2009).

**Evidence insufficient to support finding of participation in receiving stolen property.** — Defendant's adjudication as delinquent for committing theft by receiving stolen property, a motor vehicle, was reversed on appeal since there was no evidence that the defendant ever possessed or controlled the car under O.C.G.A. § 16-8-7(a) or affirmatively acted as a party to the crime under O.C.G.A. § 16-2-20. The defendant's mere presence as a passenger in the vehicle and the presence of a gasoline tank in the back seat where the defendant was observed sitting was insufficient to support any finding of guilt. *In the Interest of J.Q.W.*, 288 Ga. App. 444, 654 S.E.2d 424 (2007).

**Evidence sufficient for conviction of arson.** — See *Moak v. State*, 222 Ga.

App. 36, 473 S.E.2d 576 (1996).

**Evidence sufficient to sustain conviction for burglary.** — See *Stokes v. State*, 232 Ga. App. 232, 501 S.E.2d 599 (1998); *Dunn v. State*, 245 Ga. App. 847, 539 S.E.2d 198 (2000).

Because defendant's statement was sufficiently corroborated by evidence that a bullet from the 9 mm handgun in the defendant's possession killed the victim, and by defendant's admission to both being involved in the commission and planning of the robbery of the victim, sufficient evidence existed to find the defendant guilty as a party to the crime of burglary beyond a reasonable doubt. *Valentine v. State*, 289 Ga. App. 60, 656 S.E.2d 208 (2007).

**Evidence sufficient to sustain conviction for attempted burglary.** — While mere presence at the scene of a crime is not sufficient evidence to convict one of being a party to a crime, criminal intent may be inferred from presence, companionship, and conduct before, during and after the offense; thus, the evidence was sufficient to show that the defendant, who was convicted of attempted burglary under O.C.G.A. §§ 16-4-1 and 16-7-1, had the intent to rob the sawmill in question. The defendant and others set out early on a Saturday and entered the property in an unusual way; and the defendant drove the getaway truck, lied to police, and failed to produce a flashlight when asked to empty the defendant's pockets. *Armour v. State*, 292 Ga. App. 111, 663 S.E.2d 367 (2008).

**Evidence was insufficient to support burglary convictions** because the state failed to show that defendant participated in an on-going burglary and presented no witnesses connecting the defendant to any conspiracy existing when the burglaries occurred. *Crumpton v. State*, 240 Ga. App. 422, 523 S.E.2d 624 (1999).

**False statements and writings.** — Dismissal of an indictment for the use of false certificates was not required on the basis that defendant did not submit the certificates personally but only provided them to others who submitted them to a state department. *State v. Johnson*, 269 Ga. 370, 499 S.E.2d 56 (1998).

**Presenter of check not an accomplice.** — Uttering element was estab-

**Application (Cont'd)****6. Property Offenses (Cont'd)**

lished by sufficient evidence that the defendant's friend presented the check to a bank for cashing at the defendant's behest; trial court properly charged the jury on the corroboration requirement for accomplice testimony even though the jury determined that the friend was not an accomplice. *King v. State*, 277 Ga. App. 190, 626 S.E.2d 161 (2006).

**Evidence sufficient to support conviction of forgery.** — See *Hunt v. State*, 244 Ga. App. 578, 536 S.E.2d 251 (2000).

**Evidence sufficient for conviction of theft by conversion.** — When the defendant routinely purchased property under his wife's name, the jury was authorized to conclude that the conversion which defendant was instrumental in performing was for his use. Furthermore, the evidence of defendant's conduct before, during, and after the conversion was sufficient to enable the jury to find beyond a reasonable doubt that he was a party to the codefendant's conversion of the victims' funds. *Cochran v. State*, 204 Ga. App. 602, 420 S.E.2d 32, cert. denied, 204 Ga. App. 921, 420 S.E.2d 32 (1992).

**Evidence sufficient to show defendant's involvement in armed robbery.**

— Evidence was sufficient since the evidence established that the defendant was involved in the initial plan to commit armed robbery at the victim's residence, the defendant furnished the defendant's weapon, mask, and gloves to one of the coperpetrators, remained at the car awaiting the return of the perpetrators and the anticipated fruits of the armed robbery, and thereafter, did not reveal the commission of the offenses to law enforcement. *Dunn v. State*, 248 Ga. App. 223, 546 S.E.2d 27 (2001).

**Evidence sufficient to sustain conviction for armed robbery.** — See *Scott v. State*, 166 Ga. App. 240, 304 S.E.2d 89 (1983); *Smith v. State*, 255 Ga. 654, 341 S.E.2d 5 (1986); *Stowers v. State*, 205 Ga. App. 518, 422 S.E.2d 870 (1992), cert. denied, 205 Ga. App. 901, 422 S.E.2d 870 (1992); *Ridings v. State*, 226 Ga. App. 155, 486 S.E.2d 378 (1997); *Collins v. State*, 229 Ga. App. 210, 493 S.E.2d 592 (1997);

*Cantrell v. State*, 230 Ga. App. 693, 498 S.E.2d 90 (1998); *Tucker v. State*, 231 Ga. App. 210, 498 S.E.2d 774 (1998); *Nealy v. State*, 239 Ga. App. 651, 522 S.E.2d 34 (1999); *Hemphill v. State*, 242 Ga. App. 751, 531 S.E.2d 150 (2000).

Although the evidence was circumstantial, a rational trier of fact could have found proof of defendant's guilt beyond a reasonable doubt where the defendant's explanation of new found wealth was that after having discussed robbing UPS and failing to report to work, defendant woke up at UPS in the codefendant's car with a large sum of money. *Bailey v. State*, 203 Ga. App. 133, 416 S.E.2d 151 (1992).

Defendant was properly convicted for armed robbery, where, though defendant might not have had knowledge that defendant's accomplices intended to use a weapon to perpetrate the offense, defendant had nonetheless masterminded the plan while leaving to the accomplices the manner in which they would extract money from the victim. *Crawford v. State*, 210 Ga. App. 36, 435 S.E.2d 64 (1993).

Evidence was sufficient to show that defendant either directly committed or was a party to the crime of armed robbery. *McGhee v. State*, 229 Ga. App. 10, 492 S.E.2d 904 (1997).

By helping a coconspirator plan an armed robbery, providing the coconspirator with a gun for that purpose, and sharing in the proceeds of the robbery, the defendant was a party to the crime of armed robbery and the evidence therefore was sufficient to support a conviction of that offense. *Short v. State*, 234 Ga. App. 633, 507 S.E.2d 514 (1998).

Identification of defendant by the victim and the store clerk, and the documents defendant left in the store during escape, clearly supported a finding that defendant was in recent possession of the money orders stolen at gunpoint and was sufficient for an armed robbery conviction. *Thomas v. State*, 256 Ga. App. 712, 569 S.E.2d 620 (2002).

**Evidence sufficient for conviction of armed robbery and possession of a firearm during the commission of a felony.** — See *Green v. State*, 233 Ga. App. 87, 503 S.E.2d 339 (1998).

Two intruders entered a house through

a window, threatened the occupants with handguns, and stole items from the house. As circumstantial evidence established that the defendant drove the get-away vehicle, the defendant was properly convicted as a party to armed robbery, burglary, and possession of a firearm during the commission of a burglary. *Olds v. State*, 293 Ga. App. 884, 668 S.E.2d 485 (2008).

**Various offenses chargeable from participation in armed robbery.** — Defendant was concerned in the commission of armed robbery, aggravated assault, false imprisonment and possession of a firearm during the commission of a crime, where the evidence showed the victim saw the defendant after being shot for the third time, was lethally threatened by the defendant and victim pled with the defendant throughout the course of the ordeal. *Vincent v. State*, 210 Ga. App. 6, 435 S.E.2d 222 (1993), aff'd, 264 Ga. 234, 442 S.E.2d 748 (1994).

**Evidence sufficient to support finding that defendant was party to automobile theft.** — See *Golden v. State*, 176 Ga. App. 412, 336 S.E.2d 332 (1985).

Defendant's own custodial statement, in which defendant admitted to driving the follow-up vehicle away from the scene of the robbery, emptying and sorting out the contents of the victim's purse, and knowing about the replacement of the stolen vehicle's tag served both to corroborate the custodial statement of codefendant and to connect the appellant with the crime. *Marlow v. State*, 207 Ga. App. 269, 427 S.E.2d 600 (1993).

**Evidence insufficient to support conviction of theft by taking.** — Because the evidence presented at trial did not exclude the reasonable hypothesis that the driver had stolen the truck without defendant's knowledge or participation prior to the time defendant started riding around in the truck, defendant's conviction for theft by taking the truck was insupportable as a matter of law. *Grant v. State*, 227 Ga. App. 243, 488 S.E.2d 763 (1997).

**Evidence sufficient to show defendant was party to theft of services.** — Because sufficient evidence supported the defendant's theft of services conviction, as

such permitted the jury to infer that: (1) by paying a store clerk \$50 to access another credit application in order to provide the defendant with a cell phone, the defendant encouraged, hired, or procured the store clerk to engage in deception; and (2) the defendant did not intend to pay for the communications services received as a result. *Jones v. State*, 285 Ga. App. 822, 648 S.E.2d 133 (2007).

**Evidence insufficient to support conviction for receiving stolen property.** — When all evidence indicated that the defendant was simply along for the ride in a stolen van, and evidence was lacking that the defendant ever possessed or controlled the van or affirmatively acted as a party to the crime, adjudication of delinquency for theft by receiving stolen property was erroneous. *In re C.W.*, 226 Ga. App. 30, 485 S.E.2d 561 (1997); *Harris v. State*, 247 Ga. App. 41, 543 S.E.2d 75 (2000).

Defendant's adjudication as delinquent for committing theft by receiving stolen property, a motor vehicle, was reversed on appeal since there was no evidence that the defendant ever possessed or controlled the car under O.C.G.A. § 16-8-7(a) or affirmatively acted as a party to the crime under O.C.G.A. § 16-2-20. The defendant's mere presence as a passenger in the vehicle and the presence of a gasoline tank in the back seat where the defendant was observed sitting was insufficient to support any finding of guilt. *In the Interest of J.Q.W.*, 288 Ga. App. 444, 654 S.E.2d 424 (2007).

Defendant's conviction for theft by receiving stolen property was reversed as there was no evidence that the defendant ever possessed or controlled the stolen car, or affirmatively acted as a party to the crime, since the state only presented the police officers' general statements that based on conversations with the suspects, the officers believed they were linked to the vehicle, that the defendant had given the officers a false name, and that the suspects were wearing wet clothing, which might have indicated that they attempted to hide from the officers; there was no evidence that the steering column was damaged, that the car was driven without keys, that the defendant had sto-

**Application (Cont'd)****6. Property Offenses (Cont'd)**

len property in defendant's possession, or

that the defendant admitted doubts as to the car's ownership. *Morgan v. State*, 280 Ga. App. 646, 634 S.E.2d 818 (2006).

### **OPINIONS OF THE ATTORNEY GENERAL**

**Corporate agent who aids or abets principal in commission of crime is a party.** — Where corporate agent has either committed offense in all its elements and particulars or has intentionally aided

or abetted the corporate principal in commission of crime in all its particulars and elements, the corporate agent is a party to the offense and punishable as such. 1970 Op. Att'y Gen. No. 70-155.

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 186 et seq.

**C.J.S.** — 22 C.J.S., Criminal Law, § 164.

**ALR.** — Criminal responsibility of one cooperating in offense which he is incapable of committing personally, 5 ALR 782; 74 ALR 1110; 131 ALR 1322.

Individual criminal responsibility of officer or employee for larceny or embezzlement, through corporate act, of property of third person, 33 ALR 787.

Penal or criminal liability as affected by defendant's employment of an independent contractor, 55 ALR 642.

Criminal responsibility of one who furnishes instrumentality of a kind ordinarily used for legitimate purposes, with knowledge that it is to be used by another for criminal purposes, 108 ALR 331.

Homicide by companion of defendant while attempting to escape from scene of

crime as murder in first degree, 108 ALR 847.

Who other than actor is liable for manslaughter, 95 ALR2d 175.

Offense of aiding and abetting illegal possession of drugs or narcotics, 47 ALR3d 1239.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory, or aider and abettor, 9 ALR4th 972.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault, 24 ALR4th 243.

Criminal liability for death of another as result of accused's attempt to kill self or assist another's suicide, 40 ALR4th 702.

Prosecution of female as principal for rape, 67 ALR4th 1127.

Criminality of act of directing to, or recommending, source from which illicit drugs may be purchased, 34 ALR5th 125.

### **16-2-21. Prosecution of parties who did not directly commit the crime.**

Any party to a crime who did not directly commit the crime may be indicted, tried, convicted, and punished for commission of the crime upon proof that the crime was committed and that he was a party thereto, although the person claimed to have directly committed the crime has not been prosecuted or convicted, has been convicted of a different crime or degree of crime, or is not amenable to justice or has been acquitted. (Code 1933, § 26-802, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For note discussing organized crime in Georgia with respect to

the application of state gambling laws, and suggesting proposals for combatting

organized crime, see 7 Ga. St. B.J. 124 (1970).

## JUDICIAL DECISIONS

**Identity of all participants not prerequisite to conviction of one participant.** — One may be found guilty of a crime committed by more than one person even though identity of other participants is known *Sabel v. State*, 248 Ga. 10, 282 S.E.2d 61 (1981), overruled on other grounds, *Pruitt v. Keenan*, 264 Ga. 279, 443 S.E.2d 842 (1994), cert. denied, 454 U.S. 973, 102 S. Ct. 524, 70 L. Ed. 2d 393 (1981).

**Indictment not required to allege party status.** — Indictment's failure to allege that a defendant was a party to aggravated assault, aggravated battery, and first-degree child cruelty under O.C.G.A. §§ 16-5-21(a), 16-5-24(a), and 16-5-70(b) did not require a showing that the defendant was the principal perpetrator under O.C.G.A. § 16-2-21; the defendant's status as a party to the crimes was not an essential element used to increase the sentences for the crimes, and the trial court did not err in instructing the jury that the defendant could be convicted either as the principal perpetrator of the crimes or as a party thereto. *Hill v. State*, 282 Ga. App. 743, 639 S.E.2d 637 (2006).

Contrary to a defendant's argument, the state was not required to indicate in the defendant's armed robbery indictment that the defendant was being charged as a party to that crime; O.C.G.A. § 16-2-21 required only that the defendant be indicted, convicted, and punished for the armed robbery upon proof that the defendant was in fact a party to the crime. *Byrum v. State*, 282 Ga. 608, 652 S.E.2d 557 (2007).

**Sufficiency of indictment.** — Trial court erred in quashing an indictment for counts of residential mortgage fraud, in violation of O.C.G.A. § 16-8-102, and counts of felony theft by deception, in violation of O.C.G.A. § 16-8-3, because each count was sufficient to charge each of the named defendants as either the actual perpetrator or as a party to the crime pursuant to O.C.G.A. §§ 16-2-20(a) and 16-2-21. *State v. Corhen*, 306 Ga. App. 495, 700 S.E.2d 912 (2010).

**Acquittal of one party** does not bar separate, distinct prosecution and conviction of another party. *Eades v. State*, 232 Ga. 735, 208 S.E.2d 791 (1974).

Acquittal of defendant's wife on the same charges does not affect the validity of the defendant's convictions for armed robbery and possession of a firearm during commission of a felony. *Worthy v. State*, 180 Ga. App. 506, 349 S.E.2d 529 (1986).

While the acquittal of the principals could be introduced as some evidence that the defendant did not aid, abet, or encourage any crime of child molestation or cruelty to children, it did not preclude defendant from being indicted, tried, convicted or punished for commission of the crime. *State v. Roberts*, 234 Ga. App. 522, 507 S.E.2d 194 (1998).

**Conspiracy need not be alleged in the indictment.** *Brooks v. State*, 169 Ga. App. 543, 314 S.E.2d 115 (1984).

**Accessory after the fact is not a party to the crime under O.C.G.A. § 16-2-21**, but the act constitutes the separate offense of obstruction of justice under O.C.G.A. § 16-10-24. *Martinez v. State*, 222 Ga. App. 497, 474 S.E.2d 708 (1996); *Crumpton v. State*, 240 Ga. App. 422, 523 S.E.2d 624 (1999); *Stewart v. State*, 243 Ga. App. 860, 534 S.E.2d 544 (2000).

**Effect of equal access to drugs, where ownership not shown.** — When the state did not show the indicia giving rise to a presumption of ownership or exclusive control of a vehicle, no presumption arose and, therefore, there was no triggering of the equal access defense, but by showing circumstantially that each of the defendants had equal access to the drugs, the state was able to support the state's theory that all of the defendants were parties to the crime and thus guilty of joint constructive possession of the drugs. *Castillo v. State*, 166 Ga. App. 817, 305 S.E.2d 629 (1983).

**When codefendant pleads to lesser offense.** — Court did not err in failing to

quash indictments for murder on the grounds that a codefendant is permitted to plead to the lesser offense of conspiracy. Owens v. State, 251 Ga. 313, 305 S.E.2d 102 (1983).

**When numerous people are concerned in crime, language of section may be charged.** — By virtue of former Code 1933, §§ 26-801 and 26-802 (see O.C.G.A. §§ 16-2-20 and 16-2-21), when evidence in a criminal case shows that two or more persons were concerned in the commission of an alleged crime, it is not harmful error for the trial court to charge in the language of these provisions or to charge the jury on the law of conspiracy. Battle v. State, 231 Ga. 501, 202 S.E.2d 449 (1973); Holland v. State, 205 Ga. App. 695, 423 S.E.2d 694 (1992).

**Convicted felon in possession of a firearm who furnishes it to another** for the purpose of shooting a third person may be found guilty of felony murder even though the trigger-man is found guilty of malice murder. Whitehead v. State, 255 Ga. 526, 340 S.E.2d 885 (1986).

**Evidence showing acquittal of co-defendant held admissible.** — Defendant could introduce in trial as an alleged aider and abettor a certified copy of the indictment, plea, and verdict showing that the codefendant, the alleged principal, had been acquitted. White v. State, 257 Ga. 236, 356 S.E.2d 875 (1987).

**When the defendants were charged in accusation with directly committing specific acts of shoplifting,** but neither was specifically accused of being a party to the other's commission of the offense, there was no error in charging the jury under O.C.G.A. § 16-2-21. Jenkins v. State, 172 Ga. App. 715, 324 S.E.2d 491 (1984).

**Inference that defendant participated in tampering with evidence.** — When the defense to a tampering with evidence charge was that no one saw the defendant pull up and destroy marijuana plants, but police officers saw the defendant on the property with the plants, advised the defendant not to remove the plants, returned in two hours to find the plants missing, and saw no one else around the premises at either time, the jury could reasonably infer that the defen-

dant at the very least participated in the destruction and that in itself would justify conviction. Parish v. State, 182 Ga. App. 247, 355 S.E.2d 682 (1987).

**Defendant who admitted being party to armed robbery entitled to instruction on defense of coercion.** — Defendant who had admitted the elements of armed robbery as a party to the crime, O.C.G.A. § 16-2-21, and who testified that defendant committed such acts because a codefendant pointed a gun at the defendant and threatened to shoot the defendant or defendant's family was entitled to a jury charge on coercion under O.C.G.A. § 16-3-26, and the trial court erred in failing to so instruct the jury even in the absence of a request by the defendant. Mathis v. State, 299 Ga. App. 831, 684 S.E.2d 6 (2009).

**Requested jury instruction not warranted.** — Because the defendant was neither indicted nor tried for felony obstruction of justice, the court did not err in refusing to give the requested charge that an accomplice was one who was present at the commission of a crime, aiding and abetting the perpetrator, or an accessory before the fact; moreover, the court's own charge, which included pattern charges on parties to a crime, knowledge, mere presence at the scene of a crime, and mere association with others committing a crime, substantially covered the same legal principles as the requested charge. Buruca v. State, 278 Ga. App. 650, 629 S.E.2d 438 (2006).

Trial court did not err by refusing to charge the jury on the affirmative defense of self-defense with regard to defendant's trial for aggravated assault and criminal trespass as the evidence did not support such a charge as the record established that the victim was sitting in a vehicle when defendant struck the victim in the head with a pipe, causing serious injury, and defendant had to leave defendant's home to do the act, which was leaving a place of safety. Burnette v. State, 291 Ga. App. 504, 662 S.E.2d 272 (2008).

Trial court properly denied a requested instruction on "accessory after the fact." The defendant was not charged with being an accessory, and the trial court fully charged the jury on parties to a crime,

mere presence, mere association, intent, and knowledge. *Daugherty v. State*, 291 Ga. App. 541, 662 S.E.2d 318 (2008), cert. denied, 2008 Ga. LEXIS 792 (Ga. 2008).

Trial court did not err by failing to give the defendant's requested charges on mere presence and party to the crime because the trial court substantially covered all of the relevant legal principles relating to mere presence, mere association, and parties to a crime. *Allen v. State*, 288 Ga. 263, 702 S.E.2d 869 (2010).

**Jury instruction on accessory after fact not warranted.** — In an armed robbery prosecution, defense counsel was not deficient in not requesting jury charges on the law of abandonment and accessory after-the-fact as there was no evidence that the defendant abandoned the crime before an overt act occurred, or that the defendant was an accessory after the fact rather than a party to the robbery. *Bihlear v. State*, 295 Ga. App. 486, 672 S.E.2d 459 (2009).

**Jury instruction supported by evidence.** — Trial court did not err in giving the jury a "party to the crime" instruction even though the defendant was not specifically indicted as a party to the shoplifting because O.C.G.A. § 16-2-21 allowed the defendant to be convicted as a party to a crime if the evidence supported a finding in that regard; evidence that defendant and an accomplice took a cart with merchandise into a restricted area, lied about their purpose of being in the area, surveyed various emergency exits from a store, abandoned the merchandise at a jammed exit, and lacked any means of paying for the merchandise supported the trial court's giving of the instruction. *Alford v. State*, 292 Ga. App. 514, 664 S.E.2d 870 (2008).

**Evidence sufficient to support conviction.** — Convicted felon's conviction for possession of a shotgun was authorized, even though the shotgun was not in the felon's immediate possession, where the evidence supported a finding that the felon was a party to the crime of burglary and the felon and a codefendant were coconspirators. *Coursey v. State*, 196 Ga. App. 135, 395 S.E.2d 574 (1990).

When the defendant assisted the defendant's spouse in committing burglaries by

not only driving with the spouse to the scene of the crimes, but by serving as the getaway driver, the defendant was a party to the defendant's spouse's crimes. *Head v. State*, 261 Ga. App. 185, 582 S.E.2d 164 (2003).

Evidence was sufficient to show that defendant was trafficking in cocaine. *Carter v. State*, 261 Ga. App. 204, 583 S.E.2d 126 (2003).

Trial court's denial of a motion for a directed verdict of acquittal pursuant to O.C.G.A. § 17-9-1 was proper, as the evidence was sufficient to support a conviction of trafficking in methamphetamine, in violation of O.C.G.A. § 16-13-31(e); there was clearly evidence that the sale of the drug involved more than 28 grams of methamphetamine, that defendant either possessed or sold the methamphetamine through the defendant's presence when the drug was being cut, weighed, packaged, and sold, and that the defendant was liable as an aider and abettor under O.C.G.A. § 16-2-21 even if there was no evidence that the defendant either arranged the sale or received any money in connection therewith. *Blackwood v. State*, 277 Ga. App. 870, 627 S.E.2d 907 (2006).

Evidence that the defendant intentionally struck the victim with a stick and that either the defendant or one of the other parties to the assault intentionally struck the victim with their fists and a concrete block supported an aggravated assault conviction; further, although the victim was the only person who testified about having been hit with a concrete block, and was not sure which of the attackers struck that blow, this testimony was sufficient to establish that the victim was hit with a concrete block because it made no difference whether an accomplice, and not the defendant, assaulted the victim in the manner alleged in the indictment. *Oliver v. State*, 278 Ga. App. 425, 629 S.E.2d 63 (2006).

Despite the defendant's claim of innocence, convictions for armed robbery and two counts of aggravated assault were upheld on appeal, given sufficient evidence showing that the defendant waited at the scene of the robbery and then assisted the codefendants in an attempted escape; hence, the defendant was not en-

titled to a directed verdict of acquittal and the state was not required to exclude every reasonable hypothesis except guilt, as required by O.C.G.A. § 24-4-6. *Jordan v. State*, 281 Ga. App. 419, 636 S.E.2d 151 (2006).

Defendant's aggravated assault and robbery convictions were upheld as evidence including the defendant's admission and flight from the scene authorized the jury to conclude that the defendant went to an apartment complex intending to participate in the robbery, and in fact participated in the robbery by acting as a lookout and an additional show of force; hence, the jury was authorized to infer criminal intent from the defendant's conduct before, during, and after the commission of the crime. *Millender v. State*, 286 Ga. App. 331, 648 S.E.2d 777 (2007), cert. denied, No. S07C1717, 2008 Ga. LEXIS 80 (Ga. 2008).

Because sufficient evidence was presented that a juvenile was a party to the crime of entering an automobile with the intent to commit a theft or felony, and the evidence was corroborated by a police officer who questioned the juvenile's cohort, an adjudication based on the juvenile's commission of the act was upheld on appeal; thus, the juvenile's motion for a directed verdict was properly denied. *In the Interest of B.D.*, 287 Ga. App. 185, 651 S.E.2d 129 (2007).

Evidence supported a conviction of aggravated assault with a knife when two codefendants repeatedly struck the victim, the defendant struck the victim and threatened the victim's life, the defendant and the first codefendant entered a pharmacy to buy duct tape, and while alone with the victim, the second codefendant held a knife on the victim where the second codefendant could reach it and where the victim could see it; this authorized the conclusion that the second codefendant committed aggravated assault and that the defendant was a party. *Rhines v. State*, 288 Ga. App. 128, 653 S.E.2d 500 (2007).

Although no evidence was presented as to the ownership of a Nissan Pathfinder parked at the scene of the crime, the defendant was not entitled to a judgment of acquittal, as sufficient evidence was pre-

sented to not only link the defendant with the vehicle where the trafficking amount of drugs was found, but also to support a finding of guilt as a party to the crime; moreover, the jury could conclude that as a party to the crimes charged, the defendant was actively involved in a criminal enterprise to possess the methamphetamine stashed inside the vehicle. *Sherrer v. State*, 289 Ga. App. 156, 656 S.E.2d 258 (2008), cert. denied, 2008 Ga. LEXIS 391 (Ga. 2008).

Evidence was sufficient to sustain a defendant's convictions of two counts of aggravated assault and two counts of possession of a firearm during the commission of a crime in violation of O.C.G.A. §§ 16-5-21 and 16-11-106 because the defendant's admission that defendant was holding a rifle throughout the crimes' commission, along with evidence of the defendant's flight, authorized the jury to conclude that the defendant participated in the crimes by acting as a lookout. *Gant v. State*, 291 Ga. App. 823, 662 S.E.2d 895 (2008).

Trial court did not err by denying defendant's motion for directed verdict and convicting the defendant of armed robbery as the evidence established that defendant's presence and actions at the scene of the crime, when coupled with defendant's behavior afterwards, were sufficient to support the jury's verdict against defendant as a party to the crime of armed robbery. While the jury could have concluded from the evidence that even if defendant had not planned the robbery with the codefendant in advance, defendant chose to participate in the crime after the crime was begun. *Cox v. State*, 293 Ga. App. 98, 666 S.E.2d 379 (2008).

There was sufficient evidence to support a defendant's convictions of armed robbery, aggravated assault, burglary, false imprisonment, and possession of a firearm during the commission of a felony when the state showed that the defendant intentionally aided and abetted a home invasion in which the home was burglarized and the homeowner's teenage child was detained and robbed by use of a handgun. Even in the absence of evidence sufficient to show that the defendant directly committed the charged offenses, there was

sufficient evidence that the defendant was a party to the offenses in that the defendant and a person armed with a gun loaded a truck with property stolen from the home during the two-hour home invasion, the defendant was present speaking with the armed person during the home invasion, and the defendant confirmed that the child was home alone. *Whitley v. State*, 293 Ga. App. 605, 667 S.E.2d 447 (2008).

Following evidence was sufficient to support the defendant's convictions, as a party or perpetrator, of felony murder, armed robbery, kidnapping, and aggravated assault: (1) the defendant and two codefendants robbed four occupants of a duplex at gunpoint; (2) a codefendant hit a victim in the head with a gun; (3) the defendant and codefendants moved the victims into another room; and (4) a codefendant fatally shot a delivery person who entered the duplex. *Henderson v. State*, 285 Ga. 240, 675 S.E.2d 28 (2009).

Evidence was sufficient to support a defendant's convictions under O.C.G.A. § 16-13-30.1 for possessing with intent to distribute a substance represented to be cocaine and possessing with intent to distribute a substance represented to be methamphetamine because, although the defendant argued that the defendant was merely a backseat passenger in a vehicle involved in the underlying transaction who was not shown to be in either actual or constructive possession of the substance at issue, evidence established that the defendant negotiated to sell to an agent a substance expressly represented to be cocaine and a substance expressly represented to be methamphetamine; this material was in the car with the defendant, who handed it to a third person who was to deliver the substance to the agent, and, the claim that the defendant acted innocently was refuted by the third person's testimony that the third person and the defendant knew what was going on and that the third person called the defendant to ask about drugs in connection with this transaction. Any rational trier of fact could have concluded beyond a reasonable doubt that the defendant was a party to the crimes. *Diaz v. State*, 296 Ga. App. 589, 676 S.E.2d 252 (2009).

Evidence was sufficient to show that a mother aided and abetted her husband's sexual abuse of their twin daughters when they were between four and eight years old, but only as to one charged incident, because one daughter told a therapist that she told her mother about this incident, and the record showed that the mother knew about and saw this offense and that she also lent her approval to her husband's conduct. *Naylor v. State*, 300 Ga. App. 401, 685 S.E.2d 383 (2009).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of murder and aggravated assault because the defendant's conduct before, during, and after the crimes supported the finding that the defendant was a party thereto, notwithstanding the jury's acquittal of the defendant on three weapons charges. *Allen v. State*, 288 Ga. 263, 702 S.E.2d 869 (2010).

**Evidence insufficient to support conviction.** — Because the evidence presented at trial did not exclude the reasonable hypothesis that the driver had stolen the truck without defendant's knowledge or participation prior to the time defendant started riding around in the truck, defendant's conviction for theft by taking the truck was insupportable as a matter of law. *Grant v. State*, 227 Ga. App. 243, 488 S.E.2d 763 (1997).

Except as to one incident, the evidence was insufficient to show that a mother aided and abetted her husband's sexual abuse of their twin daughters when they were between four and eight years old, because the record showed that the mother had no knowledge of seven of the eight incidents until she took the children to therapy, and the prosecution's circumstantial evidence—including the fact of the family's nudist lifestyle, the existence of pornographic movies in the home, and the fact that, during therapy, the mother advised the girls to not talk about their father—was insufficient to prove aiding and abetting beyond a reasonable doubt. *Naylor v. State*, 300 Ga. App. 401, 685 S.E.2d 383 (2009).

**Rape sentence within statutory range.** — Fairness of a defendant's sentence of life imprisonment for being a

party to rape was not examined because, contrary to the defendant's claims, the plain terms of O.C.G.A. § 17-10-6.1(a)(5) did not prohibit the defendant from applying for scrutiny of the sentence by the Georgia Sentence Review Panel; as the defendant conceded, the sentence fell within the statutory limits under O.C.G.A. §§ 16-2-21 and 16-6-1, and as a rule, sentences that fell within such limits were not reviewed for legal error. *Johnson v. State*, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

**Cited** in *Henderson v. State*, 227 Ga. 68, 179 S.E.2d 76 (1970); *Hannah v. State*, 125 Ga. App. 596, 188 S.E.2d 401 (1972); *Wells v. State*, 127 Ga. App. 109, 192 S.E.2d 567 (1972); *Pippin v. State*, 128 Ga. App. 355, 196 S.E.2d 664 (1973); *McKenzie v. State*, 231 Ga. 513, 202 S.E.2d 417 (1973); *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973); *Freeman v. State*, 130 Ga. App. 718, 204 S.E.2d 445 (1974); *McRoy v. State*, 131 Ga. App. 307, 205 S.E.2d 445 (1974); *Strong v. State*, 232 Ga. 294, 206 S.E.2d 461 (1974); *Griffin v. State*, 133 Ga. App. 508, 211 S.E.2d 382 (1974); *Payne v. State*, 135 Ga. App. 245, 217 S.E.2d 476 (1975); *Rucker v. State*, 135 Ga. App. 468, 218 S.E.2d 146 (1975); *Garland v. State*, 235 Ga. 522, 221 S.E.2d 198 (1975); *Phillips v. State*, 238 Ga. 632, 235 S.E.2d 12 (1977); *Sullens v. State*, 239 Ga. 766, 238 S.E.2d 864 (1977); *Lunsford v. State*, 145 Ga. App. 446, 243 S.E.2d 655 (1978); *Hubbard v. State*, 145 Ga. App. 714, 244 S.E.2d 639 (1978); *Garrett v. State*, 147 Ga. App. 666, 250 S.E.2d 1 (1978); *Davis v. State*, 242 Ga. 901, 252 S.E.2d 443 (1979); *Stephens v. Balkcom*,

245 Ga. 492, 265 S.E.2d 596 (1980); *Jones v. State*, 245 Ga. 592, 266 S.E.2d 201 (1980); *Whitaker v. State*, 246 Ga. 163, 269 S.E.2d 436 (1980); *Koza v. State*, 158 Ga. App. 709, 282 S.E.2d 131 (1981); *Martin v. State*, 159 Ga. App. 31, 282 S.E.2d 656 (1981); *Ellis v. State*, 164 Ga. App. 366, 296 S.E.2d 726 (1982); *Barnes v. State*, 168 Ga. App. 925, 310 S.E.2d 777 (1983); *Widdowson v. State*, 171 Ga. App. 134, 318 S.E.2d 820 (1984); *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984); *Harrell v. State*, 253 Ga. 474, 321 S.E.2d 739 (1984); *Roberts v. State*, 257 Ga. 180, 356 S.E.2d 871 (1987); *Jones v. State*, 258 Ga. 25, 365 S.E.2d 263 (1988); *Cordova v. State*, 191 Ga. App. 297, 381 S.E.2d 436 (1989); *Brinson v. State*, 261 Ga. 884, 413 S.E.2d 443 (1992); *Lark v. State*, 263 Ga. 573, 436 S.E.2d 1 (1993); *Bishop v. State*, 223 Ga. App. 422, 477 S.E.2d 422 (1996); *Johnson v. State*, 223 Ga. App. 668, 478 S.E.2d 404 (1996); *State v. Johnson*, 269 Ga. 370, 499 S.E.2d 56 (1998); *Johnson v. State*, 269 Ga. 632, 501 S.E.2d 815 (1998); *Hudson v. State*, 234 Ga. App. 895, 508 S.E.2d 682 (1998); *Haney v. State*, 234 Ga. App. 214, 507 S.E.2d 18 (1998); *Eason v. State*, 234 Ga. App. 595, 507 S.E.2d 175 (1998); *Nealy v. State*, 239 Ga. App. 651, 522 S.E.2d 34 (1999); *Davis v. State*, 271 Ga. 527, 520 S.E.2d 218 (1999); *Granados v. State*, 244 Ga. App. 153, 34 S.E.2d 886 (2000); *Grimes v. State*, 245 Ga. App. 277, 537 S.E.2d 720 (2000); *Nanthabouthdy v. State*, 245 Ga. App. 456, 538 S.E.2d 101 (2000); *Jett v. State*, 246 Ga. App. 429, 540 S.E.2d 209 (2000); *Carter v. State*, 249 Ga. App. 354, 548 S.E.2d 102 (2001); *Rayshad v. State*, 295 Ga. App. 29, 670 S.E.2d 849 (2008).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 16 Am. Jur. 2d, Conspiracy, § 20. 21 Am. Jur. 2d, Criminal Law, § 171 et seq.

**C.J.S.** — 22 C.J.S., Criminal Law, § 183 et seq.

**ALR.** — Criminal responsibility of one cooperating in offense which he is incapable of committing personally, 5 ALR 782; 74 ALR 1110; 131 ALR 1322.

Individual criminal responsibility of of-

ficer or employee for larceny or embezzlement, through corporate act, of property of third person, 33 ALR 787.

Who other than actor is liable for manslaughter, 95 ALR2d 175.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory, or aider and abettor, 9 ALR4th 972.

## **16-2-22. Criminal responsibility of corporations.**

(a) A corporation may be prosecuted for the act or omission constituting a crime only if:

(1) The crime is defined by a statute which clearly indicates a legislative purpose to impose liability on a corporation, and an agent of the corporation performs the conduct which is an element of the crime while acting within the scope of his office or employment and in behalf of the corporation; or

(2) The commission of the crime is authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a managerial official who is acting within the scope of his employment in behalf of the corporation.

(b) For the purposes of this Code section, the term:

(1) "Agent" means any director, officer, servant, employee, or other person who is authorized to act in behalf of the corporation.

(2) "Managerial official" means an officer of the corporation or any other agent who has a position of comparable authority for the formulation of corporate policy or the supervision of subordinate employees. (Code 1933, § 26-803, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — Service of notice of filing of indictment, special presentment, or accusation against corporation, § 17-7-92.

**Law reviews.** — For survey article on

business associations, see 34 Mercer L. Rev. 13 (1982). For annual survey of cases concerning business associations, see 39 Mercer L. Rev. 53 (1987).

## **JUDICIAL DECISIONS**

**Only "top" management is intended to be covered by O.C.G.A. § 16-2-22;** not every corporate agent is a "managerial official". Military Circle Pet Ctr. No. 94, Inc. v. State, 181 Ga. App. 657, 353 S.E.2d 555, rev'd on other grounds, 257 Ga. 388, 360 S.E.2d 248 (1987).

**Deceptive business practices.** — Although O.C.G.A. § 16-9-50, defining the crime of deceptive business practices, does not contain in the statutory definition any indication of a legislative purpose to impose liability on a corporation, the state is not required to allege the provisions of O.C.G.A. § 16-2-22 in accusations under § 16-9-50, but only to prove that defendant corporation or managerial agent authorized deceptive practices. State v. Mil-

itary Circle Pet Ctr. No. 94, Inc., 257 Ga. 388, 360 S.E.2d 248 (1987).

**While a corporation may not be imprisoned, it may be fined,** and the fine enforced by levy on its property. State v. Shepherd Constr. Co., 248 Ga. 1, 281 S.E.2d 151, cert. denied, 454 U.S. 1055, 102 S. Ct. 601, 70 L. Ed. 2d 591, appeal dismissed, 454 U.S. 1074, 102 S. Ct. 626, 70 L. Ed. 2d 609 (1981).

**Court may give suspended sentence to and impose fine upon corporation.** — Pursuant to O.C.G.A. § 16-2-22(a), a corporation can be prosecuted for violating the law, and a court may sentence a corporation to serve a term for years (even though such sentence is incapable of enforcement) and may sus-

pend that sentence and impose a fine. *State v. Shepherd Constr. Co.*, 248 Ga. 1, 281 S.E.2d 151, cert. denied, 454 U.S. 1055, 102 S. Ct. 601, 70 L. Ed. 2d 591, appeal dismissed, 454 U.S. 1074, 102 S. Ct. 626, 70 L. Ed. 2d 609 (1981).

**Corporation's liability under RICO for acts of employees.** — A corporation could be held liable in a civil action for RICO predicate acts performed by its employees within the scope of their employment. *Cobb County v. Jones Group*, 218 Ga. App. 149, 460 S.E.2d 516 (1995).

In an action in which an interexchange carrier asserted that it was not obligated to pay fees to a local carrier for misrepresented toll-free cell calls, an amendment to add claims alleging violations of under the Georgia RICO Act, O.C.G.A. § 16-14-1 et seq., was granted as corporate officers had actively presented the plan for payments not allowed under the tariff and there was substantial evidence that the local carrier misrepresented the origination of calls for which it charged. *ITC Deltacom Communs. v. US LEC Corp.*, No. 3:02-CV-116-JTC, 2004 U.S. Dist. LEXIS 27557 (N.D. Ga. Mar. 15, 2004).

On remand from the U.S. Supreme Court, a federal appeals court held that legal workers employed by a Georgia rug manufacturer were entitled to sue their employer for state RICO violations because the corporation was a "person" for purposes of O.C.G.A. § 16-14-4; the court relied on the Supreme Court of Georgia's decision that O.C.G.A. § 16-2-22, which placed limits on corporate criminal liability, did not pertain to civil suits brought under the Georgia civil RICO Act. *Williams v. Mohawk Indus.*, 465 F.3d 1277 (11th Cir. 2006), cert. denied, mot. denied, 2007 U.S. LEXIS 2798 (U.S. 2007).

**Theft by taking.** — Evidence was sufficient to support defendant corporation's conviction for theft by taking based upon the conduct of its principals while acting on behalf of the corporation. *Davis v. State*, 225 Ga. App. 564, 484 S.E.2d 284 (1997).

**Cited in First Nat'l Bank & Trust Co. v. State**, 141 Ga. App. 471, 233 S.E.2d 861 (1977); *Classic Art Corp. v. State*, 245 Ga. 448, 265 S.E.2d 577 (1980).

## OPINIONS OF THE ATTORNEY GENERAL

**When corporations are criminally responsible for violations of Surface Mining Act.** — Corporations will be criminally responsible for acts or omissions constituting violations of O.C.G.A. Part 3, Art. 2, Ch. 4, T. 12 (Surface Mining Act) if, but only if, activities constituting crime

were authorized, requested, commanded, performed, or recklessly tolerated by either the board of directors or by an officer or other agent of comparable authority acting within scope of that person's authority in behalf of corporation. 1970 Op. Att'y Gen. No. 70-155.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 16 Am. Jur. 2d, Conspiracy, § 17. 18B Am. Jur. 2d, Corporations, §§ 1640 et seq., 1839 et seq., 40A Am. Jur. 2d, Homicide, § 4.

**ALR.** — Individual criminal responsibility of officer or employee for larceny or embezzlement, through corporate act, of property of third person, 33 ALR 787.

Criminal liability of corporation for extortion, false pretenses, or similar offenses, 49 ALR3d 820.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory, or aider and abettor, 9 ALR4th 972.

## CHAPTER 3

### DEFENSES TO CRIMINAL PROSECUTIONS

| <b>Article 1</b>   | <b>Sec.</b>   |
|--|---|
| <b>Responsibility</b>  |   |
| Sec.   |   |
| 16-3-1. Minimum age.   | 16-3-23. Use of force in defense of habitation.                       |
| 16-3-2. Mental capacity; insanity.   | 16-3-23.1. No duty to retreat prior to use of force in self-defense.  |
| 16-3-3. Delusional compulsion.   | 16-3-24. Use of force in defense of property other than a habitation. |
| 16-3-4. Intoxication.  | 16-3-24.1. Habitation and personal property defined.                  |
| 16-3-5. Mistake of fact.   | 16-3-24.2. Immunity from prosecution; exception.                      |
| 16-3-6. Affirmative defenses to certain sexual crimes.   | 16-3-25. Entrapment.  |
|  | 16-3-26. Coercion.  |
|  | 16-3-27. Benefit of clergy.   |
|  | 16-3-28. Affirmative defenses.  |
| <b>Article 2</b>   | <b>Sec.</b>   |
| <b>Justification and Excuse</b>  |   |
| 16-3-20. Justification.  |   |
| 16-3-21. Use of force in defense of self or others; evidence of belief that force was necessary in murder or manslaughter prosecution. |   |
| 16-3-22. Immunity from criminal liability of persons rendering assis-  | 16-3-40. Alibi.   |
| <b>Article 3</b>   | <b>Sec.</b>   |
|  | <b>Alibi</b>  |

**Cross references.** — Further provisions regarding defenses to criminal actions, §§ 16-4-4, 16-4-5, 16-4-9, 16-5-25, 16-8-10, 16-8-16(c).

**Law reviews.** — For article, "Automatism and the Theory of Action," see 39 Emory L.J. 1191 (1990).

### RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Withdrawal by Aggressor Reviving Right of Self-Defense, 3 POF2d 705.

Defense to Charge of Driving Under the Influence of Alcohol, 17 POF2d 1.

Defense to Charges of Sex Offense, 24 POF2d 515.

Criminal Law — The Battered Woman Defense, 34 POF2d 1.

**ALR.** — Subsequent marriage as bar to prosecution for rape, 9 ALR 339.

Illegal or fraudulent intent of prosecuting witness or person defrauded as de-

fense in prosecution based on false representations, 128 ALR 1520.

Recantation as defense in perjury prosecution, 64 ALR2d 276.

Consent as defense in prosecution for sodomy, 58 ALR3d 636.

Consent as defense to charge of criminal assault and battery, 58 ALR3d 662.

Automatism or unconsciousness as defense to criminal charge, 27 ALR4th 1067.

Criminal law: "official statement" mistake of law defense, 89 ALR4th 1026.

## ARTICLE 1

### RESPONSIBILITY

#### **16-3-1. Minimum age.**

A person shall not be considered or found guilty of a crime unless he has attained the age of 13 years at the time of the act, omission, or negligence constituting the crime. (Code 1933, § 26-701, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For article suggesting upward adjustment to age 15 of the age of criminal responsibility and creation of a rebuttable presumption of adult accountability for youths aged 15

to 18, see 23 Mercer L. Rev. 341 (1972). For survey article on constitutional law, see 34 Mercer L. Rev. 53 (1982).

For comment criticizing *Hatch v. O'Neill*, 231 Ga. 446, 202 S.E.2d 44 (1973), holding individual under age of criminal responsibility not civilly liable for willful torts, see 26 Mercer L. Rev. 367 (1974).

### JUDICIAL DECISIONS

**Section raises defense for purpose of protecting children from consequences of criminal guilt.** — Former Code 1933, § 26-701 (O.C.G.A. § 16-3-1) did not provide that a person under 13 years of age was incapable of performing an act which was designated a crime under the laws of this state; it simply raised a defense for such a person because of social desirability of protecting those no more than 12 years of age from consequences of criminal guilt. *K.M.S. v. State*, 129 Ga. App. 683, 200 S.E.2d 916 (1973).

**Child not guilty of contributory negligence for violation of laws.** — In a personal injury action by a 10-year-old child, since the child could not be found guilty of violating the criminal law, the trial court erred by charging that the child could be guilty of contributory negligence per se for violating certain traffic laws. *Sorrells v. Miller*, 218 Ga. App. 641, 462 S.E.2d 793 (1995).

**Legislative intent.** — Trial court did not unfairly enhance defendant's sentence for armed robbery based on a previous aggravated child molestation conviction, committed when defendant was 13 years old, as: (1) under O.C.G.A. § 16-3-1, the legislature made the age of 13 the age of criminal responsibility in Georgia; (2) the

legislature did not elect to carve out an exception that would exempt youthful offenders from the sentencing provisions of O.C.G.A. § 17-10-7(b)(2); and (3) the Georgia Supreme Court had upheld the constitutionality of the "two violent felonies" statute, O.C.G.A. § 17-10-7(b)(2). *Lee v. State*, 267 Ga. App. 834, 600 S.E.2d 825 (2004).

**Self-incrimination.** — If witness is exempt from criminal prosecution because of age, protection against self-incrimination is unnecessary. *Jones v. State*, 128 Ga. App. 885, 198 S.E.2d 336 (1973).

**Age referred to in O.C.G.A. § 16-3-1 is biological age, not "mental age."** *Couch v. State*, 253 Ga. 764, 325 S.E.2d 366 (1985).

**Application in a tort action.** — Summary judgment was properly denied on a parent's claim of intentional infliction of emotional distress, false arrest, false imprisonment, and invasion of privacy arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because the child was below the age of 13, the age of criminal responsibility under O.C.G.A. § 16-3-1, and was legally incapable of giving consent to their actions under O.C.G.A.

§§ 51-11-2 and 51-11-6. *Todd v. Byrd*, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, *Ferrell v. Mikula*, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

**Cited** in *Carter v. State*, 122 Ga. App. 21, 176 S.E.2d 238 (1970); *Brady v. Lewless*, 124 Ga. App. 858, 186 S.E.2d 310 (1971); *Hatch v. O'Neill*, 231 Ga. 446, 202 S.E.2d 44 (1973); *M.S.K. v. State*, 131 Ga. App. 1, 205 S.E.2d 59 (1974); *Soles v. Beasley*, 137 Ga. App. 280, 223 S.E.2d 477 (1976); *Carrindine v. Ricketts*, 236 Ga. 283, 223 S.E.2d 627 (1976); *Lockett v.*

State, 143 Ga. App. 629, 239 S.E.2d 238 (1977); *Morris v. State*, 150 Ga. App. 310, 257 S.E.2d 378 (1979); *Barrett v. Carter*, 248 Ga. 389, 283 S.E.2d 609 (1981); *Beldonza v. State*, 160 Ga. App. 647, 288 S.E.2d 37 (1981); *Green v. Gaydon*, 174 Ga. App. 796, 331 S.E.2d 106 (1985); *Spivey v. Sellers*, 185 Ga. App. 241, 363 S.E.2d 856 (1987); *Waugh v. State*, 263 Ga. 691, 437 S.E.2d 297 (1993); *Luke v. State*, 222 Ga. App. 203, 474 S.E.2d 49 (1996).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 34.

**C.J.S.** — 43 C.J.S., Infants, § 292.

## 16-3-2. Mental capacity; insanity.

A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence. (Code 1933, § 26-702, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — Mental capacity to stand trial; release of competency evaluation to prosecuting attorney, § 17-7-129. Mental capacity as it relates to competency to stand trial and as it relates to culpability for criminal acts, § 17-7-130. Proceedings upon plea of insanity or mental incompetency, § 17-7-131.

**Law reviews.** — For article, "The Georgia Law of Insanity," see 3 Ga. B.J. 28 (1941). For article discussing the theory of insanity in criminal law, see 15 Mercer L. Rev. 399 (1964).

For note discussing criminal responsibility and mental illness as a defense in Georgia, see 23 Ga. B.J. 538 (1961). For note comparing the M'Naghten Rule and the irresistible impulse test for legal tests of insanity, see 14 Mercer L. Rev. 418 (1963).

For comment on *Nelson v. State*, 151 N.W.2d 694 (Wis. 1967), as to constitutionality of appointment of general practitioner as an expert witness on issue of defendant's sanity, see 19 Mercer L. Rev. 263 (1968).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION APPLICATION

##### General Consideration

**Editor's notes.** — In light of the similarity of the statutory provisions, decisions rendered prior to codification of this principle by Ga. L. 1968, p. 1249, § 1 are

included in the annotations for this Code section.

**Constitutionality.** — Georgia's insanity laws are not unconstitutional even though they fail to provide for an

**General Consideration (Cont'd)**

impulse-control-disorder insanity defense. *Hicks v. State*, 256 Ga. 715, 352 S.E.2d 762, cert. denied, 482 U.S. 931, 107 S. Ct. 3220, 96 L. Ed. 2d 706 (1987).

That O.C.G.A. § 16-3-2 is defined in terms of an accused's mental capacity to distinguish between right and wrong at the time of the crime did not render the statute unconstitutionally vague. *Brantley v. State*, 262 Ga. 786, 427 S.E.2d 758 (1993).

**First codified insanity defense law consistent with present law.** — First codified "insanity defense" law of Georgia, that "[a] lunatic or person insane, without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged, provided the act so charged as criminal was committed in the condition of such lunacy or insanity; but if a lunatic has lucid intervals of understanding, he shall answer for what he does in those intervals as if he had no deficiency," is essentially consistent with O.C.G.A. §§ 16-3-2 and 16-3-3, and is still the law of Georgia. *Kirkland v. State*, 166 Ga. App. 478, 304 S.E.2d 561 (1983).

**Construction with O.C.G.A. § 16-3-4 in cases involving intoxication.** — Law of intoxication contained in O.C.G.A. § 16-3-4 must be read in light of O.C.G.A. § 16-3-2. Section 16-3-4 limits the reach of § 16-3-2 so that the inability to distinguish between right and wrong is not a defense if the inability is a consequence of voluntary intoxication (but remains a defense if the inability is a consequence of involuntary intoxication). *Foster v. State*, 258 Ga. 736, 374 S.E.2d 188 (1988), cert. denied, 490 U.S. 1085, 109 S. Ct. 2110, 104 L. Ed. 2d 671 (1989).

**Section not limited by § 17-7-130.1.** — O.C.G.A. §§ 16-3-2 and 16-3-3 provide the authority for any defendant to assert an insanity defense, and there is nothing in O.C.G.A. § 17-7-130.1 which limits that authority. *Motes v. State*, 256 Ga. 831, 353 S.E.2d 348 (1987).

**Distinction between insanity defense and special plea of insanity.** — Tests under former Code 1933, §§ 26-702 and 26-703 concern mental responsibility of defendant for crime at time alleged

offense was committed, whereas, a special plea of insanity relates only to mental competency of defendant to participate in trial at time of trial; thus, the so-called special plea of insanity does not relate to mental responsibility, but to mental competency. *Echols v. State*, 149 Ga. App. 620, 255 S.E.2d 92 (1979) (see O.C.G.A. §§ 16-3-2 and 16-3-3).

Issue raised by special plea of insanity at time of trial is not whether defendant can distinguish between right and wrong, but is whether defendant is capable at time of trial of understanding the nature and object of the proceedings going on against the defendant and rightly comprehends defendant's own condition in reference to such proceedings, and is capable of rendering defense attorneys such assistance as a proper defense to indictment preferred against the defendant demands. *Spain v. State*, 243 Ga. 15, 252 S.E.2d 436 (1979); *Echols v. State*, 149 Ga. App. 620, 255 S.E.2d 92 (1979).

**General insanity is not a defense to a crime;** the only defenses recognized in Georgia are found in O.C.G.A. § 16-3-2 (no capacity to distinguish right from wrong at the time of the act, omission, or negligence) and O.C.G.A. § 16-3-3 (delusional compulsion at the time of the act, omission, or negligence constituting the crime). *Gould v. State*, 168 Ga. App. 605, 309 S.E.2d 888 (1983).

**Legal insanity concerns ability to distinguish right from wrong,** and delusional compulsions which overmaster one's will. *Echols v. State*, 149 Ga. App. 620, 255 S.E.2d 92 (1979); *Green v. State*, 197 Ga. App. 16, 397 S.E.2d 590 (1990).

**Temporary insanity is a recognized defense in Georgia.** *Jackson v. State*, 149 Ga. App. 253, 253 S.E.2d 874 (1979).

**Whether insanity at time of offense was temporary or permanent is immaterial.** — Insanity may be, and very frequently is, only a temporary malady and, if accused, at time of act the commission of which the accused is charged, did not have reason sufficient to distinguish between right and wrong with reference to that act, the accused would not be criminally responsible, and it makes no difference, insofar as the law is concerned, whether the accused's condition of insan-

ity at time of commission of the act was of a temporary nature or permanent in character, the test of criminal responsibility being the condition of the accused's mind at the time of commission of the act. *Drewry v. State*, 208 Ga. 239, 65 S.E.2d 916 (1951).

**Mental abnormality** is not a defense to a crime unless it amounts to insanity. *Dennis v. State*, 170 Ga. App. 630, 317 S.E.2d 874 (1984).

**Weakmindedness** alone is no defense to crime. *Bonner v. State*, 118 Ga. App. 530, 164 S.E.2d 453 (1968).

**Evidence that defendant had mentality of child does not relieve defendant from responsibility for crime.** *Reece v. State*, 212 Ga. 609, 94 S.E.2d 723 (1956).

**Mere showing of a medical psychosis**, such as schizophrenia, does not establish legal insanity. *Dennis v. State*, 170 Ga. App. 630, 317 S.E.2d 874 (1984).

Schizophrenia is a psychosis, but a psychosis is not the equivalent of insanity. Merely showing that a person suffers from schizophrenia or some other psychosis does not establish legal insanity. *Rogers v. State*, 195 Ga. App. 446, 394 S.E.2d 116 (1990).

**Multiple personalities.** — In every circumstance, including the existence of multiple personalities, the law is justified in finding accountability where at the time of the criminal act the person had the mental capacity to distinguish between right and wrong in relation to such act and was not acting because of a delusional compulsion as to such act which overmastered the person's will to resist committing the crime, which delusion would, if true, have justified the act. If these elements are found to be present the law will not inquire whether the individual possesses other personalities, fugues, or even moods in which the person would not have performed the act or perhaps did not even know the act was being performed. *Kirkland v. State*, 166 Ga. App. 478, 304 S.E.2d 561 (1983).

Fact that defendant suffered from a multiple personality disorder did not absolve defendant of criminal responsibility, since it was undisputed that the defendant was conscious and acting under the

defendant's own volition, and the defendant was able to recognize right from wrong and was not suffering from delusional compulsions. *Kirby v. State*, 201 Ga. App. 116, 410 S.E.2d 333 (1991).

**Confusional migraines.** — Defendant did not receive effective assistance of counsel when the defendant provided counsel with medical records showing that the defendant suffered from "confusional migraines," which could render the defendant unable to form the requisite criminal intent, but counsel did not investigate the condition, nor was evidence of it, which was the only defense offered, presented; furthermore, the defendant was prejudiced because other evidence showed the defendant was suffering from this condition at the time of the defendant's alleged crime. *Guzman v. State*, 260 Ga. App. 689, 580 S.E.2d 654 (2003).

**Lack of intent not implicated.** — Persons are not excused from criminal liability under O.C.G.A. § 16-3-2 because they are incapable of forming criminal intent. Lack of intent is a defense, but it is not implicated by that Code section. *Foster v. State*, 258 Ga. 736, 374 S.E.2d 188 (1988), cert. denied, 490 U.S. 1085, 109 S. Ct. 2110, 104 L. Ed. 2d 671 (1989).

**Finding of insanity necessarily negates essential element of criminal intent.** *Avery v. State*, 138 Ga. App. 65, 225 S.E.2d 454, rev'd on other grounds, 237 Ga. 865, 230 S.E.2d 301 (1976).

**Georgia law presumes sanity, and insanity is an affirmative defense.** *Parker v. State*, 256 Ga. 363, 349 S.E.2d 379 (1986).

**Insanity is an affirmative defense that accused must prove by preponderance of evidence.** and suffers from no constitutional infirmity. *Grace v. Hopper*, 566 F.2d 507 (5th Cir.), cert. denied, 439 U.S. 844, 99 S. Ct. 139, 58 L. Ed. 2d 144 (1978); *Adams v. State*, 254 Ga. 481, 330 S.E.2d 869 (1985).

**Presumption of sanity may be overcome by preponderance of evidence.** — In every case there is a presumption that accused is sane, but this presumption may be overcome by a preponderance of evidence. *Handspike v. State*, 203 Ga. 115, 45 S.E.2d 662 (1947).

**Responsibility for establishing defense of insanity is on defense.** *Revill v.*

**General Consideration (Cont'd)**

State, 235 Ga. 71, 218 S.E.2d 816 (1975).

**When one has been adjudged insane, presumption** is that such insanity continues until contrary adjudication. Orange v. State, 77 Ga. App. 36, 47 S.E.2d 756 (1948).

**Presumption of insanity cancelled by administrative release from hospital.** — Defendant's administrative release from hospitalization for mental illness cancelled any previously existing presumption of insanity, leaving a rebuttable presumption of sanity. Salter v. State, 257 Ga. 88, 356 S.E.2d 196 (1987).

**Presumption of sanity may be rebutted** by evidence of the mental condition of the accused at the time of the offense, or before and after the offense, which tends to show the accused's condition at the time of the offense. Chancellor v. State, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

**That the state must prove sanity beyond a reasonable doubt** is not antagonistic to the notion that the defendant has the burden to establish insanity by a preponderance of the evidence. Kirk v. State, 168 Ga. App. 226, 308 S.E.2d 592 (1983).

Rule regarding burden of proof suffers from no constitutional infirmity. Grace v. Hopper, 566 F.2d 507 (5th Cir.), cert denied, 439 U.S. 844, 99 S. Ct. 139, 58 L. Ed. 2d 144 (1978).

**Specifically charging burden of proof.** — When charge of court includes instruction as to insanity but places burden of proof as to each essential element of crime, including intent, upon state beyond reasonable doubt, it is not error for the court not to instruct the jury specifically, absent request, as to any burden of proof regarding sanity. Howard v. State, 150 Ga. App. 356, 258 S.E.2d 39 (1979).

**Insanity is a question of fact**, and not of law, and it is the exclusive province of the jury to determine all questions of fact; but this does not mean that juries can arbitrarily disregard clearest and most convincing proof, and accept, as truth in evidence, that which, from every standpoint of reason and human experience, is not entitled to any evidentiary

weight or value; and, if they do so the ends of justice demand that their verdict should be disregarded. Handspike v. State, 203 Ga. 115, 45 S.E.2d 662 (1947) (decided under prior law).

**Mental condition before and after offense tend to show condition at time of offense.** — To show insanity of accused at time of commission of offense it is relevant to introduce testimony showing mental condition of accused at time of offense, and defendant's mental condition before and after offense may be proved as tending to show defendant's condition at time of offense. Handspike v. State, 203 Ga. 115, 45 S.E.2d 662 (1947).

**Sanity or insanity is proper subject for opinion evidence**, and if the question under examination, and to be decided by the jury, shall be one of opinion, any witness may swear to an opinion or belief, giving reasons therefor. Chancellor v. State, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

**Lay witness' testimony as to post-homicide observations.** — Lay witnesses should be permitted to use incidents from post-homicide period for basis of opinions as to defendant's sanity. Chancellor v. State, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

Exclusion of testimony of witnesses' lay opinions as to defendant's mental state based on post-homicide observations is not harmful error where there is no evidence that defendant did not know the difference between right and wrong. Chancellor v. State, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

**Exclusion of lay person's testimony as to defendant's sanity not warranting new trial.** — While a lay witness may testify regarding the witness's opinion or belief as to a defendant's sanity, giving reasons therefor, the exclusion of such testimony does not warrant a new trial when there was no evidence that the defendant did not know the difference between right and wrong. Smith v. State, 180 Ga. App. 278, 349 S.E.2d 26 (1986).

**There is no constitutional right to mental examination, absent reasonable showing of need therefor**, as there is a basic presumption of sanity. Roach v. Mauldin, 277 F. Supp. 54 (N.D. Ga. 1967),

aff'd, 391 F.2d 907 (5th Cir. 1968), cert. denied, 393 U.S. 1095, 89 S. Ct. 884, 21 L. Ed. 2d 786 (1969), aff'd, 391 F.2d 907 (5th Cir. 1968), cert. denied, 393 U.S. 1095, 89 S. Ct. 884, 21 L. Ed. 2d 786 (1969).

**Court is under no duty to grant psychiatric examination in absence of special plea of insanity.** *McNeil v. State*, 165 Ga. App. 537, 301 S.E.2d 895 (1983).

**Defense must make preliminary showing.** — Appointment of a psychiatrist is not always necessary, even when the defense makes a motion for appointment of one as that does not constitute the required preliminary showing that sanity at the time of the offense is likely to be a significant factor at trial. *LaCount v. State*, 265 Ga. App. 352, 593 S.E.2d 885 (2004).

**Counsel not ineffective for not raising issue.** — Defendant failed to show that counsel was ineffective in violation of U.S. Const., amend. 6 for a failure to pursue a request for a psychological examination, an insanity defense under O.C.G.A. § 16-3-2, and a failure to assert that the defendant was not competent to stand trial under O.C.G.A. § 17-7-130 in a criminal trial arising from multiple offenses, including murder, as there was nothing in the defendant's psychological history or in counsels' interactions with the defendant which suggested that there was a problem with the defendant's sanity or competency. *Redwine v. State*, 280 Ga. 58, 623 S.E.2d 485 (2005).

**Failure to obtain psychological evaluation of defendant was not ineffective assistance.** — Defendant failed to show ineffective assistance of defense counsel for failure to pursue a psychological examination of the defendant to determine whether the defendant could assert the defense of mental incapacity by insanity because counsel testified that, upon counsel's dealings with the defendant, counsel did not believe that any such examination was necessary. Further, regardless of whether trial counsel had any obligation to seek a psychological evaluation of the defendant under the facts, the defendant failed to show what the result of any such examination would be and thus failed to establish prejudice

by showing that the result of the trial would have been different if a psychological examination was pursued. *Taylor v. State*, 282 Ga. 693, 653 S.E.2d 477 (2007).

**Second insanity test.** — Defendant received an evaluation of the defendant's mental competence at the time of the offenses and the defendant's competency to stand trial for the charges. Nothing in the record indicated the defendant's inability to distinguish (as opposed to do) right from wrong, so the trial court did not abuse its discretion in not ordering another evaluation. *LaCount v. State*, 265 Ga. App. 352, 593 S.E.2d 885 (2004).

**Cited in** *Teasley v. State*, 228 Ga. 107, 184 S.E.2d 179 (1971); *Freeman v. State*, 132 Ga. App. 742, 209 S.E.2d 127 (1974); *Graham v. State*, 236 Ga. 378, 223 S.E.2d 803 (1976); *Biddy v. State*, 138 Ga. App. 4, 225 S.E.2d 448 (1976); *Barner v. State*, 139 Ga. App. 50, 227 S.E.2d 874 (1976); *Printup v. State*, 142 Ga. App. 42, 234 S.E.2d 840 (1977); *Moore v. State*, 142 Ga. App. 145, 235 S.E.2d 577 (1977); *Lewis v. State*, 239 Ga. 732, 238 S.E.2d 892 (1977); *Hill v. State*, 144 Ga. App. 259, 241 S.E.2d 44 (1977); *Bennett v. State*, 146 Ga. App. 407, 246 S.E.2d 425 (1978); *Longshore v. State*, 242 Ga. 689, 251 S.E.2d 280 (1978); *Shirley v. State*, 149 Ga. App. 194, 253 S.E.2d 787 (1979); *Howard v. State*, 150 Ga. App. 356, 258 S.E.2d 39 (1979); *Moody v. State*, 244 Ga. 247, 260 S.E.2d 11 (1979); *Smith v. State*, 245 Ga. 44, 262 S.E.2d 806 (1980); *Clark v. State*, 245 Ga. 629, 266 S.E.2d 466 (1980); *Bowers v. State*, 153 Ga. App. 894, 267 S.E.2d 309 (1980); *Murphy v. State*, 246 Ga. 626, 273 S.E.2d 2 (1980); *Bailey v. State*, 249 Ga. 535, 291 S.E.2d 704 (1982); *Brown v. State*, 250 Ga. 66, 295 S.E.2d 727 (1982); *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983); *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984); *O'Neal v. State*, 254 Ga. 1, 325 S.E.2d 759 (1985); *Caldwell v. State*, 257 Ga. 10, 354 S.E.2d 124 (1987); *Holloway v. State*, 257 Ga. 620, 361 S.E.2d 794 (1987); *Dick v. Kemp*, 833 F.2d 1448 (11th Cir. 1987); *Godfrey v. Kemp*, 836 F.2d 1557 (11th Cir. 1988); *Sciarrone v. Brownlee*, 83 Bankr. 836 (Bankr. N.D. Ga. 1988); *Lawrence v. State*, 265 Ga. 310, 454 S.E.2d 446 (1995); *Vanderpool v. State*, 244 Ga. App. 804, 536 S.E.2d 821 (2000),

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cert denied, 532 U.S. 996, 121 S. Ct. 1658, 149 L. Ed. 2d 640 (2001); Hicks v. Head, 333 F.3d 1280 (11th Cir. 2003); Radford v. State, 281 Ga. 303, 637 S.E.2d 712 (2006).

**Application**

**Deficiency of will, conscience, or controlling mental power.** — Under former Code 1933, §§ 26-702 and 26-703, if one's reason and mental powers are either so deficient that one has no will, conscience, or controlling mental power, or if through overwhelming power of mental disease, one's intellectual power is for the time obliterated, one is not a responsible moral agent, and is not punishable for criminal acts. Mendenhall v. Hopper, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979) (see O.C.G.A. §§ 16-3-2 and 16-3-3).

**Evidence of actions following killing.** — When, in arguing that the defendant did not meet the burden of proof, the state points to actions taken by the defendant after the murder, including wiping blood from the windows and placing the blood-covered shirt and tee-shirt in the rear of the car, as well as asking about the death penalty in Georgia, these facts might be relevant to the defendant's argument under O.C.G.A. § 16-3-2 that at the time of the crime the defendant lacked the capacity to distinguish between right and wrong, but the facts asserted by the state do not detract from the overwhelming evidence in support of the defendant's defense under O.C.G.A. § 16-3-2, that at the time of the homicide the defendant was acting under a delusional compulsion which overmastered the defendant's will to resist committing the crime. Stevens v. State, 256 Ga. 440, 350 S.E.2d 21 (1986).

**Delusion of spouse's infidelity insufficient to prove insanity.** — Evidence that the defendant knew right from wrong but believed the defendant's actions to have been justified by the delusion of the defendant's spouse's infidelity did not meet the test of insanity which would require a verdict of not guilty by reason of insanity at the defendant's trial for the murder of the defendant's neighbor. Salter

v. State, 257 Ga. 88, 356 S.E.2d 196 (1987).

**Epilepsy can be defense to crime.** Murphy v. State, 132 Ga. App. 654, 209 S.E.2d 101 (1974).

**Epileptics** are responsible for their acts unless reason is dethroned because of seizure of epilepsy at time of such conduct. Starr v. State, 134 Ga. App. 149, 213 S.E.2d 531 (1975).

**Act resulting from narcotic withdrawal symptoms.** — Evidence that defendant became addicted to narcotics in prison and that the burglary of medical pharmacy was result of overwhelming passion for narcotics brought on by withdrawal symptoms does not demand conclusion either that defendant lacked mental capacity to distinguish between right and wrong, or that because of mental disease defendant acted under a delusional compulsion which overmastered defendant's will to resist committing the crime. Brand v. State, 123 Ga. App. 273, 180 S.E.2d 579 (1971).

**Some evidence that defendants were intoxicated,** by itself, does not require charge under former Code 1933, § 26-702. Treadwell v. State, 129 Ga. App. 573, 200 S.E.2d 323 (1973) (see O.C.G.A. § 16-3-2).

**Instruction on insanity not required by defendant's testimony of lack of memory.** — If only evidence of insanity is defendant's testimony that defendant cannot remember events surrounding episode which was the result of intoxication, this would not require instruction on insanity. Jackson v. State, 149 Ga. App. 253, 253 S.E.2d 874 (1979).

**Defendant's testimony of lack of memory following blow to head.** — When there was no plea of insanity and no evidence of insanity save the defendant's assertion that after being struck on the head by the deceased, the defendant did not remember what happened, a charge on insanity was not required. Garrett v. State, 126 Ga. App. 83, 189 S.E.2d 860 (1972).

**Testimony that lay witness thought defendant was crazy did not require insanity instruction.** — When the only testimony relating to the defendant's mental condition was from his former

wife, who testified that on observing defendant just prior to the assault, she told her mother, "Maybe he's going crazy," and on cross-examination she responded: "If you want my opinion, I'll say he's crazy," such testimony, without any clarification or foundation, does not raise issue of insanity sufficiently to require charge thereon in absence of request to so charge. *McClendon v. State*, 157 Ga. App. 435, 278 S.E.2d 96 (1981).

**Evidence insufficient to require charge on insanity.** — See *Duck v. State*, 250 Ga. 592, 300 S.E.2d 121 (1983).

**Jury charges correctly stating law.** — In light of the statutory definition of insanity, a trial court's jury charge that being upset or distraught, or suffering from mental stress, was not a defense if the defendant was able to distinguish right from wrong was a correct statement of the law and was not a judicial comment on the evidence. *Chancellor v. State*, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

When the trial court instructed the jury that the reasonable man standard governs a person's act, and when an act violates that standard and a penal statute, the conduct is criminal unless excused by insanity, the charge does not direct a verdict against the defendant; the jury instruction states valid principles of law. *Chancellor v. State*, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

Trial court correctly charged the jury that the defendant's inability to evaluate the quality and consequences of defendant's acts to the same degree as a normal or average person would not excuse the defendant if the defendant was able to distinguish between right and wrong. *Adams v. State*, 254 Ga. 481, 330 S.E.2d 869 (1985).

**Burden of proof.** — State does not have burden of proving sanity of accused beyond reasonable doubt, so it is not error to refuse to give such an instruction to the jury. *Chancellor v. State*, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

It is not error to charge that defendant has burden of proving mental incapacity by preponderance of evidence. Such a charge does not impermissibly shift the burden of proof to the defendant. *Chancellor v. State*, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

**Charging that mental abnormality or mere weakness of mind is no excuse** did not constitute error, unless the abnormality or weakness amounts to imbecility or idiocy which deprives the offender of the ability to distinguish between right and wrong in relation to the particular act about to be committed. *Howard v. State*, 166 Ga. App. 224, 303 S.E.2d 763 (1983).

Mental abnormality or weakness of mind does not excuse criminal actions unless the abnormality or weakness is tantamount to imbecility or idiocy which deprives the actor of the ability to distinguish right from wrong. *Kirk v. State*, 168 Ga. App. 226, 308 S.E.2d 592 (1983), aff'd, 252 Ga. 133, 311 S.E.2d 821 (1984).

**Conflicting evidence.** — When the evidence on insanity was conflicting, the jury was authorized to find that a defendant failed to prove insanity by a preponderance of the evidence. *Foster v. State*, 283 Ga. 47, 656 S.E.2d 838 (2008).

**Conflicting opinion evidence.** — Although the defendant's experts opined that the defendant was insane when the defendant stabbed two people after consuming alcohol and cocaine with the defendant's victims, the state supreme court affirmed the jury's verdict that the defendant was not insane because testimony from the state's expert that the defendant knew the difference between right and wrong when the defendant committed the crimes and testimony from a police officer that the defendant was calm and cooperative when the officer talked to the defendant shortly after the defendant committed the crimes supported the jury's verdict. *Whitner v. State*, 276 Ga. 742, 584 S.E.2d 247 (2003), overruled on other grounds, No. S10P1859, 2011 Ga. LEXIS 267 (Ga. 2011).

**Jury may reject expert testimony as to sanity and rely on presumption of insanity.** — Jury is free to reject testimony of expert witnesses as to insanity of accused and rely instead on presumption of sanity and can find that defendant is sane even though there is no positive testimony to that effect. *Fields v. State*, 221 Ga. 307, 144 S.E.2d 339 (1965) (decided under prior law).

There is no error in court's refusal to

**Application (Cont'd)**

charge that jury cannot arbitrarily disregard defense established by positive, uncontradicted, unimpeached testimony, even assuming testimony of defendant's good character and insanity was positive, uncontradicted, and unimpeached. Chancellor v. State, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

**Charge must cover general insanity and delusional insanity where both are applicable.** — When both defense of general insanity and defense of delusional insanity are involved, it is not only the right but the duty of the judge to give to the defendant by the judge's charge the benefit of both defenses. Reeves v. State, 196 Ga. 604, 27 S.E.2d 375 (1943) (decided under prior law).

**Charge on delusional compulsion is not authorized when the delusion allegedly suffered by defendant (the adulterous affair between her husband and the victim) does not justify homicide.** Chancellor v. State, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

**Instruction effectively removed any possible problem of an impermissibly burden-shifting charge.** — See Chancellor v. State, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

**Attributing intent to rape to thoughts instilled by divine power.** — When the appellant admitted an intention to rape the victim, but said that "God or Jesus, Savior, put all this stuff in my head and messed me up," evidence supported the jury's finding that the appellant was not insane so as to excuse the appellant's criminal act. Dupree v. State, 163 Ga. App. 502, 295 S.E.2d 332 (1982).

**Instructing as to difference between not guilty by reason of insanity and guilty but mentally ill.** — When the trial court charges the jury on the defense of insanity at the time of the crime, O.C.G.A. § 16-3-2, and on guilty but mentally ill at the time of the crime, O.C.G.A. § 17-7-131, the trial court must make clear to the jury in its charge that if they find the defendant did not have the mental capacity to distinguish between right and wrong (or acted because of delusional compulsion), they must find the

defendant not guilty by reason of insanity and must not find the defendant guilty but mentally ill. Keener v. State, 254 Ga. 699, 334 S.E.2d 175 (1985); Price v. State, 179 Ga. App. 598, 347 S.E.2d 608 (1986).

**Verdict of guilty but mentally ill proper when multiple personalities shown.** — Since the trial judge accepted that defendant suffers from a multiple personality disorder, but ruled that the personality (be she Phyllis or Sharon, or both) who robbed the banks did so with rational, purposeful criminal intent and with knowledge that it was wrong, there is no error in the judge finding that defendant was guilty but mentally ill. Kirkland v. State, 166 Ga. App. 478, 304 S.E.2d 561 (1983).

**Verdict of guilty but mentally ill proper where defendant schizophrenic.** — Where a clinical psychologist testified that the defendant was a responsible and competent person at the time of the killing and did not kill the victim as a result of schizophrenia, a rational trier of fact could have found that the defendant did not show by a preponderance of the evidence that defendant was legally insane at the time of the crime. Stephens v. State, 258 Ga. 320, 368 S.E.2d 754 (1988).

**When the defendant's counsel acquiesced in presenting the guilty-but-mentally-ill verdict option to the jury,** the defendant was estopped from contending on appeal that the option infringed on defendant's defense of insanity. Milam v. State, 255 Ga. 560, 341 S.E.2d 216 (1986).

**Guilty but mentally ill verdict under O.C.G.A. § 17-7-131 allowed for accommodation** to the mental health needs of the appellant who was found guilty, but was laboring under a mental illness which fell short of the legal defense of insanity and delusional compulsion promulgated in O.C.G.A. §§ 16-3-2 and 16-3-3. Dimauro v. State, 185 Ga. App. 524, 364 S.E.2d 900 (1988).

**Defendant failed to prove insanity at the time of the crime.** — See Tarver v. State, 186 Ga. App. 905, 368 S.E.2d 828 (1988); Mitchell v. State, 187 Ga. App. 40, 369 S.E.2d 487, cert. denied, 187 Ga. App. 908, 369 S.E.2d 487 (1988); Levin v. State, 222 Ga. App. 123, 473 S.E.2d 582 (1996).

**Prejudice not shown by trial counsel's failure to call expert.** — Even if trial counsel were ineffective in not calling a psychologist to testify for the defense that the defendant was incompetent to stand trial and that the defendant was insane at the time of the crime under O.C.G.A. §§ 16-3-2 and 16-3-3, the defense expert's testimony would not have changed the outcome; the defense expert's opinion was contradicted by a second expert, whose opinion was based on an evaluation over an extended period of time as opposed to the defense expert's evaluation of less than one day, and by testimony of

the defendant and trial counsel that the defendant understood the basis of the charges and the nature of the proceedings and assisted in preparing the defense. Wallin v. State, 285 Ga. App. 377, 646 S.E.2d 484 (2007).

**There is no constitutional right to mental examination, absent reasonable showing of need therefor,** as there is a basic presumption of sanity. Roach v. Mauldin, 277 F. Supp. 54 (N.D. Ga. 1967), aff'd, 391 F.2d 907 (5th Cir. 1968), cert. denied, 393 U.S. 1095, 89 S. Ct. 884, 21 L. Ed. 2d 786 (1969).

## OPINIONS OF THE ATTORNEY GENERAL

**Definitions of insanity in former Code 1933, §§ 26-702 and 26-703 (see O.C.G.A. §§ 16-3-2 and 16-3-3) are inapplicable to instructions to physician under former Code 1933, § 27-2602 (see O.C.G.A. § 17-10-61).** — In view of fact that former Code 1933, § 27-2602 (see O.C.G.A. § 17-10-61) specifically requires that inquiry into whether person convicted of capital felony offense has become insane be directed to alleged insanity occurring subsequent to conviction, definitions of insanity as

stated in former Code 1933, §§ 26-702 and 26-703 (see O.C.G.A. §§ 16-3-2 and 16-3-3) are inapplicable and should not be given in written instructions to physicians appointed pursuant to former Code 1933, § 27-2602 (see O.C.G.A. § 17-10-61); since basic issue is the individual's sanity at a time subsequent to conviction, or in effect, the person's present sanity, the appropriate test should be that as employed upon a special plea of insanity. 1976 Op. Att'y Gen. No. 76-123.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 53 et seq. 29 Am. Jur. 2d, Evidence, § 437. 29A Am. Jur. 2d Evidence § 871 et seq. 75 Am. Jur. 2d, Trial, § 282. 75A Am. Jur. 2d, Trial, §§ 610, 618.

**Am. Jur. Proof of Facts.** — Defendant's Competency to Stand Trial, 40 POF2d 171.

**C.J.S.** — 22 C.J.S., Criminal Law, § 128.

**ALR.** — Test of present insanity which will prevent trial for crime or punishment after conviction, 3 ALR 94.

Remedy of one convicted of crime while insane, 10 ALR 213; 121 ALR 267.

Subnormal mentality as defense to crime, 44 ALR 584.

Constitutionality of statute relating to insanity as defense to crime, 74 ALR 265.

Irresistible impulse as excuse for crime, 173 ALR 391.

Presumption of continuing insanity as

applied to accused in criminal case, 27 ALR2d 121.

Prejudicial effect of argument or comment that accused, if acquitted on ground of insanity, would be released from institution to which committed, 44 ALR2d 978.

Effect of voluntary drug intoxication upon criminal responsibility, 73 ALR2d 12.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 ALR3d 146.

Mental or emotional condition as diminishing responsibility for crime, 22 ALR3d 1228.

XXY syndrome as affecting criminal responsibility, 42 ALR3d 1414.

Drug addiction or related mental state as defense to criminal charge, 73 ALR3d 16.

Necessity or propriety of bifurcated

criminal trial on issue of insanity defense, 1 ALR4th 884.

Modern status of test of criminal responsibility — state cases, 9 ALR4th 526.

Propriety of transferring patient found not guilty by reason of insanity to less restrictive confinement, 43 ALR5th 777.

Adequacy of defense counsel's representation of criminal client — pretrial conduct or conduct at unspecified time regarding issues of insanity, 72 ALR5th 109.

Qualification of nonmedical psychologist to testify as to mental condition or competency, 72 ALR5th 529.

### 16-3-3. Delusional compulsion.

A person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, the person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime. (Code 1933, § 26-703, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — Mental capacity as it relates to competency to stand trial and as it relates to culpability for criminal acts, see §§ 17-7-129, 17-7-130, 17-7-131.

**Law reviews.** — For article discussing the theory of insanity in criminal law, see 15 Mercer L. Rev. 399 (1964).

Adequacy of defense counsel's representation of criminal client — conduct occurring at time of trial regarding issues of diminished capacity, intoxication, and unconsciousness, 78 ALR5th 197.

Adequacy of defense counsel's representation of criminal client — pretrial conduct or conduct at unspecified time regarding issues of diminished capacity, intoxication, and unconsciousness, 79 ALR5th 419.

For note comparing the M'Naghten Rule and the irresistible impulse test for legal tests of insanity, see 14 Mercer L. Rev. 418 (1963).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION APPLICATION

#### General Consideration

**Editor's notes.** — In light of the similarity of the statutory provisions, decisions rendered prior to codification of this principle by Ga. L. 1968, p. 1249, § 1 are included in the annotations for this Code section.

**Constitutionality.** — Georgia's insanity laws are not unconstitutional even though they fail to provide for an impulse-control-disorder insanity defense. *Hicks v. State*, 256 Ga. 715, 352 S.E.2d 762, cert. denied, 482 U.S. 931, 107 S. Ct. 3220, 96 L. Ed. 2d 706 (1987).

**First codified insanity defense law**

**consistent with present law.** — First codified "insanity defense" law of Georgia, that "[a] lunatic or person insane, without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged, provided the act so charged as criminal was committed in the condition of such lunacy or insanity; but if a lunatic has lucid intervals of understanding, he shall answer for what he does in those intervals as if he had no deficiency," is essentially consistent with O.C.G.A. §§ 16-3-2 and 16-3-3 and is still the law of Georgia. *Kirkland v. State*, 166 Ga. App. 478, 304 S.E.2d 561 (1983).

**Section not limited by § 17-7-130.1.** — O.C.G.A. §§ 16-3-2 and 16-3-3 provide the authority for any defendant to assert an insanity defense, and there is nothing in O.C.G.A. § 17-7-130.1 which limits that authority. *Motes v. State*, 256 Ga. 831, 353 S.E.2d 348 (1987).

**Distinction between insanity defense and special plea of insanity.** — Tests under former Code 1933, §§ 26-702 and 26-703 concern mental responsibility of defendant for crime at time alleged offense was committed; whereas, a special plea of insanity relates only to mental competency of defendant to participate in trial at time of trial; thus, the so-called special plea of insanity does not relate to mental responsibility, but to mental competency. *Echols v. State*, 149 Ga. App. 620, 255 S.E.2d 92 (1979) (see O.C.G.A. §§ 16-3-2 and 16-3-3).

Issue raised by special plea of insanity at time of trial is not whether defendant can distinguish between right and wrong, but is whether defendant is capable at the time of trial of understanding the nature and object of the proceedings going on against the defendant and rightly comprehends defendant's own condition in reference to such proceedings, and is capable of rendering defense attorneys such assistance as a proper defense to indictment preferred against the defendant demands. *Echols v. State*, 149 Ga. App. 620, 255 S.E.2d 92 (1979).

**General insanity is not a defense to a crime;** the only defenses recognized in Georgia are found in O.C.G.A. § 16-3-2 (no capacity to distinguish right from wrong at the time of the act, omission, or negligence) and O.C.G.A. § 16-3-3 (delusional compulsion at the time of the act, omission, or negligence constituting the crime). *Gould v. State*, 168 Ga. App. 605, 309 S.E.2d 888 (1983).

**Psychosis as establishing legal insanity.** — Schizophrenia is a psychosis, but a psychosis is not the equivalent of insanity. The mere showing that a person suffers from schizophrenia or some other psychosis does not establish legal insanity. *Rogers v. State*, 195 Ga. App. 446, 394 S.E.2d 116 (1990).

**Legal insanity concerns ability to distinguish right from wrong,** and de-

lusional compulsions which overmaster one's will. *Echols v. State*, 149 Ga. App. 620, 255 S.E.2d 92 (1979); *Green v. State*, 197 Ga. App. 16, 397 S.E.2d 590 (1990).

**Delusion may be defined as an absurd and unfounded belief.** *McKinnon v. State*, 51 Ga. App. 549, 181 S.E. 91 (1935).

**Elements of defense of delusional compulsion.** — To rely on delusional compulsion alone, one must show both that the act was the result of delusion and also that the delusion was as to a fact which, if true, would justify the act. *Freeman v. State*, 132 Ga. App. 742, 209 S.E.2d 127 (1974).

In order for defense of delusional compulsion to be available in trial for murder there must be evidence that defendant was laboring under a delusion, that the act itself was connected with the delusion and furthermore that the delusion would, if true, justify the act. *Graham v. State*, 236 Ga. 378, 223 S.E.2d 803 (1976).

Delusional insanity may be found when, in consequence of a delusion brought about by mental disease, the will is so overmastered that there is no criminal intent in reference to the act, and it must appear not only that defendant was actually laboring under a delusion operating as a causative factor, but that the delusion was such that it, if true, would justify the act. *Biddy v. State*, 138 Ga. App. 4, 225 S.E.2d 448 (1976).

In order for defense of delusional compulsion to be available in trial for murder, there must be evidence that defendant was laboring under a delusion. *Wells v. State*, 247 Ga. 792, 279 S.E.2d 213 (1981).

To support a finding that a defendant is not guilty of a criminal act under O.C.G.A. § 16-2-3, it must appear: (1) that the defendant was laboring under a delusion; (2) that the criminal act was connected with the delusion under which the defendant was laboring; and (3) that the delusion was as to a fact which, if true, would have justified the act. *Stevens v. State*, 256 Ga. 440, 350 S.E.2d 21 (1986); *Fulghum v. Ford*, 850 F.2d 1529 (11th Cir. 1988), cert. denied, 488 U.S. 1013, 109 S. Ct. 802, 102 L. Ed. 2d 793 (1989); *Martin v. State*, 196 Ga. App. 869, 397 S.E.2d 301 (1990); *Rogers v. State*, 199 Ga. App. 545, 405 S.E.2d 541 (1991).

**General Consideration (Cont'd)**

In order for a delusional compulsion to constitute a defense to a criminal charge, it must be as to a fact which, if true, would justify the act. *State Auto. Mut. Ins. Co. v. Gross*, 188 Ga. App. 542, 373 S.E.2d 789, cert. denied, 188 Ga. App. 912, 373 S.E.2d 789 (1988).

**Self-defense applicable to delusional compulsion defense.** — General law of self-defense was properly applied to determine whether the defendant had met the justification criteria for delusional compulsion defense. *Dutton v. State*, 225 Ga. App. 67, 483 S.E.2d 305 (1997).

**Criminal act must stem from delusions.** — That defendant be impressed with delusions or hallucinations is not enough; the defendant's criminal act must stem from such mental disorder, or else the defendant's accountability for the criminal act is measured by the general test of whether defendant could, at time of crime's commission, distinguish between right and wrong. *Mullins v. State*, 216 Ga. 183, 115 S.E.2d 547 (1960).

**Delusion as to fact which would not excuse does not authorize acquittal.** *McKinnon v. State*, 51 Ga. App. 549, 181 S.E. 91 (1935).

**Proof of multiple personalities.** — In every circumstance, including the existence of multiple personalities, the law is justified in finding accountability where at the time of the criminal act the person had mental capacity to distinguish between right and wrong in relation to such act and was not acting because of a delusional compulsion as to such act which overmastered the person's will to resist committing the crime, which delusion would, if true, have justified the act. If these elements are found to be present the law will not inquire whether the individual possesses other personalities, fugues, or even moods in which the person would not have performed the act or perhaps did not even know the act was being performed. *Kirkland v. State*, 166 Ga. App. 478, 304 S.E.2d 561 (1983).

Fact that the defendant suffered from a multiple personality disorder did not absolve the defendant of criminal responsibility, since it was undisputed that the

defendant was conscious and acting under the defendant's own volition, and defendant was able to recognize right from wrong and was not suffering from delusional compulsions. *Kirby v. State*, 201 Ga. App. 116, 410 S.E.2d 333 (1991).

**Delusional compulsion must justify action in question.** *Brannen v. State*, 235 Ga. 505, 220 S.E.2d 264 (1975).

**Burden of proof.** — Insanity is an affirmative defense that accused must prove by preponderance of evidence. *Grace v. Hopper*, 566 F.2d 507 (5th Cir.), cert. denied, 439 U.S. 844, 99 S. Ct. 139, 58 L. Ed. 2d 144 (1978).

**Insanity is an affirmative defense** that the accused must prove by a preponderance of the evidence and this burden of proof suffers from no constitutional infirmity. *Grace v. Hopper*, 566 F.2d 507 (5th Cir.), cert. denied, 439 U.S. 844, 99 S. Ct. 139, 58 L. Ed. 2d 144 (1978).

**There is no constitutional right to mental examination**, absent reasonable showing of need therefor, as there is a basic presumption of sanity. *Roach v. Mauldin*, 277 F. Supp. 54 (N.D. Ga. 1967), aff'd, 391 F.2d 907 (5th Cir. 1968), cert. denied, 393 U.S. 1095, 89 S. Ct. 884, 21 L. Ed. 2d 786 (1969).

**Charge must cover general insanity and delusional insanity where both are applicable.** — When both defense of general insanity and defense of delusional insanity are involved, it is not only the right but the duty of the judge to give to defendant by the judge's charge the benefit of both defenses. *Reeves v. State*, 196 Ga. 604, 27 S.E.2d 375 (1943).

**Failure to instruct on delusional compulsion** was not error because the defendant never requested such a charge, the evidence did not support it, and the defense never suggested that the defendant was acting under a delusional compulsion when the crimes were committed. *Heidler v. State*, 273 Ga. 54, 537 S.E.2d 44 (2000), cert denied, 532 U.S. 1029, 121 S. Ct. 1979, 149 L. Ed. 2d 771 (2001).

**Cited in** *Teasley v. State*, 228 Ga. 107, 184 S.E.2d 179 (1971); *Revill v. State*, 235 Ga. 71, 218 S.E.2d 816 (1975); *Roberts v. State*, 137 Ga. App. 215, 223 S.E.2d 256 (1976); *Moore v. State*, 142 Ga. App. 145, 235 S.E.2d 577 (1977); *Hill v. State*, 144

Ga. App. 259, 241 S.E.2d 44 (1977); Bennett v. State, 146 Ga. App. 407, 246 S.E.2d 425 (1978); Shirley v. State, 149 Ga. App. 194, 253 S.E.2d 787 (1979); Boykin v. State, 149 Ga. App. 457, 254 S.E.2d 457 (1979); Smith v. State, 245 Ga. 44, 262 S.E.2d 806 (1980); Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980); Bailey v. State, 249 Ga. 535, 291 S.E.2d 704 (1982); Bentley v. State, 162 Ga. App. 755, 293 S.E.2d 36 (1982); Brown v. State, 250 Ga. 66, 295 S.E.2d 727 (1982); Benham v. Edwards, 678 F.2d 511 (5th Cir. 1982); Corn v. Zant, 708 F.2d 549 (11th Cir. 1983); Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984); O'Neal v. State, 254 Ga. 1, 325 S.E.2d 759 (1985); Eason v. State, 256 Ga. 701, 353 S.E.2d 188 (1987); Caldwell v. State, 257 Ga. 10, 354 S.E.2d 124 (1987); Dick v. Kemp, 833 F.2d 1448 (11th Cir. 1987); Sciarrone v. Brownlee, 83 Bankr. 836 (Bankr. N.D. Ga. 1988); Green v. State, 208 Ga. App. 1, 429 S.E.2d 694 (1993); Lawrence v. State, 265 Ga. 310, 454 S.E.2d 446 (1995); Trammel v. Bradberry, 256 Ga. App. 412, 568 S.E.2d 715 (2002); Hicks v. Head, 333 F.3d 1280 (11th Cir. 2003); Radford v. State, 281 Ga. 303, 637 S.E.2d 712 (2006).

### Application

**Delusional compulsion no defense to civil action.** — It is clearly error to give an exculpatory insanity or delusional compulsion charge as a defense to a civil action for assault or battery seeking compensatory damages. Continental Cas. Co. v. Parker, 167 Ga. App. 859, 307 S.E.2d 744 (1983).

**One having no will, conscience, or controlling mental power is not punishable for criminal acts.** — Under former Code 1933, §§ 26-702 and 26-703, if one's reason and mental powers are either so deficient that one has no will, conscience, or controlling mental power, or if through overwhelming power of mental disease, one's intellectual power is for the time obliterated, one is not a responsible moral agent, and one not punishable for criminal acts. Mendenhall v. Hopper, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979) (see O.C.G.A. §§ 16-3-2 and 16-3-3).

**Delusions must exist during offense to warrant instruction.** — When the court did not instruct the jury on delusional compulsion, it was not in error if defendant, who has a history of delusions, was not experiencing delusions at the time of the offense. Dowdy v. State, 169 Ga. App. 14, 311 S.E.2d 184 (1983).

**Evidence sufficient to prove delusion.** — Since the evidence was overwhelming that at the time the defendant killed his wife he was operating under the delusion that she was possessed by Satan and that he, the defendant, was defending himself against Satan's physical attacks and attempts to trap and destroy him, as well as putting an end to the evil and destruction in the world caused by Satan, this evidence demanded a finding that the defendant met the justification criterion for a defense of delusional compulsion. Stevens v. State, 256 Ga. 440, 350 S.E.2d 21 (1986).

**Evidence insufficient to prove delusion.** — Evidence that defendant had acted in response to inner voices which were telling him to kill himself, to kill someone else, or to "go rob something" did not establish a delusion "as to a fact which, if true, would justify the act." McMachren v. State, 187 Ga. App. 793, 371 S.E.2d 445 (1988).

Delusion from which the perpetrator was purportedly suffering at the time the perpetrator shot the decedent — i.e., that the decedent was having an affair with his wife — obviously was not as to a fact which, if true, would have justified the killing, nor would such a delusion have deprived the perpetrator of the capacity to intend the consequences of the shooting. State Auto. Mut. Ins. Co. v. Gross, 188 Ga. App. 542, 373 S.E.2d 789, cert. denied, 188 Ga. App. 912, 373 S.E.2d 789 (1988).

Expert testimony describing defendant as alert, well-oriented, calm, stable, and a very good conversationalist with no signs or history of mental illness, and stating that defendant never indicated that gang members from whom defendant was fleeing were armed and so close as to threaten defendant with imminent bodily harm supported finding that defendant's delusion, even if true, did not justify defendant's decision to aim a gun at a neighbor

**Application (Cont'd)**

or fire in the direction of a police officer. *Appling v. State*, 222 Ga. App. 327, 474 S.E.2d 237 (1996).

**Expert testimony failed to establish that the criteria for an insanity defense under O.C.G.A. § 16-3-3 was satisfied.** *Rodriquez v. State*, 271 Ga. 40, 518 S.E.2d 131 (1999).

Defendant failed to prove that a finding of not guilty by reason of insanity should have been reached for aggravated assault and aggravated battery for shooting and injuring defendant's neighbors; although there was evidence that defendant suffered from paranoia and delusions, the experts agreed that defendant knew that the shooting was wrong, and there was testimony that defendant appeared rational after the crime. *Jackson v. State*, 251 Ga. App. 448, 554 S.E.2d 592 (2001).

**Justification element not proved.** — Defendant failed to prove the justification element of the defendant's delusional compulsion defense since the defendant was found guilty of aggravated assault but mentally ill, because the defendant's delusions that the mother might eventually kill the defendant and that the defendant's mother was using thoughts to shout obscenities at the defendant were not facts that, if true, amounted to a delusion of an immediate physical threat from the mother that justified the knife attack on the defendant's mother. *VanVoorhis v. State*, 234 Ga. App. 749, 507 S.E.2d 555 (1998).

Defendant's mental illness did not prove legal insanity on a bus hijacking charge because the defendant told a psychologist that the defendant grabbed the steering wheel of a moving bus because the driver was in difficulty; the trier of fact could conclude that if the defendant was motivated by a delusion that others were planning to harm the defendant, the delusion did not justify forcibly exercising control over the bus because the defendant did not tell the psychologist that the defendant took over steering the bus because of a fear of being harmed. *Robinson v. State*, 272 Ga. App. 87, 611 S.E.2d 759 (2005).

**Evidence of actions following killing.** — When, in arguing that the defen-

dant did not meet the defendant's burden of proof, the state points to actions taken by the defendant after the murder, including wiping blood from the windows and placing the blood-covered shirt and tee-shirt in the rear of the car, as well as asking about the death penalty in Georgia, these facts might be relevant to the defendant's argument under O.C.G.A. § 16-3-2 that at the time of the crime defendant lacked the capacity to distinguish between right and wrong, but the facts asserted by the state do not detract from the overwhelming evidence in support of the defendant's defense under O.C.G.A. § 16-3-3, that at the time of the homicide defendant was acting under a delusional compulsion which overmastered the defendant's will to resist committing the crime. *Stevens v. State*, 256 Ga. 440, 350 S.E.2d 21 (1986).

**Epilepsy can be defense to crime.** — *Murphy v. State*, 132 Ga. App. 654, 209 S.E.2d 101 (1974).

**Epileptics are responsible for their acts** unless reason is dethroned because of seizure of epilepsy at time of such conduct. *Starr v. State*, 134 Ga. App. 149, 213 S.E.2d 531 (1975).

**Crime committed while voluntarily intoxicated is not excused.** — Though it is the general rule that insanity is ordinarily an excuse, there is an exception to this rule, and that is, when crime is committed by one in a fit of intoxication; a voluntary contracted madness is not excuse for crime. *Wells v. State*, 247 Ga. 792, 279 S.E.2d 213 (1981).

**Act resulting from narcotic withdrawal symptoms.** — Evidence that defendant became addicted to narcotics in prison and that burglary of medical pharmacy was result of overwhelming passion for narcotics brought on by withdrawal symptoms does not demand conclusion either that the defendant lacked mental capacity to distinguish between right and wrong, or that because of mental disease defendant acted under a delusional compulsion which overmastered defendant's will to resist committing the crime. *Brand v. State*, 123 Ga. App. 273, 180 S.E.2d 579 (1971).

**Applicability of defense to crimes other than homicide.** — Delusional

compulsion insanity defense is not available only in cases of homicide and, consequently, the elements necessary to prove that defense are in no way dependent upon the death of the victim. *Byrd v. State*, 182 Ga. App. 737, 356 S.E.2d 708 (1987).

**Guilty but mentally ill verdict under O.C.G.A. § 17-7-131 allowed for accommodation** to the mental health needs of the appellant who was found guilty, but was laboring under a mental illness which fell short of the legal defense of insanity and delusional compulsion promulgated O.C.G.A. §§ 16-3-2 and 16-3-3. *Dimauro v. State*, 185 Ga. App. 524, 364 S.E.2d 900 (1988).

**Verdict of guilty but mentally ill proper where multiple personalities shown.** — Where the trial judge accepted that defendant suffers from a multiple personality disorder, but ruled that the personality (be she Phyllis or Sharon, or both) who robbed the banks did so with rational, purposeful criminal intent and with knowledge that it was wrong, there is no error in the judge's finding that defendant was guilty but mentally ill. *Kirkland v. State*, 166 Ga. App. 478, 304 S.E.2d 561 (1983).

**When the defendant's counsel acquiesced in presenting the**

**guilty-but-mentally-ill verdict option to the jury**, the defendant was estopped from contending on appeal that the option infringed on the defendant's defense of insanity. *Milam v. State*, 255 Ga. 560, 341 S.E.2d 216 (1986).

**Prejudice not shown by trial counsel's failure to call expert.** — Even if trial counsel were ineffective in not calling a psychologist to testify for the defense that the defendant was incompetent to stand trial and that the defendant was insane at the time of the crime under O.C.G.A. §§ 16-3-2 and 16-3-3, the defense expert's testimony would not have changed the outcome; the defense expert's opinion was contradicted by a second expert, whose opinion was based on an evaluation over an extended period of time as opposed to the defense expert's evaluation of less than one day, and by testimony of the defendant and trial counsel that the defendant understood the basis of the charges and the nature of the proceedings and assisted in preparing the defense. *Wallin v. State*, 285 Ga. App. 377, 646 S.E.2d 484 (2007).

**Defendant failed to prove insanity at the time of the crime.** — See *Mitchell v. State*, 187 Ga. App. 40, 369 S.E.2d 487, cert. denied, 187 Ga. App. 908, 369 S.E.2d 487 (1988).

## OPINIONS OF THE ATTORNEY GENERAL

**Definitions of insanity in former Code 1933, §§ 26-702 and 26-703 (see O.C.G.A. §§ 16-3-2 and 16-3-3) are inapplicable to instructions to physician under former Code 1933, § 27-2602 (see O.C.G.A. § 17-10-61).** — In view of fact that former Code 1933, § 27-2602 (see O.C.G.A. § 17-10-61) specifically requires that inquiry into whether person convicted of capital felony offense has become insane be directed to alleged insanity occurring subsequent to

conviction, definitions of insanity as stated in former Code 1933, §§ 26-702 and 26-703 (see O.C.G.A. §§ 16-3-2 and 16-3-3) are inapplicable and should not be given in written instructions to physicians appointed pursuant to Georgia law; since basic issue is the individual's sanity at the time subsequent to conviction, or in effect, the individual's present sanity, the appropriate test should be that as employed upon a special plea of insanity. 1976 Op. Att'y Gen. No. 76-123.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 51 et seq.

**ALR.** — Remedy of one convicted of crime while insane, 10 ALR 213; 121 ALR 267.

Irresistible impulse as an excuse for crime, 70 ALR 659; 173 ALR 391.

Effect of voluntary drug intoxication upon criminal responsibility, 73 ALR2d 12.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 ALR3d 146.

Amnesia as affecting capacity to commit crime or stand trial, 46 ALR3d 544.

Drug addiction or related mental state as defense to criminal charge, 73 ALR3d 16.

Admissibility and prejudicial effect of evidence, in criminal prosecution, of defendant's involvement with witchcraft, satanism, or the like, 18 ALR5th 804.

Qualification of nonmedical psychologist to testify as to mental condition or competency, 72 ALR5th 529.

### 16-3-4. Intoxication.

(a) A person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, the person, because of involuntary intoxication, did not have sufficient mental capacity to distinguish between right and wrong in relation to such act.

(b) Involuntary intoxication means intoxication caused by:

- (1) Consumption of a substance through excusable ignorance; or
- (2) The coercion, fraud, artifice, or contrivance of another person.

(c) Voluntary intoxication shall not be an excuse for any criminal act or omission. (Laws 1833, Cobb's 1851 Digest, p. 779; Code 1863, § 4197; Code 1868, § 4236; Code 1873, § 4301; Code 1882, § 4301; Penal Code 1895, § 39; Penal Code 1910, § 39; Code 1933, § 26-403; Code 1933, § 26-704, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — Voidable nature of contracts made by intoxicated persons, § 13-3-25. Mental capacity as it relates to competency to stand trial and as it relates to culpability for criminal acts,

§§ 17-7-130, 17-7-131. Driving under influence of alcohol or drugs, § 40-6-391.

**Law reviews.** — For article discussing the theory of insanity in criminal law, see 15 Mercer L. Rev. 399 (1964).

### JUDICIAL DECISIONS

#### ANALYSIS

##### GENERAL CONSIDERATION

##### APPLICATION TO SPECIFIC CRIMES

##### DRUG ADDICTION

#### General Consideration

**Construction with O.C.G.A. § 16-3-2.** — Law of intoxication contained in O.C.G.A. § 16-3-4 must be read in light of O.C.G.A. § 16-3-2. O.C.G.A. § 16-3-4 limits the reach of O.C.G.A. § 16-3-2 so that the inability to distinguish between right and wrong is not a defense if the inability is a consequence of voluntary intoxication (but remains a defense if the inability is a consequence of involuntary intoxication). Foster v. State, 258 Ga. 736,

374 S.E.2d 188 (1988), cert. denied, 490 U.S. 1085, 109 S. Ct. 2110, 104 L. Ed. 2d 671 (1989).

**Voluntary intoxication shall not be an excuse** for any criminal act or omission. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

If condition of a man's mind, when unexcited by liquor, is capable of distinguishing between right and wrong, reasoning

and acting rationally, and one voluntarily deprives self of reason by intoxication, and commits an offense while in that condition, one is criminally responsible for it. *Williams v. State*, 237 Ga. 399, 228 S.E.2d 806 (1976).

As long as a criminal defendant can distinguish between right and wrong, can reason and act rationally when sober, and the defendant voluntarily deprives self of reason by intoxication and commits an offense while intoxicated, defendant is criminally responsible for defendant's actions. *Booth v. State*, 184 Ga. App. 494, 361 S.E.2d 868 (1987).

Claim that the defendant was unaware of what the defendant was doing because of medication the defendant was taking at the time of a burglary did not excuse the crime because voluntary intoxication was not a defense. *Meeks v. State*, 274 Ga. App. 517, 618 S.E.2d 152 (2005).

**Voluntary drunkenness furnishes no excuse for crime**, though the sensibilities may be temporarily dulled, or though the crime be committed in excitement or frenzy produced thereby. *Estes v. State*, 55 Ga. 30 (1875); *Marshall v. State*, 59 Ga. 154 (1877); *Hanvey v. State*, 68 Ga. 612 (1882); *Moon v. State*, 68 Ga. 687 (1882); *Beck v. State*, 76 Ga. 452 (1886); *Bernhard v. State*, 76 Ga. 613 (1886); *McCook v. State*, 91 Ga. 740, 17 S.E. 1019 (1893); *Cribb v. State*, 118 Ga. 316, 45 S.E. 396 (1903); *Strickland v. State*, 137 Ga. 115, 72 S.E. 922 (1911); *Dickens v. State*, 137 Ga. 523, 73 S.E. 826 (1912); *Stephens v. State*, 139 Ga. 594, 77 S.E. 875 (1913); *Bonner v. State*, 26 Ga. App. 185, 105 S.E. 863 (1921).

Evidence was sufficient to enable the trial court to find, beyond a reasonable doubt, that the defendant possessed the intent necessary to commit aggravated assault, O.C.G.A. § 16-5-21(a), and felony murder, O.C.G.A. § 16-5-1(c), because the defendant used a vehicle as an offensive weapon, was extremely drunk when the defendant committed the crimes, and there was no evidence of brain damage, temporary or permanent; the defendant's crimes would have been aggravated assault and felony murder if the defendant were sober, and the fact that the defendant was voluntarily intoxicated did not

make the crimes anything less. *Guyse v. State*, 286 Ga. 574, 690 S.E.2d 406 (2010).

**Voluntary intoxication looked upon as aggravation to rather than excuse for offense.** — As to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary frenzy, the law looks upon this as an aggravation of an offense, rather than an excuse for any criminal misbehavior. *Grimes v. Burch*, 223 Ga. 856, 159 S.E.2d 69 (1968).

**Kind or strength of liquor drunk is immaterial.** *Cribb v. State*, 118 Ga. 316, 45 S.E. 396 (1903); *Strickland v. State*, 137 Ga. 115, 72 S.E. 922 (1911).

**It makes no difference that defendant is particularly susceptible to ill effects of liquor.** — It does not make any difference that a man, either by former injury to the head or brain, or constitutional infirmity, is more liable to be maddened by liquor than another man. If one has legal memory and discretion when sober, and voluntarily deprives self of reason, one is responsible for own acts while in that condition. *Massey v. State*, 222 Ga. 143, 149 S.E.2d 118, appeal dismissed, 385 U.S. 36, 87 S. Ct. 241, 17 L. Ed. 2d 36 (1966).

**Defendant not involuntarily intoxicated.** — There was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that defendant was not involuntarily intoxicated since defendant consumed alcohol while on prescription medication in direct contradiction of a doctor's orders. *Carter v. State*, 248 Ga. App. 139, 546 S.E.2d 5 (2001).

**Jury can consider drunkenness to shed light on transaction**, though drunkenness cannot excuse the transaction. *Hicks v. State*, 146 Ga. 221, 91 S.E. 57 (1916) (decided under former Penal Code 1910, § 39).

**One sober enough to try to hide is sober enough to form a guilty intent.** *Brazzell v. State*, 119 Ga. 559, 46 S.E. 837 (1904).

**Defense of involuntary intoxication.** — Defendant's convictions for driving under the influence per se and reckless driving were proper, as the evidence was not sufficient to raise the issue of

**General Consideration (Cont'd)**

insanity by way of involuntary intoxication in the defendant's trial because it only showed, at most, that the defendant could not remember committing the crimes or was in a "blanked out" state of mind during the commission of the acts charged. *Crossley v. State*, 261 Ga. App. 250, 582 S.E.2d 204 (2003).

**Counsel conducted reasonable investigation into involuntary intoxication defense.** — Defendant's trial counsel was not ineffective as counsel's investigation of the defendant's involuntary intoxication defense was reasonable, even though the investigation failed to lead to an expert competent to testify as to the defendant's intoxication and potential effects of combining alcohol with a substance marketed as an over-the-counter "performance supplement." *Knox v. State*, 290 Ga. App. 49, 658 S.E.2d 819 (2008).

**Only involuntary intoxication sufficient to remove the mental capacity** to distinguish between right and wrong in relation to the act may excuse a criminal act. Voluntary intoxication is not an excuse for any criminal act. *Bailey v. State*, 198 Ga. App. 632, 402 S.E.2d 363 (1991).

**Chronic intoxication** does not constitute involuntary intoxication within meaning of O.C.G.A. § 16-3-4. *Franklin v. State*, 183 Ga. App. 58, 357 S.E.2d 879 (1987).

**Defense of chronic alcoholism is not an excuse for offense of escape.** *Grimes v. Burch*, 223 Ga. 856, 159 S.E.2d 69 (1968).

**Alcoholism** is not involuntary intoxication and consequently is not a defense to offense of escape or any other criminal act or omission. *Ford v. State*, 164 Ga. App. 620, 298 S.E.2d 327 (1982).

**Cross-examination regarding effect of alcohol and drugs.** — Trial court properly disallowed cross-examination of a psychological forensic specialist on the effect of alcohol and drugs on defendant's ability to form the intent to commit kidnapping and aggravated assault, where there was no evidence that defendant was unconscious or comatose when the crimes were committed. *Carsner v. State*, 190 Ga. App. 141, 378 S.E.2d 181 (1989).

**Lack of intent not implicated.** — Persons are not excused from criminal liability under O.C.G.A. § 16-3-4 because they are incapable of forming criminal intent. Lack of intent is a defense, but it is not implicated by that section. *Foster v. State*, 258 Ga. 736, 374 S.E.2d 188 (1988), cert. denied, 490 U.S. 1085, 109 S. Ct. 2110, 104 L. Ed. 2d 671 (1989); *Mills v. State*, 198 Ga. App. 527, 402 S.E.2d 123 (1991).

**Defendant bears burden of showing that voluntary intoxication negated intent.** — Defendant has burden, once criminal intent has been shown, of illustrating that defendant's voluntary intoxication rose to a level required to negate intent. *Blankenship v. State*, 247 Ga. 590, 277 S.E.2d 505 (1981), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152 (1988), overruled on other grounds, *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993).

State was not required to disprove a defendant's O.C.G.A. § 16-3-4 affirmative defense of involuntary intoxication as the defendant failed to initially establish by a preponderance of the evidence that the defendant had involuntarily been injected with drugs by the defendant's aggravated assault victim and that due to the injection, the defendant was not mentally responsible for the actions that led to false imprisonment and aggravated assault charges. *Stewart v. State*, 291 Ga. App. 846, 663 S.E.2d 278 (2008).

**Level of intoxication necessary to render act unintentional.** — Unless actor was so intoxicated as to be unable to know, understand and intend to do the act, it cannot be said that the actor's was not intentional. *Transamerica Ins. Co. v. Thrift-Mart, Inc.*, 159 Ga. App. 874, 285 S.E.2d 566 (1981).

**Closing argument regarding voluntary intoxication proper.** — In a prosecution for murder, the prosecutor properly noted during closing argument that voluntary intoxication is not a defense where one of the investigating officers testified that the defendant smelled of alcohol and an expert witness for the defense testified that the defendant admitted that defendant consumed liquor and cocaine on the day of the murder.

**Payne v. State**, 273 Ga. 317, 540 S.E.2d 191 (2001).

**Trial court's charge on voluntary intoxication was correct and sufficient** because voluntary intoxication was not a defense to the crime unless the intoxication resulted in altering brain function so as to negate intent, and defendant offered no evidence at trial concerning such permanent alteration of defendant's brain function. **Mathis v. State**, 241 Ga. App. 869, 528 S.E.2d 293 (2000).

**Jury charges.** — Refusal to give charges not error. **Houck v. State**, 173 Ga. App. 388, 326 S.E.2d 567 (1985); **Williams v. State**, 180 Ga. App. 854, 350 S.E.2d 837 (1986).

Portion of a request to charge that, "whether intent to commit a felony or a theft is present is usually a jury question, but where, through unconsciousness, drunkenness, or other cause, there can be no intent, this would be a defense to a criminal charge," was misleading to the extent that it implied that voluntary intoxication in and of itself may be a defense to a crime, and the trial court did not err in refusing the requested charge. **Tutton v. State**, 179 Ga. App. 462, 346 S.E.2d 898 (1986).

Instruction that "voluntary intoxication shall not be an excuse for any criminal act" was sufficient. The trial court was not required to charge that defendant should be acquitted if defendant was intoxicated to the point where defendant could not form the requisite intent for the crimes of attempted armed robbery and aggravated battery. **Franklin v. State**, 183 Ga. App. 58, 357 S.E.2d 879 (1987).

It is not error to refuse to charge that voluntary intoxication can negate the specific intent for a crime. **Mitchell v. State**, 187 Ga. App. 40, 369 S.E.2d 487, cert. denied, 187 Ga. App. 908, 369 S.E.2d 487 (1988); **Clark v. State**, 187 Ga. App. 232, 369 S.E.2d 550 (1988).

Even though trial court's charge was not clear on the issue of whether voluntary intoxication can be considered a defense to a crime, defendant failed to show how defendant was harmed by the charge; thus, reversal was not required.

**Rattansay v. State**, 240 Ga. App. 165, 523 S.E.2d 36 (1999).

**Counsel not ineffective for failing to raise defense.** — As voluntary intoxication was not an excuse for a criminal act, pursuant to O.C.G.A. § 16-3-4(c), counsel was not ineffective for failing to present a defense predicated on a lack of criminal intent due to alcohol intoxication. **Leppla v. State**, 277 Ga. App. 804, 627 S.E.2d 794 (2006).

**Cited in** **Meadows v. State**, 230 Ga. 471, 197 S.E.2d 698 (1973); **Pierce v. State**, 231 Ga. 731, 204 S.E.2d 159 (1974); **McKenty v. State**, 135 Ga. App. 271, 217 S.E.2d 388 (1975); **Johnson v. State**, 235 Ga. 486, 220 S.E.2d 448 (1975); **Cochran v. State**, 136 Ga. App. 125, 220 S.E.2d 477 (1975); **Barnes v. State**, 139 Ga. App. 50, 227 S.E.2d 874 (1976); **Mason v. Balcom**, 531 F.2d 717 (5th Cir. 1976); **Young v. State**, 239 Ga. 53, 236 S.E.2d 1 (1977); **Veasley v. State**, 142 Ga. App. 863, 237 S.E.2d 464 (1977); **Richardson v. State**, 143 Ga. App. 846, 240 S.E.2d 217 (1977); **Jackson v. State**, 149 Ga. App. 253, 253 S.E.2d 874 (1979); **Kennedy v. State**, 156 Ga. App. 792, 275 S.E.2d 339 (1980); **Moore v. State**, 158 Ga. App. 579, 281 S.E.2d 322 (1981); **Webb v. State**, 159 Ga. App. 403, 283 S.E.2d 636 (1981); **Dick v. State**, 248 Ga. 898, 287 S.E.2d 11 (1982); **Butler v. State**, 161 Ga. App. 251, 288 S.E.2d 306 (1982); **Tucker v. State**, 249 Ga. 323, 290 S.E.2d 97 (1982); **Bailey v. State**, 249 Ga. 535, 291 S.E.2d 704 (1982); **Ford v. State**, 164 Ga. App. 620, 298 S.E.2d 327 (1982); **Nash v. State**, 166 Ga. App. 533, 304 S.E.2d 727 (1983); **Hatcher v. State**, 251 Ga. 388, 306 S.E.2d 250 (1983); **Purdue v. State**, 170 Ga. App. 18, 316 S.E.2d 166 (1984); **Tucker v. Kemp**, 256 Ga. 571, 351 S.E.2d 196 (1987); **Haywood v. State**, 256 Ga. 694, 353 S.E.2d 184 (1987); **Collins v. State**, 183 Ga. App. 243, 358 S.E.2d 876 (1987); **State Farm Fire & Cas. Co. v. Morgan**, 185 Ga. App. 377, 364 S.E.2d 62 (1987); **McEver v. State**, 258 Ga. 768, 373 S.E.2d 624 (1988); **Swenson v. State**, 196 Ga. App. 898, 397 S.E.2d 211 (1990); **Stephens v. State**, 214 Ga. App. 183, 447 S.E.2d 26 (1994); **Burchfield v. State**, 219 Ga. App. 40, 464 S.E.2d 27 (1995); **Ford v.**

**General Consideration (Cont'd)**

Schofield, 488 F. Supp. 2d 1258 (N.D. Ga. 2007).

**Application to Specific Crimes**

**Fact of intoxication will not lessen character or degree of malice apparent from circumstances.** — If defendant was in a state of drunkenness by voluntary use of intoxicating liquor, and circumstances of killing were such as to show an abandoned and malignant heart, fact of intoxication will not lessen or affect character or degree of malice. Bradberry v. State, 170 Ga. 870, 154 S.E. 351 (1930).

Trial court did not err in refusing to allow the defendant to call a forensic toxicologist as a newly-discovered exculpatory witness to testify about the defendant's blood-alcohol level at the time the defendant's spouse was shot in the head, as voluntary intoxication was not an excuse for a criminal act and other evidence that the defendant had been drinking on the night of the shooting had already been admitted. Rowe v. State, 276 Ga. 800, 582 S.E.2d 119 (2003).

**Drunkenness will not reduce murder to manslaughter.** — Simply to prove that a person was drunk and killed another in passion would not reduce crime from murder to manslaughter. Bradberry v. State, 170 Ga. 859, 154 S.E. 344 (1930).

Habeas court erred in granting relief to a petitioner on a malice murder conviction on the basis of ineffective assistance of counsel because counsel's defense theory of innocence was not unsupported by the evidence, and there was no evidence of sudden passion supporting a proposed theory of voluntary manslaughter under O.C.G.A. § 16-5-2(a). Petitioner's intoxication likewise would not support a theory of voluntary manslaughter. Hall v. Lewis, 286 Ga. 767, 692 S.E.2d 580 (2010).

**Burglary and aggravated sexual battery.** — Trial court was not required to charge that defendant should be acquitted if defendant was intoxicated to the point where defendant could not form the requisite intent for the crimes of burglary and aggravated sexual battery. Sydenstricker v. State, 209 Ga. App. 418, 433 S.E.2d 644 (1993).

**One capable of intent to shoot is capable of intent to kill.** — One who can voluntarily shoot is capable of malice, unless one can plead some infirmity besides drunkenness. To be too drunk to form intent to kill, one must be too drunk to form intent to shoot. Marshall v. State, 59 Ga. 154 (1877); Cone v. State, 193 Ga. 420, 18 S.E.2d 850 (1942).

Person, sober enough to intend to shoot at another, and actually to shoot at and hit that person, without any provocation or justification whatever, is to be deemed sober enough to form specific intent to murder; and mere drunkenness, whatever its degree, will not negative such intent. Bradberry v. State, 170 Ga. 859, 154 S.E. 344 (1930).

**If intent to steal is present, fact that drunkenness is the cause is no excuse.** — While drunkenness may be a circumstance from which the jury may infer that one who has taken and carried away another's property did not intend to steal the property, still, if intention to steal is present, drunkenness is no excuse for the crime, even though intent to steal is caused by the drunkenness itself. Greeson v. State, 90 Ga. App. 57, 81 S.E.2d 839 (1954).

**Voluntary intoxication charge was not "red flag" as to character.** — Defendant's claim that the state used a voluntary intoxication charge as a "red flag" to the jury that the defendant was drunk and therefore was "an unsavory character," that the victim's parents now might question their decision "to invite this intoxicated man into their home," and that the defendant had "major psychological problems" was rejected; there was evidence from which an inference or deduction might be made that the defendant was drunk on the afternoon in question. Byers v. State, 276 Ga. App. 295, 623 S.E.2d 157 (2005).

**Child molestation.** — Trial court properly instructed the jury on voluntary intoxication in the defendant's trial for child molestation because there was evidence that: (1) the defendant was drinking on the night before and on the day the incident occurred; (2) the defendant told an interviewing agent that the defendant "probably" consumed four or five beers on

that day and that the defendant would not have driven a car; (3) the defendant insisted that the defendant was not "intoxicated" by the defendant's definition of the word; and (4), the defendant estimated that the defendant drank three or four beers on the afternoon of the incident. *Byers v. State*, 276 Ga. App. 295, 623 S.E.2d 157 (2005).

### Drug Addiction

**Drug addiction presents no defense** unless it results in involuntary intoxication. *Goldsmith v. State*, 148 Ga. App. 786, 252 S.E.2d 657 (1979).

**Intoxication from drug is no defense to crime.** — See *Cribb v. State*, 118 Ga. 316, 45 S.E. 396 (1903); *Strickland v. State*, 137 Ga. 115, 72 S.E. 977 (1911).

**Drug addiction is not involuntary.** — *McLaughlin v. State*, 236 Ga. 577, 224 S.E.2d 412 (1976).

Chronic drug abuse, like chronic alcoholism, is not involuntary under the law. *Mitchell v. State*, 187 Ga. App. 40, 369 S.E.2d 487, cert. denied, 187 Ga. App. 908, 369 S.E.2d 487 (1988).

**When a defendant relies upon in-**

**voluntary intoxication because of mandatory medication** as a defense to criminal prosecution, the defendant bears the burden of showing by a preponderance of the evidence that defendant was not mentally responsible at the time of the alleged crime. *Rauschenberg v. State*, 161 Ga. App. 331, 291 S.E.2d 58 (1982).

**Use of prescribed medication.** — If a defendant charged with driving under the influence of drugs would otherwise be entitled to an instruction under O.C.G.A. § 16-3-4, such an instruction would be required to be given without regard to whether the drug involved was legally prescribed or not. *Flanders v. State*, 188 Ga. App. 98, 371 S.E.2d 918 (1988).

Trial court properly refused defendant's requested instruction when, although defendant produced evidence that defendant was not aware that a prescribed medication could affect defendant's ability to drive, there was no evidence that defendant did not have sufficient mental capacity to distinguish between right and wrong by reason of intoxication. *Flanders v. State*, 188 Ga. App. 98, 371 S.E.2d 918 (1988).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 52. 29 Am. Jur. 2d, Evidence, § 570. 75 Am. Jur. 2d, Trial, § 284. 75A Am. Jur. 2d, Trial, § 624 et seq.

**Am. Jur. Proof of Facts.** — Lack of Capacity to Form Specific Intent — Voluntary Intoxication, 5 POF2d 189.

Punitive Damages in Motor Vehicle Litigation — Intoxicated Driver, 18 POF3d 1.

**C.J.S.** — 22 C.J.S., Criminal Law, § 145.

**ALR.** — Drunkenness as affecting existence of elements essential to murder in second degree, 8 ALR 1052.

Voluntary intoxication as defense to homicide, 12 ALR 861; 79 ALR 897.

Effect of voluntary drug intoxication upon criminal responsibility, 73 ALR2d 12.

Modern status of the rules as to volun-

tary intoxication as defense to criminal charge, 8 ALR3d 1236.

When intoxication deemed involuntary so as to constitute a defense to criminal charge, 73 ALR3d 195.

Validity, construction and effect of Uniform Alcoholism and Intoxication Treatment Act, 85 ALR3d 701.

Adequacy of defense counsel's representation of criminal client — conduct occurring at time of trial regarding issues of diminished capacity, intoxication, and unconsciousness, 78 ALR5th 197.

Adequacy of defense counsel's representation of criminal client — pretrial conduct or conduct at unspecified time regarding issues of diminished capacity, intoxication, and unconsciousness, 79 ALR5th 419.

### 16-3-5. Mistake of fact.

A person shall not be found guilty of a crime if the act or omission to act constituting the crime was induced by a misapprehension of fact which, if true, would have justified the act or omission. (Code 1933, § 26-705, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 3.)

### JUDICIAL DECISIONS

#### ANALYSIS

##### GENERAL CONSIDERATION JURY INSTRUCTIONS

#### General Consideration

**Honest belief that act was lawful is no defense unless knowledge is element of offense.** — While a person may honestly believe a thing and yet not know it, an honest belief will not avail one who has committed an act in violation of a criminal statute, unless knowledge is made a part of the offense, so that scienter must be proved by state, and thus burden is on state to prove guilty knowledge. Tant v. State, 158 Ga. App. 624, 281 S.E.2d 357 (1981).

**Mistake induced by fault or negligence** of the party doing the wrongful act does not constitute a defense to a criminal charge. Baise v. State, 232 Ga. App. 556, 502 S.E.2d 492 (1998).

**Mistake is a defense where mistake negates mental state.** — Mistake of fact is a defense to a crime to the extent that the ignorance of some fact negates the existence of the mental state required to establish a material element of the crime. Jones v. State, 263 Ga. 835, 439 S.E.2d 645 (1994).

**Mistake due to fault not valid defense.** — Defendant's mistaken belief that the victim was a turkey was due to defendant's own fault in taking an unsafe shot under unsafe conditions at a target that defendant had not positively identified as legal game; accordingly, the jury was authorized to reject defendant's mistake of fact defense. Hines v. State, 276 Ga. 491, 578 S.E.2d 868 (2003).

**Condonation by forgery victim after the crime occurs** is not an acceptable defense. Pratt v. State, 167 Ga. App. 819, 307 S.E.2d 714 (1983).

**Cited in** Porter v. State, 122 Ga. App. 658, 178 S.E.2d 283 (1970); McClendon v. State, 231 Ga. 47, 199 S.E.2d 904 (1973); Treadwell v. State, 129 Ga. App. 573, 200 S.E.2d 323 (1973); Hess v. State, 132 Ga. App. 26, 207 S.E.2d 580 (1974); Carter v. State, 232 Ga. 654, 208 S.E.2d 474 (1974); Jordon v. State, 232 Ga. 749, 208 S.E.2d 840 (1974); Nichols v. State, 133 Ga. App. 717, 213 S.E.2d 20 (1975); Corder v. State, 134 Ga. App. 316, 214 S.E.2d 404 (1975); Johnson v. State, 142 Ga. App. 526, 236 S.E.2d 493 (1977); Childers v. State, 145 Ga. App. 594, 244 S.E.2d 108 (1978); Smith v. State, 148 Ga. App. 634, 252 S.E.2d 62 (1979); High v. State, 153 Ga. App. 729, 266 S.E.2d 364 (1980); Davis v. State, 153 Ga. App. 847, 267 S.E.2d 263 (1980); Bowers v. State, 153 Ga. App. 894, 267 S.E.2d 309 (1980); Powell v. State, 154 Ga. App. 568, 269 S.E.2d 70 (1980); Ellison v. State, 158 Ga. App. 419, 280 S.E.2d 371 (1981); Morgan v. State, 161 Ga. App. 67, 288 S.E.2d 836 (1982); Curry v. State, 162 Ga. App. 71, 290 S.E.2d 179 (1982); Hobgood v. State, 162 Ga. App. 435, 291 S.E.2d 570 (1982); Chapman v. State, 164 Ga. App. 662, 297 S.E.2d 322 (1982); Diggs v. State, 170 Ga. App. 48, 316 S.E.2d 171 (1984); McIlhenny v. State, 172 Ga. App. 419, 323 S.E.2d 280 (1984); Pitts v. State, 184 Ga. App. 220, 361 S.E.2d 234 (1987); Banks v. State, 184 Ga. App. 504, 362 S.E.2d 227 (1987); Bowman v. State, 186 Ga. App. 544, 368 S.E.2d 143 (1988); Hayes v. State, 193 Ga. App. 33, 387 S.E.2d 139 (1989); Broomall v. State, 260 Ga. 220, 391 S.E.2d 918 (1990); Sims v. State, 197 Ga. App. 214, 398 S.E.2d 244 (1990); Williams v. State, 221 Ga. App.

296, 471 S.E.2d 258 (1996); *Crawford v. State*, 267 Ga. 543, 480 S.E.2d 573 (1997).

### Jury Instructions

**Charge on mistake of fact not warranted.** — Failure to give a charge on mistake of fact is not error when the evidence shows that a party has made a mistake of law. *Turner v. State*, 210 Ga. App. 303, 436 S.E.2d 229 (1993); *Taylor v. State*, 233 Ga. App. 221, 504 S.E.2d 57 (1998).

Defendant was not entitled to a mistake of fact instruction in defendant's prosecution for burglary, with theft by taking as the underlying felony, when defendant testified that the "mistake" was in misunderstanding the attorney's advice, which led defendant to believe that it was lawful to remove and sell personal property from a trailer belonging to the victim to repay a debt allegedly owed to the defendant by the victim, but such mistake was one of law and not of fact. *Randall v. State*, 234 Ga. App. 704, 507 S.E.2d 511 (1998).

Since defendant's own testimony indicated that defendant's misapprehension of fact was the result of defendant's own fault or negligence in committing the burglary and kidnapping, the trial court correctly refused to give an instruction of "mistake of fact" under O.C.G.A. § 16-3-5. *Wilson v. State*, 241 Ga. App. 773, 527 S.E.2d 623 (2000).

When defendant's testimony at trial, which was the only evidence of defendant's defense, was that the elderly victim from whom defendant took a check for a large sum was competent to make a gift of the check and had done so, such evidence did not raise a mistake of fact; thus, the trial court properly refused to instruct the jury on mistake of fact as a defense to the charge that defendant committed theft by taking the check. *Hall v. State*, 258 Ga. App. 156, 573 S.E.2d 415 (2002).

Trial court did not err in declining to give the defendant's requested instruction on mistake of fact, as the facts of the defendant's burglary case did not show that such an instruction was warranted; the evidence showed that the defendant never attempted to verify the spouse's claim that some unidentified person stated that they were abandoning prop-

erty in the other person's storage unit from which the defendant took property the defendant was not authorized to take, and, thus, the defendant and the spouse at best were negligently acting on the basis of speculative information when the defendant took the property. *Lummus v. State*, 274 Ga. App. 636, 618 S.E.2d 692 (2005), overruled on other grounds, *McCart v. State*, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

In criminal trial on a charge of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e), the trial court did not err when it did not sua sponte instruct the jury on the affirmative defense of mistake of fact under O.C.G.A. § 16-3-5, as defendant's mistaken belief that the bag that defendant delivered contained marijuana rather than methamphetamine, did not justify delivery of the package in any event. *Dimas v. State*, 276 Ga. App. 245, 622 S.E.2d 914 (2005).

Mistake of fact defense was not applicable because the defendant did not admit participation in the murder and, in fact, denied any involvement. *Murphy v. State*, 280 Ga. 158, 625 S.E.2d 764 (2006).

In a murder prosecution, a defendant was not entitled to a charge on mistake of fact, under O.C.G.A. § 16-3-5, because the defendant admitted that the defendant could not see anything when the defendant shot blindly at an unidentified noise, so any mistake of fact on the defendant's part as to the identity of the intended target was solely the result of the failure to identify the source of the noise before firing. *Gabriel v. State*, 280 Ga. 237, 626 S.E.2d 491 (2006).

In a murder prosecution, the fact that the defendant testified to a belief that the defendant was required to defend himself because the victim was about to drag the defendant down the street with a truck did not entitle the defendant to a mistake of fact defense under O.C.G.A. § 16-3-5, because the trial court gave a complete charge on the principles of law relating to the asserted defenses of justification and self-defense. *Bell v. State*, 280 Ga. 562, 629 S.E.2d 213 (2006).

**Trial court did not err in refusing to charge mistake of fact** since the jury

**Jury Instructions (Cont'd)**

did not find justifiable homicide but found criminal intent comprising voluntary manslaughter, necessarily precluding any possibility that appellant could have been acquitted for mistake of fact. *Williams v. State*, 162 Ga. App. 663, 292 S.E.2d 531 (1982).

Trial court did not err in refusing to charge mistake of fact where the asserted mistake of fact concerned whether the victim was armed and, thus, whether the defendant was justified in shooting first in self-defense where the trial court gave a full charge on self-defense. *Ellis v. State*, 174 Ga. App. 535, 330 S.E.2d 764 (1985).

There was no error in failing to charge on a lesser included offense where the defendant made a specific written request for a lesser included offense instruction on mistake of fact. *Taylor v. State*, 195 Ga. App. 314, 393 S.E.2d 690 (1990).

In a prosecution for shoplifting, the trial court did not err in refusing to charge mistake of fact where there was no evidence showing that defendant believed the merchandise in defendant's possession had been paid for by defendant's companion. *Darty v. State*, 232 Ga. App. 814, 503 S.E.2d 76 (1998).

Trial court's refusal to charge the jury on misapprehension of fact or mistaken belief was not error because, even though the defendant may have been mistaken about the purpose of the intrusion into the victim's house, the defendant's mistaken impression did not justify breaking into the house and attempting to rob its inhabitants; thus, defendant's requested charge was not adjusted to the evidence. *Taylor v. State*, 272 Ga. 744, 534 S.E.2d 67 (2000).

Trial court did not err in refusing to charge mistake of fact since defendant's defense was not a mistake of fact but was a denial of committing the crime alleged. *Harden v. State*, 239 Ga. App. 700, 521 S.E.2d 829 (1999); *Davis v. State*, 249 Ga. App. 579, 548 S.E.2d 678 (2001).

When the defendant was prosecuted for serving alcohol to a minor, under O.C.G.A. § 3-3-23(a)(1), it was not error for a trial court to refuse to give defendant's preferred instructions on the requirement to prove defendant's knowledge of the age of

the person to whom alcohol was served or on mistake of fact because the jury was instructed, *inter alia*, on the requirement that defendant knowingly served alcohol to a minor, and, pursuant to O.C.G.A. § 3-3-23(h), that, when a reasonable person could reasonably be in doubt as to whether a person to whom alcohol was served was 21 years old or older, it was a defendant's duty to request identification and that defendant's failure to do so could be considered in determining if defendant knowingly furnished alcohol to a minor. *Butler v. State*, 298 Ga. App. 129, 679 S.E.2d 361 (2009).

Despite a burglary defendant's explanation that the defendant had entered a house because the defendant believed the house was for sale and was looking at the house for the defendant's mother, the jury was authorized to reject that explanation based on other evidence, including a witness's hearing the defendant rummaging through drawers and the fact that there was no "For Sale" sign at the house. The defendant was not entitled to a jury charge on mistake of fact. *Price v. State*, 303 Ga. App. 589, 693 S.E.2d 826 (2010).

Trial court did not err in refusing to give a defendant's requested charge on mistake of fact in defense to a charge of sexual battery based on the defendant's testimony that the defendant believed that the victim was 19 rather than 12 when the defendant performed oral sex on the victim, because the defendant denied committing the acts that constituted sexual battery. The defendant could not deny committing an act while claiming to have committed the same act by mistake. *Disabato v. State*, 303 Ga. App. 68, 692 S.E.2d 701 (2010).

**When mistake is a material issue, charge on subject is required even absent request.** *Henderson v. State*, 141 Ga. App. 430, 233 S.E.2d 505 (1977).

**Charge on mistake of fact mandatory where it constitutes sole defense.** — When the mistake of fact was the defendant's sole defense and excuse, failure to give charge on subject, even without request, was error. *Arnold v. State*, 157 Ga. App. 714, 278 S.E.2d 418 (1981).

**Charge mandatory even if other defenses asserted.** — Failure to give a

mistake-of-fact charge may constitute reversible error when that defense is the defendant's sole defense; however, it is not reversible error when the defendant asserts another defense at trial. *Adcock v. State*, 260 Ga. 302, 392 S.E.2d 886 (1990).

**When defendant pursued other defenses** of good character and misfortune or accident, and the incident as portrayed by defendant's witness, rather than raising the spectre of misapprehension of fact, raised the possibility of accident, which principle was charged, the trial court's refusal to charge O.C.G.A. § 16-3-5 under the circumstances presented no basis for reversal. *Laymac v. State*, 181 Ga. App. 737, 353 S.E.2d 559 (1987).

Inasmuch as the appellant's defense was based on justification and self-defense, and inasmuch as the trial court gave a full jury charge with respect thereto, the appellant was not entitled to a charge on mistake of fact under O.C.G.A. § 16-3-5. *Pullin v. State*, 257 Ga. 815, 364 S.E.2d 848 (1988).

**Charge on sole defense of mistake need not be given unless authorized by evidence.** — While the trial court is required to charge on the criminal defendant's sole defense of mistake of fact, even absent request to do so, such charge is not required where it is not authorized by evidence. *Gunter v. State*, 155 Ga. App. 176, 270 S.E.2d 224 (1980).

**Misapprehension of officer's right to enter house one of law rather than fact.** — In prosecution for obstruction of a law enforcement officer, where defendant was aware that police were attempting to

enter defendant's home to arrest another individual, and defendant's only concern was whether the officer had lawful authority to enter the house to apprehend the subject, this constituted a misapprehension of the law rather than one of fact, thus, a charge on O.C.G.A. § 16-3-5 was not warranted. *Brown v. State*, 163 Ga. App. 209, 294 S.E.2d 305 (1982).

**Defendant's misapprehension over victim's possession of weapon.** — In a prosecution for aggravated assault, because the trial court charged the jury on justification, self-defense, misfortune, and accident, the defendant's contention that a charge on mistake of fact was warranted because defendant mistakenly believed that a cordless telephone carried by the victim was a gun was not valid. *Free v. State*, 245 Ga. App. 886, 539 S.E.2d 213 (2000).

Defense counsel did not provide ineffective assistance of counsel by failing to request a charge of mistake of fact under O.C.G.A. § 16-3-5 as the charge was not supported by the evidence as the defendant testified that the defendant was totally unaware of any of the codefendants' plans for breaking or entering the house; thus, the defense was a lack of knowledge of the crime, not that the defendant knew they had broken into the victim's house, but believed that they were authorized to do so, and the trial court charged the jury on mere presence, mere association, and the requirement that the state prove beyond a reasonable doubt that the defendant knew that a crime was being committed. *Botelho v. State*, 268 Ga. App. 129, 601 S.E.2d 494 (2004).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 153.

**C.J.S.** — 22 C.J.S., Criminal Law, § 127.

**ALR.** — Reliance upon advice of counsel as affecting criminal responsibility, 133 ALR 1055.

Relief to owner of motor vehicle subject

to state forfeiture for use in violation of narcotics laws, 50 ALR3d 172.

Unintentional killing of or injury to third person during attempted self-defense, 55 ALR3d 620.

Mistake or lack of information as to victim's age as defense to statutory rape, 46 ALR5th 499.

## 16-3-6. Affirmative defenses to certain sexual crimes.

(a) As used in this Code section, the term:

(1) "Coercion" shall have the same meaning as set forth in Code Section 16-5-46.

(2) "Deception" shall have the same meaning as set forth in Code Section 16-5-46.

(3) "Sexual crime" means prostitution, sodomy, solicitation of sodomy, or masturbation for hire as such offenses are proscribed in Chapter 6 of Title 16.

(4) "Sexual servitude" shall have the same meaning as set forth in Code Section 16-5-46.

(b) A person shall not be guilty of a sexual crime if the conduct upon which the alleged criminal liability is based was committed under coercion or deception while the accused was being trafficked for sexual servitude in violation of subsection (c) of Code Section 16-5-46.

(c) A defense based upon any of the provisions of this Code section shall be an affirmative defense. (Code 1981, § 16-3-6, enacted by Ga. L. 2011, p. 217, § 3/HB 200.)

**Effective date.** — This Code section became effective July 1, 2011.

fenses, § 16-3-28. Investigation of trafficking offenses, § 35-3-4.3.

**Cross references.** — Affirmative de-

## ARTICLE 2

### JUSTIFICATION AND EXCUSE

#### JUDICIAL DECISIONS

##### **Defendant does not bear burden of persuasion as to affirmative defenses.**

— Affirmative defenses authorized by the former Criminal Code (see O.C.G.A. T. 16, Art. 2) and former Code 1933, § 26-1003 (see O.C.G.A. § 16-4-5) imply that if a defendant presents one it is to defendant's advantage and to defendant's interest to affirmatively show it as best defendant can, but defendant has no burden to show it nor does defendant have burden of per-

suasion. *Moore v. State*, 137 Ga. App. 735, 224 S.E.2d 856, rev'd on other grounds, 237 Ga. 269, 227 S.E.2d 241 (1976).

**Cited in** *Grainger v. State*, 138 Ga. App. 753, 227 S.E.2d 483 (1976); *Perkins v. State*, 151 Ga. App. 199, 259 S.E.2d 193 (1979); *Powell v. State*, 154 Ga. App. 568, 269 S.E.2d 70 (1980); *Patterson v. Fuller*, 654 F. Supp. 418 (N.D. Ga. 1987); *Hightower v. State*, 224 Ga. App. 703, 481 S.E.2d 867 (1997).

#### RESEARCH REFERENCES

**ALR.** — Homicide or assault in attempting to prevent elopement, 8 ALR 660.

Fact that gun was unloaded as affecting criminal responsibility, 68 ALR4th 507.

### **16-3-20. Justification.**

The fact that a person's conduct is justified is a defense to prosecution for any crime based on that conduct. The defense of justification can be claimed:

- (1) When the person's conduct is justified under Code Section 16-3-21, 16-3-23, 16-3-24, 16-3-25, or 16-3-26;
- (2) When the person's conduct is in reasonable fulfillment of his duties as a government officer or employee;
- (3) When the person's conduct is the reasonable discipline of a minor by his parent or a person in loco parentis;
- (4) When the person's conduct is reasonable and is performed in the course of making a lawful arrest;
- (5) When the person's conduct is justified for any other reason under the laws of this state; or
- (6) In all other instances which stand upon the same footing of reason and justice as those enumerated in this article. (Code 1933, § 26-901, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1999, p. 81, § 16.)

**Law reviews.** — For survey article on criminal law, see 60 Mercer L. Rev. 85 (2008).

### **JUDICIAL DECISIONS**

#### **ANALYSIS**

GENERAL CONSIDERATION  
APPLICATION  
JURY INSTRUCTION

#### **General Consideration**

**Editor's notes.** — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 26-1011 and 26-1016 prior to revision of title by Ga. L. 1968, p. 1249 are included in the annotations for this Code section.

**Premise for defense under paragraph (6).** — In order to "stand upon the same footing of reason and justice," a defense of justification under O.C.G.A. § 16-3-20(6) would still have to be premised upon the asserted prevention of "imminent use of unlawful force." Hoover v. State, 198 Ga. App. 481, 402 S.E.2d 92 (1991).

**Justifiable homicide is a substantive and affirmative defense.** Trask v. State, 132 Ga. App. 645, 208 S.E.2d 591 (1974).

**Burden of proof rests entirely upon state,** even when defendant asserts affirmative defense as set out in O.C.G.A. § 16-3-20. Barnes v. State, 178 Ga. App. 205, 342 S.E.2d 388 (1986).

When a defendant raises the affirmative defense of justification and testifies to the same, the burden is on the state to disprove that defense beyond a reasonable doubt. Anderson v. State, 262 Ga. 7, 413 S.E.2d 722 (1992), overruled on other grounds, 264 Ga. 253, 443 S.E.2d 626 (1994).

**General Consideration (Cont'd)**

**Law presumes every killing to be malicious until contrary appears** from circumstances of alleviation, excuse, or justification; and it is incumbent on defendant to make out such circumstances to satisfaction of jury. *Mullis v. State*, 196 Ga. 569, 27 S.E.2d 91 (1943) (decided under former Code 1933, § 26-1011).

When homicide is shown to have been committed by a defendant, or is admitted by a defendant, a legal presumption of malice arises, and it devolves upon the defendant to exculpate oneself from the crime and guilt of murder by showing justification, mitigation, or excuse, unless defendant's statement admitting the killing or state's evidence showing the killings, or surrounding facts and circumstances connected with such evidence or admission should themselves tend to justify or mitigate the homicide. *Cady v. State*, 198 Ga. 99, 31 S.E.2d 38, appeal dismissed and cert. denied, 323 U.S. 676, 65 S. Ct. 190, 89 L. Ed. 549 (1944) (decided under former Code 1933, § 26-1011).

**When evidence relied upon by state discloses circumstances of justification**, presumption of malice does not arise; and in such case, burden does not devolve on defendant to show such facts as would reduce homicide from murder to manslaughter or justify it. *Mullis v. State*, 196 Ga. 569, 27 S.E.2d 91 (1943) (decided under former Code 1933, § 26-1011).

**Justification, if established under former Code 1933, § 26-1011, should always result in acquittal.** *Gordy v. State*, 93 Ga. App. 743, 92 S.E.2d 737 (1956) (decided under former Code 1933, § 26-1011).

**When justification is found, defendant is entitled to acquittal.** — Justifiable homicide is in law itself a substantive and affirmative defense, and, if found well supported in fact, the accused is entitled to an acquittal, without reference to evidence which apparently tended to convict the accused of the offense of murder or voluntary manslaughter. *Fountain v. State*, 207 Ga. 144, 60 S.E.2d 433 (1950), overruled on other grounds, *Lavender v. State*, 234 Ga. 608, 216 S.E.2d 855 (1975); *Farr v. State*, 83 Ga. App. 855, 65 S.E.2d

270 (1951) (decided under former Code 1933, § 26-1011).

In a prosecution for malice murder, felony murder, and aggravated assault, although no error resulted from the trial court's issuance of a sequential jury charge, because the jury found in the defendant's favor on the defense of justification as to the malice murder count, the finding also applied to the felony murder charge. Thus, the trial court erred in finding the defendant guilty of both felony murder and the underlying felony of aggravated assault. *Turner v. State*, 283 Ga. 17, 655 S.E.2d 589 (2008).

**No verdict less than acquittal cures omission or erroneous charge of justifiable homicide.** — If, under facts of case in which defendant is charged with murder, a charge or charges on justification is authorized, and court charges erroneously on defense or defenses, no verdict less than one of acquittal could cure such error or errors. *McKibben v. State*, 88 Ga. App. 466, 77 S.E.2d 86 (1953) (decided under former Code 1933, § 26-1011).

**Self-defense applicable to delusional compulsion defense.** — General law of self-defense was properly applied to determine whether defendant had met the justification criteria for delusional compulsion defense. *Dutton v. State*, 225 Ga. App. 67, 483 S.E.2d 305 (1997).

**Cited** in *Johnson v. State*, 122 Ga. App. 542, 178 S.E.2d 42 (1970); *Brown v. State*, 228 Ga. 215, 184 S.E.2d 655 (1971); *Hewitt v. State*, 127 Ga. App. 180, 193 S.E.2d 47 (1972); *Highland v. State*, 127 Ga. App. 518, 194 S.E.2d 332 (1972); *Howard v. State*, 128 Ga. App. 807, 198 S.E.2d 334 (1973); *Singleton v. State*, 129 Ga. App. 644, 200 S.E.2d 507 (1973); *Sims v. State*, 234 Ga. 177, 214 S.E.2d 902 (1975); *King v. State*, 134 Ga. App. 636, 215 S.E.2d 532 (1975); *Henderson v. State*, 136 Ga. App. 490, 221 S.E.2d 633 (1975); *Ellis v. State*, 137 Ga. App. 834, 224 S.E.2d 799 (1976); *Colson v. State*, 138 Ga. App. 366, 226 S.E.2d 154 (1976); *Reaves v. State*, 146 Ga. App. 409, 246 S.E.2d 427 (1978); *McCane v. State*, 147 Ga. App. 730, 250 S.E.2d 181 (1978); *Lanham v. State*, 243 Ga. 576, 255 S.E.2d 52 (1979); *Carter v. State*, 150 Ga. App. 119, 257 S.E.2d 11 (1979); *Frazier v. State*,

150 Ga. App. 343, 258 S.E.2d 29 (1979); Lemley v. State, 245 Ga. 350, 264 S.E.2d 881 (1980); Anderson v. State, 245 Ga. 619, 266 S.E.2d 221 (1980); Powell v. State, 154 Ga. App. 568, 269 S.E.2d 70 (1980); Townsend v. State, 155 Ga. App. 422, 271 S.E.2d 7 (1980); Hill v. State, 156 Ga. App. 518, 275 S.E.2d 104 (1980); Mason v. Balkcom, 487 F. Supp. 554 (M.D. Ga. 1980); Williams v. State, 249 Ga. 6, 287 S.E.2d 31 (1982); Whatley v. State, 162 Ga. App. 106, 290 S.E.2d 316 (1982); Young v. State, 163 Ga. App. 507, 295 S.E.2d 175 (1982); Millwood v. State, 164 Ga. App. 699, 296 S.E.2d 239 (1982); Rivers v. State, 250 Ga. 288, 298 S.E.2d 10 (1982); Taylor v. State, 180 Ga. App. 200, 348 S.E.2d 582 (1986); Dukes v. State, 285 Ga. App. 172, 645 S.E.2d 664 (2007); McClendon v. State, 287 Ga. App. 238, 651 S.E.2d 165 (2007); Hudson v. State, 296 Ga. App. 692, 675 S.E.2d 578 (2009); Hines v. State, 308 Ga. App. 299, 707 S.E.2d 534 (2011).

### Application

**Effect of court's refusal to sever in felony murder trial.** — Trial court's refusal to sever charge of felony murder while in commission of the offense of possession of a firearm by a convicted felon does not create an irrebuttable presumption of an absence of justification. Smith v. State, 257 Ga. 468, 360 S.E.2d 591 (1987).

**Evidence sufficient to show that defendant acted in self-defense.** — See Steele v. State, 166 Ga. App. 24, 303 S.E.2d 462 (1983).

**Simple battery.** — Justification is a defense in a case of simple battery. Harrell v. State, 205 Ga. App. 378, 422 S.E.2d 71 (1992).

**Underage drinking.** — Defendant's conviction for underaged drinking of an alcoholic beverage was upheld on appeal since the police officer smelled alcohol on the defendant's breath in the county wherein the defendant was arrested, which was enough to establish venue, pursuant to O.C.G.A. § 17-2-2(h) and, because the defendant never produced evidence that a parent or guardian gave the defendant the beer that the defendant admitted to drinking and that the possession of the beer was in the home and

presence of a parent or guardian, the defendant failed to establish the affirmative defense under O.C.G.A. § 3-3-23(a)(2). Burchett v. State, 283 Ga. App. 271, 641 S.E.2d 262 (2007).

**Reasonable discipline of child.** — When in prosecution for cruelty to children the state's evidence showed that the victim was a five-year old child upon whom bruises were visible on about 75 percent of the face and neck and 25 percent of the body, the trial court committed no error in refusing to charge O.C.G.A. § 16-3-20(3), as such injuries, if occasioned by defendant's acts, could not be determined to have been reasonable discipline. Bearden v. State, 163 Ga. App. 434, 294 S.E.2d 667 (1982).

Homicide defendant who relies on the "reasonable parental discipline" justification defense is not entitled to an additional instruction on involuntary manslaughter in the course of a lawful act because if the defendant is justified in administering reasonable parental discipline the defendant is guilty of no crime; if the defendant is not entitled to rely on the reasonable discipline defense, the homicide does not fall within the "lawful act" predicate of O.C.G.A. § 16-5-3(b), since in rejecting the justification claim the jury has determined that the act was not lawful. Paul v. State, 274 Ga. 601, 555 S.E.2d 716 (2001), cert. denied, 537 U.S. 828, 123 S. Ct. 123, 154 L. Ed. 2d 41 (2002).

**Killing for revenge.** — It is error to charge jury that no matter what circumstances might be, killing committed in spirit of revenge is never justifiable. Crolger v. State, 88 Ga. App. 566, 77 S.E.2d 98 (1953) (decided under former Code 1933, § 26-1011).

In order to make killing justifiable on grounds that it was committed under fears of a reasonable man, an essential element is that it must appear the homicide was not committed in a spirit of revenge. Lackey v. State, 217 Ga. 345, 122 S.E.2d 115 (1961) (decided under former Code 1933, § 26-1011).

**Evidence clearly authorized finding that defendant was not "justified" in escape** from the county correctional institute in which defendant stipulated to being lawfully confined. Mullins v. State,

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167 Ga. App. 670, 307 S.E.2d 61 (1983).

**Right to resist unlawful arrest** permits use of force proportionate to force being unlawfully exerted. *Mullis v. State*, 196 Ga. 569, 27 S.E.2d 91 (1943) (decided under former Code 1933, § 26-1011).

**Prevention of planned act of adultery as justification for homicide.** — Charge which provides that if jury finds that marriage relation existed between defendant in murder trial and her purported husband, each would have mutual right to protect such relationship, and shooting of a third person by one of them to prevent adultery with the other may be justified by real or apparent necessity presented by facts and circumstances as they appear to her at moment of her interposition to prevent the adultery, was a proper charge. *Drewry v. State*, 208 Ga. 239, 65 S.E.2d 916 (1951) (decided under former Code 1933, § 26-1016); but see *Burger v. State*, 238 Ga. 171, 231 S.E.2d 769 (1977).

If wife kills another woman to prevent sexual relations between such other woman and her husband, the killing is justified provided the killing was apparently necessary to prevent commission of such sexual act. In order to justify such a killing it is not necessary that the act be in progress, or that it is to be committed then and there. It is enough if it is apparent that the killing is necessary to prevent a planned act of sexual intercourse. *Scroggs v. State*, 94 Ga. App. 28, 93 S.E.2d 583 (1956) (decided under former Code 1933, § 26-1016); but see *Burger v. State*, 238 Ga. 171, 231 S.E.2d 769 (1977).

**Slaying of illicit lover by wronged spouse** in order to prevent adultery is not justifiable homicide. *Chancellor v. State*, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

It was not error for the trial court to inform the jury that a person was not justified in taking the life of a spouse's lover in order to prevent adultery. *Chancellor v. State*, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

Since the Supreme Court has ruled that prevention of adultery does not justify the killing of an illicit lover by a spouse, and the Court of Appeals has ruled that men-

tal anguish does not rise to the level of "great bodily harm" as it is used in O.C.G.A. § 16-3-21, an instruction that justification was a possible defense under O.C.G.A. § 16-3-20(6) was not authorized and the trial court committed no error in refusing to give it. *Chancellor v. State*, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

**No justification.** — Conduct is not justified under O.C.G.A. § 16-3-20(6) when purpose is ensuring that one's dog gets to stay inside one's house. *Mitchell v. State*, 187 Ga. App. 40, 369 S.E.2d 487, cert. denied, 187 Ga. App. 908, 369 S.E.2d 487 (1988).

Even though the trial court charged the jury on justification in the specific context of defense of self or a third person as provided in O.C.G.A. § 16-3-21(a) and defense of property as provided in O.C.G.A. § 16-3-24, such instruction alone failed to fairly present to the jury the law on defendant's theory of the case and defendant's defense of justification. The trial court erred in failing to charge justification under O.C.G.A. § 16-3-20(6) and in failing to charge the jury on the state's burden of proving the absence of the elements of a justification defense. *Nelson v. State*, 213 Ga. App. 641, 445 S.E.2d 543 (1994).

Jury charge on justification was not required where the evidence, including defendant's own statements, showed that the victim was shot as the victim was trying to leave the premises and there was no hint of confrontation with defendant or that defendant was fearful for own safety or that of others. *Bowden v. State*, 270 Ga. 19, 504 S.E.2d 699 (1998).

Grounds for justification outlined in O.C.G.A. § 16-3-20 did not include a desire not to wake a sleeping child as justification for disobeying lawful orders of an officer, and, thus, the state disproved that affirmative defense to the charge against defendant of obstruction of an officer. *Arsenault v. State*, 257 Ga. App. 456, 571 S.E.2d 456 (2002).

Trial court erred in finding that a guardian had proved by a preponderance of the evidence, as required under O.C.G.A. § 19-13-3(a), that a parent committed an act of family violence pursuant to O.C.G.A. § 19-13-1, as there was insufficient evidence that the parent commit-

ted an act of violence, specifically simple battery in violation of O.C.G.A. § 16-5-23, as opposed to administering reasonable discipline in the form of corporal punishment, as O.C.G.A. § 16-5-23 specifically exempted corporal punishment from the definition of battery, and the appellate court determined after considering O.C.G.A. § 16-3-20 and O.C.G.A. § 20-2-731 that the alleged action of the parent in slapping the child did not arise to the level of unreasonable discipline. *Buchheit v. Stinson*, 260 Ga. App. 450, 579 S.E.2d 853 (2003).

Jury was authorized to find that the defendant's resistance to being arrested after the defendant pushed and hit another officer was not legally justified under O.C.G.A. § 16-3-20 because the jury was authorized to disbelieve the defendant's claim that the defendant was attempting to get medical assistance for the defendant's parent who was having a seizure, and to reject that defense. *Harris v. State*, 276 Ga. App. 234, 622 S.E.2d 905 (2005).

Because the defendant did not admit or testify to driving aggressively, the defendant was not entitled to assert the affirmative defense of justification. *Frasard v. State*, 278 Ga. App. 352, 629 S.E.2d 53 (2006).

Because the defendant failed in the burden of proving that the evidence of specific acts of violence by the victim should be admitted, and testimony did not establish that the event occurred before the defendant's attack on the victim, the trial court's ruling that there was no evidence to support a defense of justification was not clearly erroneous. *Cross v. State*, 285 Ga. App. 518, 646 S.E.2d 723 (2007), cert. denied, 2007 Ga. LEXIS 680 (Ga. 2007).

**Ineffective assistance not found as evidence did not support justification defense.** — Trial counsel's failure to introduce evidence of the defendant's mental health history was not ineffective assistance of counsel as a prior shooting, in which the defendant was shot, could not support a justification defense. *Harris v. State*, 279 Ga. 304, 612 S.E.2d 789 (2005).

**Counsel ineffective when evidence of victim's prior act of violence not admitted.** — When the defendant pre-

sented a prima facie case of justification, counsel was ineffective in not introducing evidence of a prior act of violence by the victim based on counsel's mistaken belief that such an act had to have occurred prior to the act being tried in order to be admissible. The error was not harmless as the assault, which like the charged crime involved an assault with a gun upon a man leaving the residence of the victim's ex-spouse, was highly relevant to the sole defense of justification. *Bennett v. State*, 298 Ga. App. 464, 680 S.E.2d 538 (2009).

**Battered person defense not allowed.** — In a prosecution for child molestation, defendant was not allowed to assert a battered person defense since the criminal acts were directed toward nonaggressor victims and self-defense was not an issue in the case. *Graham v. State*, 239 Ga. App. 429, 521 S.E.2d 249 (1999).

In a prosecution for possession of marijuana, defendant was not entitled to an instruction on justification based on defendant's use of marijuana for certain physical ailments. *Carlson v. State*, 240 Ga. App. 589, 524 S.E.2d 283 (1999).

There was no error in the refusal to admit expert testimony regarding the battered person syndrome to support the defendant's justification defense of coercion at the defendant's trial for various assault crimes committed against the defendant's nine-year-old child. *Pickle v. State*, 280 Ga. App. 821, 635 S.E.2d 197 (2006), cert. denied, 2007 Ga. LEXIS 110, 111 (Ga. 2007).

**Self-defense applicable to delusional compulsion defense.** — General law of self-defense was properly applied to determine whether the defendant had met the justification criteria for delusional compulsion defense. *Dutton v. State*, 225 Ga. App. 67, 483 S.E.2d 305 (1997).

**Prima facie case of justification established.** — Because the state's evidence established a prima facie case of justification through the defendant's statement, in which the defendant claimed to have shot the victim out of self-defense, it was error to refuse to admit evidence of violence by the victim toward a third party unless the defendant testified. The error, which implicated the

**Application (Cont'd)**

Fifth Amendment, was not harmless because when the defendant took the stand, the state was able on cross-examination to undermine the defense by showing that the defendant had been able to disarm the victim in the past by using the defendant's military training. *Williams v. State*, 298 Ga. App. 151, 679 S.E.2d 377 (2009).

**Defense unavailable when defendant did not admit to crimes charged.**

— Trial court properly refused to allow the defendant, who was charged with obstructing an officer, to testify as to the defendant's state of mind in order to prove the defense of justification; because the defendant did not admit to the crimes charged, the defense of justification was not available. *Ojemuyiwa v. State*, 285 Ga. App. 617, 647 S.E.2d 598 (2007).

**Jury free to reject defense.** — Jury was free to accept the evidence that the shootings were not done in self-defense or in defense of another person, including the defendant's own inculpatory statements, and to reject any evidence offered by the defendant in support of a justification defense. *Harris v. State*, 279 Ga. 304, 612 S.E.2d 789 (2005).

**Prima facie showing of justification.** — Defendant, who claimed to have acted in self-defense when the defendant beat the victim with a pipe, made a prima facie showing of justification. The defendant testified that the victim approached the defendant, uttered a racial epithet, and threatened to shoot the defendant, and the defendant claimed that the defendant feared for the defendant's life because the defendant knew of the victim's reputation and had previously seen the victim with a pistol in the victim's jeans. *Bennett v. State*, 298 Ga. App. 464, 680 S.E.2d 538 (2009).

**Jury Instruction**

**Absent request, charge on justification not required if raised solely by defendant's statement.** *McKibben v. State*, 88 Ga. App. 466, 77 S.E.2d 86 (1953) (decided under former Code 1933, § 26-1011).

Judge may construct a charge upon various issues made by evidence, and if de-

fense is set up in statement alone, it is not error for judge to omit submitting law appropriate to such defense, in absence of timely written request. *Pope v. State*, 76 Ga. App. 288, 45 S.E.2d 681 (1947) (decided under former Code 1933, § 26-1011).

In a trial in which the defendant claimed that the defendant was wrongfully threatened by a drug dealer that if the defendant did not fatally shoot a victim, then the dealer would harm the defendant and the defendant's family members, and accordingly, the defendant shot the victim and then hid the victim's body in a shallow grave until such time as the defendant confessed to the crime 10 years later, the trial court properly refused to instruct the jury on justification pursuant to O.C.G.A. § 16-3-20(6), as the defendant's criminal acts were directed toward a non-aggressor victim and there was no evidence that the defendant or any family members were threatened with "imminent death or great bodily injury"; furthermore, a coercion defense under O.C.G.A. § 16-3-26 would not be applicable to a charge of murder. *Gravitt v. State*, 279 Ga. 33, 608 S.E.2d 202 (2005).

In a prosecution for driving under the influence and making an improper lane change, because the defendant did not request instructions on accident and justification, the trial court did not err in failing to give those instructions; moreover, because the jury was charged on involuntary intoxication, the failure to charge on accident was not harmful as a matter of law. *Walker v. State*, 280 Ga. App. 393, 634 S.E.2d 177 (2006).

**Where court charges on justification, even though not raised at trial, defendant cannot complain.** — If issue of justification is not raised by evidence or defendant's statement, but, nevertheless, court charges, either correctly or incorrectly, on justification, defendant cannot complain, as court under these circumstances has given or attempted to give defendant benefit of a defense to which defendant was not entitled. *McKibben v. State*, 88 Ga. App. 466, 77 S.E.2d 86 (1953) (decided under former Code 1933, § 26-1011).

O.C.G.A. § 40-6-395(a) was not uncon-

stitutional merely because the statute failed to include a provision for the exercise of a fundamental right of self-defense, given the statutory defense that the fact that a person's conduct was justified remained a defense to the prosecution for any crime based on that conduct; moreover, the defendant was permitted to present evidence of justification, and the trial court instructed the jury that justification was a defense and could be claimed when the person's conduct was justified for any reason under the law or in all other instances based on similar reason and justice. *Harbuck v. State*, 280 Ga. 775, 631 S.E.2d 351 (2006).

**Defendant entitled to a charge as to justification.** — When a defendant was charged with possession of a firearm by a convicted felon, the defendant was entitled to a charge as to justification, the only defense defendant claimed; when the court refused to so charge, and charged merely the language of O.C.G.A. § 16-11-131, this was tantamount to a directed verdict, requiring reversal. *Little v. State*, 195 Ga. App. 130, 392 S.E.2d 896 (1990).

When the defendant testified that he drove without a license because his wife was experiencing labor pains, the doctor said he needed to see her, and she could not drive herself to the doctor's office, a jury could have found that his decision to seek medical help for his wife and their soon-to-be-born child stands on "the same footing of reason and justice" as a government employee's reasonable fulfillment of his duties, a parent's reasonable discipline of a child, and a person's reasonable conduct in performing a citizen's arrest. *Tarvestad v. State*, 261 Ga. 605, 409 S.E.2d 513 (1991).

Trial court's failure to charge the jury on justification as a defense to the crime of impersonating an officer was reversible error since defendant's sole defense was justification. *Wells v. State*, 200 Ga. App. 104, 407 S.E.2d 86 (1991).

When the defendant's testimony provided "some" evidence in support of defendant's justification defense based on a claim of self-defense, the trial court's refusal to charge the jury on this sole defense was reversible error, even though

the defendant was a convicted felon and not authorized by law to possess a firearm. *Jones v. State*, 220 Ga. App. 784, 470 S.E.2d 326 (1996).

In a prosecution for interference with government property, the court improperly refused to charge the jury with regard to justification where: (1) it was undisputed that the defendant had high blood pressure and allergies and that pepper spray with which defendant was sprayed caused defendant acute respiratory distress; (2) while seated in a police cruiser, defendant screamed for air, gagged, and bodily secretions streamed down defendant's face; (3) although an officer cracked one window a few inches, this brought the defendant no relief; and (4) defendant kicked out the window to ease the symptoms. *Moore v. State*, 234 Ga. App. 332, 506 S.E.2d 685 (1998).

Defendant was entitled to a jury charge on the affirmative legal defense of justification on the charge of failure to maintain a lane, which was defendant's sole defense, since the testimony could support that charge. *Smith v. State*, 250 Ga. App. 532, 552 S.E.2d 499 (2001).

**Defendant was not entitled to an instruction on the defense of justification** regarding a charge of possession of a firearm as a convicted felon because the defendant did not present evidence of any imminent threat or other present threat of death or serious bodily harm either to the defendant or to a third party. *Branton v. State*, 292 Ga. App. 104, 663 S.E.2d 414 (2008), cert. denied, No. S08C1771, 2008 Ga. LEXIS 873 (Ga. 2008).

In a prosecution for kidnapping the defendant's former lawyer and law firm employees, the defendant was not entitled to a jury instruction on a justification defense under O.C.G.A. § 16-3-20(5) or (6) as the defendant did not identify any reason under state law that would have justified such conduct, the defendant had no duty to act on behalf of a third party, and there was no need for prompt action. *Brower v. State*, 298 Ga. App. 699, 680 S.E.2d 859 (2009), cert. denied, No. S09C1845, 2010 Ga. LEXIS 13 (Ga. 2010).

Trial court did not err in refusing to charge the jury on the defense of justification because the defendant made no at-

**Jury Instruction (Cont'd)**

tempt to argue how the defendant's subjective, drug-influenced belief that the defendant was being pursued across the state by unidentified men with Uzis supported the application of a justification defense; defendant's fear, which was based upon an earlier encounter with unidentified men, could not provide justification for the crimes because there was no immediate threat of would-be assassins at the time of the crimes but only a pursuit by law enforcement vehicles with lights flashing and sirens blaring. *Luke v. State*, 306 Ga. App. 701, 703 S.E.2d 335 (2010).

Circumstances did not support a charge on justification because the defendant's argument that the defendant did not intend to commit any crime could be contradicted by a defense that the defendant acted intentionally but was justified in doing so; while a defendant may choose to pursue alternative defense theories, the trial court has no obligation to charge the jury *sua sponte* on all possible theories of defense. *Luke v. State*, 306 Ga. App. 701, 703 S.E.2d 335 (2010).

**Charge as to justification not misleading or confusing.** — In a trial for aggravated assault, the jury charge as to justification was not misleading or confusing; the charge made it clear that the state bore the burden of proving both elements of aggravated assault under the indictment and that defendant's use of force was not justified beyond a reasonable doubt. *White v. State*, 291 Ga. App. 249, 661 S.E.2d 865 (2008).

**When specific instruction unnecessary.** — Court did not err in failing to specifically charge the jury on the law of justification and coercion since the charge and the evidence as a whole adequately and fairly presented the defendant's theories of the case, that is, that the defendant was only incidentally involved in the commission of the crimes (armed robbery and kidnapping), and the defendant's testimony was not that the defendant was coerced into commission of the crime, but that the defendant on the defendant's own initiative had robbed the victim and forced the victim into the automobile, that

the defendant was at all times attempting to talk the codefendant out of committing the crime, and that the defendant had nothing to do with either the robbery or the kidnapping. *Mallory v. State*, 166 Ga. App. 812, 305 S.E.2d 656 (1983).

**Ineffective assistance not found.** — Trial court properly denied the defendant's request for a justification charge as there was no evidence to authorize such charge under O.C.G.A. § 16-3-20 since the defendant was not acting in self-defense, defense of others, or habitation; nor was the defendant's conduct justified under the statute. *Stanford v. State*, 259 Ga. App. 188, 576 S.E.2d 594 (2003).

Defendant did not receive ineffective assistance of counsel based on defense counsel withdrawal of a request for a justification instruction as the defendant's testimony that the defendant did not act with the intent to inflict injury on a former love interest did not support an instruction on justification. *Alston v. State*, 277 Ga. App. 117, 625 S.E.2d 475 (2005).

Defense counsel was not ineffective for failing to request for a jury charge on justification in accordance with O.C.G.A. § 16-3-20(6) as the defendant could not show that the defendant was justified in firing shots at the victim since the victim had only fired the victim's gun one time in the air and then was in a car and leaving at the time that the defendant and the codefendant fatally shot back. *Stinchcomb v. State*, 280 Ga. 170, 626 S.E.2d 88 (2006).

Defendant's trial counsel did not render ineffective assistance by failing to request a charge that was not adjusted to the facts of the case; moreover, the trial court properly charged on the defenses of self-defense and the defense of others, as requested. *Davenport v. State*, 283 Ga. 171, 656 S.E.2d 844 (2008).

**Sua sponte instruction not warranted.** — Trial court did not err in failing to *sua sponte* give an instruction on justification because the defendant's testimony that the defendant did not act with the intent to inflict injury on a former love interest did not support an instruction on justification. *Alston v. State*, 277 Ga. App. 117, 625 S.E.2d 475 (2005).

## OPINIONS OF THE ATTORNEY GENERAL

**Reasonable force permissible in arresting person reasonably believed to be aiding escape.** — If correctional officer reasonably believes persons in aircraft landing inside perimeter of correctional facility are aiding or attempting to aid an escape, then the officer is entitled to make an arrest of those persons. To

effectuate this arrest the officer is justified in using reasonable force. 1981 Op. Att'y Gen. No. 81-90.

**Extent of force permissible in disabling aircraft landing inside perimeter of correctional facility.** See 1981 Op. Att'y Gen. No. 81-90.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 5 Am. Jur. 2d, Arrest, § 1 et seq. 6 Am. Jur. 2d, Assault and Battery, §§ 31 et seq., 111. 39 Am. Jur. 2d, Guardian and Ward, § 63. 40A Am. Jur. 2d, Homicide, § 128 et seq. 59 Am. Jur. 2d, Parent and Child, §§ 9, 25 et seq. 63C Am. Jur. 2d, Public Officers and Employees, § 369 et seq.

**C.J.S.** — 22 C.J.S., Criminal Law, §§ 66, 122. 67A C.J.S., Parent and Child, §§ 12, 155.

**ALR.** — Duty to retreat to wall as affected by illegal character of premises on which homicide occurs, 2 ALR 518.

Acquittal on charge as to one as bar to charge as to the other, where one person is killed or assaulted by acts directed at another, 2 ALR 606.

Right of self-defense as affected by defendant's violation of law only casually related to the encounter, 10 ALR 861.

Voluntary intoxication as defense to homicide, 12 ALR 861; 79 ALR 897.

Criminal law: criminal responsibility of peace officers for killing or wounding one whom they wished to investigate or identify, 18 ALR 1368; 61 ALR 321.

Right of one in loco parentis other than teacher to punish child, 43 ALR 507.

Presumption that public officers have properly performed their duty, as evidence, 141 ALR 1037.

Proof to establish or negative self-defense in civil action for death from intentional act, 17 ALR2d 597.

Pleading self-defense or other justification in civil assault and battery action, 67 ALR2d 405.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 ALR2d 396.

Retaking of money lost in gambling as robbery or larceny, 77 ALR3d 1363.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 ALR3d 1309.

"Choice of evils," necessity, duress, or similar defense to state or local criminal charges based on acts of public protest, 3 ALR5th 521.

Automobiles: necessity or emergency as defense in prosecution for driving without operator's license or while license is suspended, 7 ALR5th 73.

Ineffective assistance of counsel: compulsion, duress, necessity, or "hostage syndrome" defense, 8 ALR5th 713.

### 16-3-21. Use of force in defense of self or others; evidence of belief that force was necessary in murder or manslaughter prosecution.

(a) A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself or herself or a third person against such other's imminent use of unlawful force; however, except as provided in Code Section 16-3-23, a person is justified in using force which is intended or likely to cause death or great bodily harm only if

he or she reasonably believes that such force is necessary to prevent death or great bodily injury to himself or herself or a third person or to prevent the commission of a forcible felony.

(b) A person is not justified in using force under the circumstances specified in subsection (a) of this Code section if he:

(1) Initially provokes the use of force against himself with the intent to use such force as an excuse to inflict bodily harm upon the assailant;

(2) Is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or

(3) Was the aggressor or was engaged in a combat by agreement unless he withdraws from the encounter and effectively communicates to such other person his intent to do so and the other, notwithstanding, continues or threatens to continue the use of unlawful force.

(c) Any rule, regulation, or policy of any agency of the state or any ordinance, resolution, rule, regulation, or policy of any county, municipality, or other political subdivision of the state which is in conflict with this Code section shall be null, void, and of no force and effect.

(d) In a prosecution for murder or manslaughter, if a defendant raises as a defense a justification provided by subsection (a) of this Code section, the defendant, in order to establish the defendant's reasonable belief that the use of force or deadly force was immediately necessary, may be permitted to offer:

(1) Relevant evidence that the defendant had been the victim of acts of family violence or child abuse committed by the deceased, as such acts are described in Code Sections 19-13-1 and 19-15-1, respectively; and

(2) Relevant expert testimony regarding the condition of the mind of the defendant at the time of the offense, including those relevant facts and circumstances relating to the family violence or child abuse that are the bases of the expert's opinion. (Laws 1833, Cobb's 1851 Digest, p. 785; Code 1863, § 4230; Code 1868, § 4267; Code 1873, § 4333; Code 1882, § 4333; Penal Code 1895, § 73; Penal Code 1910, § 73; Code 1933, § 26-1014; Code 1933, § 26-902, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1975, p. 1209, § 1; Ga. L. 1993, p. 1716, § 2; Ga. L. 2001, p. 1247, § 1.)

**Law reviews.** — For survey article on evidence, see 34 Mercer L. Rev. 163 (1982). For survey article on criminal law, see 60 Mercer L. Rev. 85 (2008).

For note on admissibility of expert psy-

chological testimony in Georgia, see 4 Georgia St. U.L. Rev. 117 (1988). For note on 1993 amendment of this Code section, see 10 Georgia St. U.L. Rev. 131 (1993). For note, "Smith v. State: The Georgia

Supreme Court Mandated Jury Instructions in Battered Person Syndrome Cases," see 49 Mercer L. Rev. 1141 (1998). For note, "Open Season on Batterers in Georgia? Georgia Supreme Court Allows Jury Instructions on Battered Person Syndrome in Self-Defense Cases: Smith v. State (1997)," see 15 Georgia St. U.L. Rev.

821 (1999). For note on the 2001 amendment to O.C.G.A. § 16-3-21, see 18 Georgia St. U.L. Rev. 25 (2001).

For comment discussing the unconstitutional use of deadly force against nonviolent fleeing felons, see 18 Ga. L. Rev. 137 (1983).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION  
FEAR OF REASONABLE MAN  
MUTUAL COMBAT  
JURY CHARGE  
1. IN GENERAL  
2. CONTENT  
APPLICATION

#### General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1863, §§ 4227, 4228, former Code 1868, §§ 4264, 4265, former Code 1873, §§ 4330, 4331, former Code 1882, §§ 4330, 4331, former Penal Code 1895, §§ 70, 71, former Penal Code 1910, §§ 70, 71, and former Code 1933, §§ 26-1011, 26-1012, are included in the annotations for this Code section.

**Conflict with other statutes and administrative rules.** — Neither the self-defense statute nor the arrest statute automatically prohibits the discharge of a firearm if the lives of innocent people may be in danger, and, where a mandatory prohibition against such an action in a police department work rule conflicted with these statutes, it was invalid, and could not form the basis for a police officer's suspension. *Allen v. City of Atlanta*, 235 Ga. App. 516, 510 S.E.2d 64 (1998).

**Justification, if established, should always result in acquittal.** *Gordy v. State*, 93 Ga. App. 743, 92 S.E.2d 737 (1956) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Justification is affirmative defense.** — In a wrongful death action, because justification is an affirmative defense, defendant bore the burden of proving actions met the requirements of O.C.G.A. § 16-3-21. *Bell v. Smith*, 227 Ga. App. 17, 488 S.E.2d 91 (1997).

In an action in which the defendant was convicted of the murder of the defendant's parent's love interest, defense counsel failure to investigate the victim's violent nature was not ineffective; the jury was given considerable information concerning the victim's violent nature, that the victim had beaten the defendant's parent, and had consumed cocaine; even with further investigation, the outcome of the trial would not have changed; the jury rejected both the justification defense and the lesser charge because there was overwhelming evidence that the defendant committed malice murder. *Cooper v. State*, 279 Ga. 189, 612 S.E.2d 256 (2005).

**State has burden to disprove defense.** — When a defendant presents evidence that defendant was justified in using deadly force, the burden is on the state to disprove the defense beyond a reasonable doubt. *Hall v. State*, 235 Ga. App. 44, 508 S.E.2d 703 (1998).

**Justifiable homicide is a substantive and affirmative defense** and, if found well supported in fact, the accused is entitled to acquittal without reference to the evidence which apparently tends to convict the accused of the offense of murder or voluntary manslaughter. *Fountain v. State*, 207 Ga. 144, 60 S.E.2d 433 (1950), overruled on other grounds, *Lavender v. State*, 234 Ga. 608, 216 S.E.2d 855 (1975) (decided under former Code 1933, §§ 26-1011, 26-1012). *Farr v. State*,

**General Consideration (Cont'd)**

83 Ga. App. 855, 65 S.E.2d 270 (1951) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Controlling elements of self-defense.** — Controlling element of self-defense is protecting against impending danger which either actually or as it reasonably appears to slayer cannot be otherwise prevented than by death of assailant. Green v. State, 52 Ga. App. 290, 183 S.E. 204 (1935) (decided under former Code 1933, §§ 26-1011, 26-1012).

Two elements must be present before the use of deadly force is justified: (1) the danger to either the actor or a third person must be imminent; and (2) the actor must reasonably believe that such force is necessary to prevent death or great bodily injury to self or a third person. Coley v. State, 201 Ga. App. 722, 411 S.E.2d 804 (1991).

Where witnesses testified that the victim of a stabbing started a fight with the juvenile defendant by "slamming" the defendant, this evidence did not demand a finding that the defendant acted solely in self-defense. In re T.T., 236 Ga. App. 46, 510 S.E.2d 901 (1999).

**When sole defense is denial of killing,** justifiable homicide in self-defense is not applicable. Stevens v. State, 8 Ga. App. 217, 68 S.E. 874 (1910) (decided under former Penal Code 1895, §§ 70, 71).

**It is permissible to rely upon both defenses:** that defendant did not kill, and that if defendant did kill, it was justifiable. Green v. State, 7 Ga. App. 803, 68 S.E. 318 (1910).

**Admission to specific allegations not required.** — There is no requirement that a defendant has to admit to the specific allegations of violence in order to obtain the protection of O.C.G.A. § 16-3-21(a). State v. Yapo, 296 Ga. App. 158, 674 S.E.2d 44 (2009).

**Defenses of self-defense and accident inconsistent.** — Defenses of self-defense and justification do not deny the intent to inflict injury, but claim authority for the act under the legal excuse of reasonable fear of immediate serious harm to oneself or another. Since an accident defense involves the lack of intent to

do the act at all, the two defenses are inconsistent. Fields v. State, 167 Ga. App. 816, 307 S.E.2d 712 (1983).

Defenses of self-defense and accident are inconsistent. Wilkerson v. State, 183 Ga. App. 26, 357 S.E.2d 814 (1987).

**Instructions on accident and justification authorized.** — Where there is evidence of both justification and accident, and timely requests for instructions on both topics have been made, the trial court should instruct the jury as to both. Koritta v. State, 263 Ga. 703, 438 S.E.2d 68 (1994).

**Prevention or defense against impending or progressing wrong** must enter into all cases of justifiable homicide. Lakeland v. State, 53 Ga. App. 345, 185 S.E. 583 (1936) (decided under former Code 1933, §§ 26-1011, 26-1012).

**One is justified in slaying an antagonist to avoid a felony** being committed on that one. Ellison v. State, 50 Ga. App. 58, 176 S.E. 885 (1934) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Use of deadly force not justified.** — Evidence was sufficient to allow the jury to conclude beyond a reasonable doubt that defendant did not justifiably use deadly force to protect self from the victim's assault. Brown v. State, 242 Ga. App. 106, 528 S.E.2d 868 (2000).

**Mental anguish not justification for killing.** — Mental anguish does not constitute "great bodily harm"; therefore, its alleged infliction does not justify killing the inflictor. Chancellor v. State, 165 Ga. App. 365, 301 S.E.2d 294 (1983) (decided under former Penal Code 1910, §§ 70, 71).

**Law, in cases of homicide, does not take into account actual fears of slayer,** but considers all circumstances, with reference to determination as to whether the circumstances were sufficient to excite fears of a reasonable person. Daniels v. State, 248 Ga. 591, 285 S.E.2d 516 (1981).

**Apprehensions or opinions of third parties that accused is in imminent danger** are not relevant. But facts from which apprehension might reasonably be inferred, as distinct from opinion, are relevant when stated or shown by third parties. Melear v. State, 159 Ga. App. 574, 284 S.E.2d 79 (1981).

On a trial for murder, as to the defendant's theory of self-defense, apprehensions or opinions of third parties that the accused is in imminent danger are not relevant. But facts from which apprehension might reasonably be inferred, as distinct from opinions, are relevant when stated or shown by third parties. Lancaster v. State, 250 Ga. 871, 301 S.E.2d 882 (1983).

**Means of inflicting threatened injury must apparently be at hand** to warrant reasonable fear which may justify homicide. Lee v. State, 42 Ga. App. 360, 156 S.E. 296 (1930) (decided under former Penal Code 1910, §§ 70, 71).

**Victim's threats may be communicated by third persons.** — Victim's prior threats need not be directly related to the defendant but may be communicated via third persons from the deceased to defendant. McDonald v. State, 182 Ga. App. 509, 356 S.E.2d 264 (1987).

**Previous attack not relevant to justification defense.** — Evidence of a previous attack upon defendant by a third party which occurred two years before the crime on trial was not relevant to defendant's justification defense. Lara v. State, 216 Ga. App. 117, 453 S.E.2d 137 (1995).

**Previous attack upon defendant is relevant to reasonableness of belief.**

— Evidence that defendant was previously attacked with a knife and received scars to defendant's chest is relevant to whether defendant reasonably and honestly believed that deadly force was "necessary" to prevent death or great bodily injury to self. Daniels v. State, 248 Ga. 591, 285 S.E.2d 516 (1981).

**Prior acts of violence admissible to corroborate justification defense.** —

If the defendant's res gestae evidence establishes a *prima facie* justification defense, evidence of the victim's prior acts of violence against the accused, or against third parties, may be relevant to corroborate the defendant's contention that defendant did not act with the requisite criminal intent. Johnson v. State, 270 Ga. 234, 507 S.E.2d 737 (1998).

**Lapse of time between prior occurrences and homicide.** — Lapse of time between prior occurrences and homicide go to weight and credit to be accorded

testimony by jury and not to its admissibility. In cases of doubt, the testimony should be admitted. Daniels v. State, 248 Ga. 591, 285 S.E.2d 516 (1981).

**Distinction between voluntary manslaughter and justifiable homicide.** — In voluntary manslaughter, killing is done solely because of passion or anger created in defendant by attempt on part of deceased to commit a serious injury upon defendant; whereas, justifiable homicide occurs when defendant kills because defendant reasonably believes such force is necessary to prevent great bodily injury. Williams v. State, 126 Ga. App. 454, 191 S.E.2d 100 (1972).

**Unlawfulness, in sense of absence of excuse or justification,** is essential element of murder and voluntary manslaughter. Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981).

**Absence of self-defense is an essential element** of crime of voluntary manslaughter, and where trial court's charge operated to place burden of persuasion on defendant on this issue, defendant's conviction violates defendant's due process rights under the United States Constitution. Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**Lawfulness is proved by establishing self-defense.** Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981).

**In prosecution for voluntary manslaughter state bears burden of persuasion** in negating presence of self-defense. Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

Trial court's charge in homicide case shifting burden of persuasion to defendant on issue of self-defense in violation of due process clause of U.S. Const., amend. 14 is not harmless error. Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981).

**Mistake of fact and self-defense inconsistent.** — Inasmuch as the appellant's defense was based on justification and self-defense, and inasmuch as the trial court gave a full jury charge with respect thereto, the appellant was not entitled to a charge on mistake of fact

**General Consideration (Cont'd)**

under O.C.G.A. § 16-3-5. *Pullin v. State*, 257 Ga. 815, 364 S.E.2d 848 (1988).

**Defendant not precluded from raising defense in felony murder case.** — Regardless of the felony specified by the state as the underlying felony to a felony murder charge, where there is sufficient evidence of a confrontation between the defendant and the victim, or other circumstances which ordinarily would support a charge on justification, the defendant is not precluded from raising justification as a defense. *Heard v. State*, 261 Ga. 262, 403 S.E.2d 438 (1991).

**Conduct of lawful abortion not “imminent use of unlawful force.”** — To constitute justification under O.C.G.A. § 16-3-21, the defendant must be acting in response to another’s “imminent use of unlawful force.” A lawful abortion conducted in compliance with O.C.G.A. § 16-12-141 would not constitute “imminent use of unlawful force”. *Hoover v. State*, 198 Ga. App. 481, 402 S.E.2d 92 (1991).

**Jury selection.** — Defendant’s counsel was properly limited to questioning prospective jurors about whether they knew anyone who had acted in self-defense but not in asking them anything further, as that limit properly omitted jurors’ personal beliefs on the defense while still allowing the necessary questioning as to their degree of fairness and impartiality, in defendant’s trial for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2). *Stewart v. State*, 262 Ga. App. 426, 585 S.E.2d 622 (2003).

**Cited in Head v. State**, 168 Ga. 843, 149 S.E. 145 (1929); *Johnson v. State*, 122 Ga. App. 542, 178 S.E.2d 42 (1970); *Tate v. State*, 123 Ga. App. 18, 179 S.E.2d 307 (1970); *Witt v. State*, 124 Ga. App. 535, 184 S.E.2d 517 (1971); *Butts v. State*, 126 Ga. App. 512, 191 S.E.2d 329 (1972); *Chambers v. State*, 127 Ga. App. 196, 192 S.E.2d 916 (1972); *Hewitt v. State*, 127 Ga. App. 180, 193 S.E.2d 47 (1972); *Harper v. State*, 127 Ga. App. 359, 193 S.E.2d 259 (1972); *Highland v. State*, 127 Ga. App. 518, 194 S.E.2d 332 (1972); *Towns v. State*, 127 Ga. App. 751, 195 S.E.2d 235 (1972); *Walters v. State*, 128

Ga. App. 232, 196 S.E.2d 326 (1973); *Howard v. State*, 128 Ga. App. 807, 198 S.E.2d 334 (1973); *White v. State*, 129 Ga. App. 353, 199 S.E.2d 624 (1973); *Nolan v. State*, 129 Ga. App. 653, 200 S.E.2d 474 (1973); *Ford v. State*, 232 Ga. 511, 207 S.E.2d 494 (1974); *Wilson v. State*, 233 Ga. 479, 211 S.E.2d 757 (1975); *Barker v. State*, 233 Ga. 781, 213 S.E.2d 624 (1975); *Stewart v. State*, 234 Ga. 3, 214 S.E.2d 509 (1975); *Mitchell v. State*, 134 Ga. App. 376, 214 S.E.2d 593 (1975); *Parham v. State*, 135 Ga. App. 315, 217 S.E.2d 493 (1975); *Hale v. State*, 135 Ga. App. 625, 218 S.E.2d 643 (1975); *Smith v. State*, 235 Ga. 327, 219 S.E.2d 440 (1975); *Franklin v. State*, 136 Ga. App. 47, 220 S.E.2d 60 (1975); *Henderson v. State*, 136 Ga. App. 490, 221 S.E.2d 633 (1975); *Mathis v. State*, 136 Ga. App. 701, 222 S.E.2d 647 (1975); *Holloway v. State*, 137 Ga. App. 124, 222 S.E.2d 898 (1975); *Mason v. State*, 236 Ga. 46, 222 S.E.2d 339 (1976); *Graham v. State*, 236 Ga. 378, 223 S.E.2d 803 (1976); *Kessel v. State*, 236 Ga. 373, 223 S.E.2d 811 (1976); *Stovall v. State*, 236 Ga. 840, 225 S.E.2d 292 (1976); *Adams v. State*, 138 Ga. App. 242, 225 S.E.2d 699 (1976); *Colson v. State*, 138 Ga. App. 366, 226 S.E.2d 154 (1976); *Harris v. State*, 138 Ga. App. 461, 226 S.E.2d 301 (1976); *Harrison v. State*, 138 Ga. App. 419, 226 S.E.2d 480 (1976); *Copeland v. State*, 139 Ga. App. 55, 227 S.E.2d 850 (1976); *King v. State*, 238 Ga. 240, 232 S.E.2d 236 (1977); *Jackson v. State*, 239 Ga. 40, 235 S.E.2d 477 (1977); *Johnson v. State*, 142 Ga. App. 526, 236 S.E.2d 493 (1977); *Veasley v. State*, 142 Ga. App. 863, 237 S.E.2d 464 (1977); *Aguilar v. State*, 240 Ga. 830, 242 S.E.2d 620 (1978); *Dasher v. State*, 146 Ga. App. 118, 245 S.E.2d 476 (1978); *Pullen v. State*, 146 Ga. App. 665, 247 S.E.2d 128 (1978); *Griffin v. State*, 242 Ga. 51, 247 S.E.2d 853 (1978); *Upshaw v. State*, 147 Ga. App. 57, 248 S.E.2d 17 (1978); *Mason v. State*, 147 Ga. App. 179, 248 S.E.2d 302 (1978); *Riner v. State*, 147 Ga. App. 707, 250 S.E.2d 161 (1978); *Nordmann v. International Follies, Inc.*, 147 Ga. App. 77, 250 S.E.2d 794 (1978); *Tabb v. State*, 148 Ga. App. 13, 251 S.E.2d 16 (1978); *Lanham v. State*, 243 Ga. 576, 255 S.E.2d 52 (1979); *Simpkins v. State*, 149 Ga. App. 763, 256 S.E.2d 63

(1979); P.D. v. State, 151 Ga. App. 662, 261 S.E.2d 413 (1979); Boling v. State, 244 Ga. 825, 262 S.E.2d 123 (1979); Jarrard v. State, 152 Ga. App. 553, 263 S.E.2d 444 (1979); Lemley v. State, 245 Ga. 350, 264 S.E.2d 881 (1980); Keller v. State, 245 Ga. 522, 265 S.E.2d 813 (1980); Davis v. State, 153 Ga. App. 528, 265 S.E.2d 857 (1980); Walston v. State, 245 Ga. 572, 266 S.E.2d 185 (1980); Bagley v. State, 153 Ga. App. 777, 266 S.E.2d 804 (1980); Powell v. State, 154 Ga. App. 568, 269 S.E.2d 70 (1980); Jones v. State, 154 Ga. App. 806, 270 S.E.2d 201 (1980); Townsend v. State, 155 Ga. App. 422, 271 S.E.2d 7 (1980); Lastinger v. State, 155 Ga. App. 707, 272 S.E.2d 571 (1980); Hill v. State, 156 Ga. App. 518, 275 S.E.2d 104 (1980); Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981); Booker v. State, 157 Ga. App. 872, 278 S.E.2d 745 (1981); Daniels v. State, 158 Ga. App. 476, 282 S.E.2d 118 (1981); Mullis v. State, 248 Ga. 338, 282 S.E.2d 334 (1981); Webb v. State, 159 Ga. App. 403, 283 S.E.2d 636 (1981); Lett v. State, 160 Ga. App. 476, 287 S.E.2d 384 (1981); Cooper v. State, 249 Ga. 58, 287 S.E.2d 212 (1982); Sawyer v. State, 161 Ga. App. 479, 288 S.E.2d 108 (1982); Coppola v. State, 161 Ga. App. 517, 288 S.E.2d 744 (1982); Hanlon v. State, 162 Ga. App. 46, 290 S.E.2d 285 (1982); Whatley v. State, 163 Ga. App. 106, 290 S.E.2d 316 (1982); Roland v. State, 161 Ga. App. 197, 291 S.E.2d 41 (1982); Miller v. State, 162 Ga. App. 759, 292 S.E.2d 481 (1982); Respres v. State, 249 Ga. 731, 293 S.E.2d 319 (1982); Allen v. State, 249 Ga. 779, 294 S.E.2d 491 (1982); Williams v. State, 249 Ga. 822, 295 S.E.2d 293 (1982); Talley v. State, 164 Ga. App. 150, 296 S.E.2d 173 (1982); Millwood v. State, 164 Ga. App. 699, 296 S.E.2d 239 (1982); Walker v. State, 250 Ga. 230, 297 S.E.2d 33 (1982); Rivers v. State, 250 Ga. 288, 298 S.E.2d 10 (1982); Payment v. State, 164 Ga. App. 841, 298 S.E.2d 298 (1982); Yeargin v. State, 164 Ga. App. 835, 298 S.E.2d 606 (1982); Conner v. State, 251 Ga. 113, 303 S.E.2d 266 (1983); Hunter v. State, 167 Ga. App. 349, 306 S.E.2d 408 (1983); McNeil v. Parker, 169 Ga. App. 756, 315 S.E.2d 270 (1984); Syms v. State, 175 Ga. App. 179, 332 S.E.2d 689 (1985); White v. State, 179 Ga. App. 276, 346 S.E.2d 91

(1986); Hambrick v. State, 256 Ga. 688, 353 S.E.2d 177 (1987); Mitchell v. State, 187 Ga. App. 40, 369 S.E.2d 487 (1988); Young v. State, 188 Ga. App. 601, 373 S.E.2d 837 (1988); Thomas v. State, 189 Ga. App. 774, 377 S.E.2d 539 (1989); Nobles v. State, 191 Ga. App. 594, 382 S.E.2d 637 (1989); McWhorter v. State, 198 Ga. App. 493, 402 S.E.2d 60 (1991); Shackleford v. State, 198 Ga. App. 768, 403 S.E.2d 74 (1991); McKissic v. State, 201 Ga. App. 525, 411 S.E.2d 516 (1991); Dye v. State, 202 Ga. App. 31, 413 S.E.2d 500 (1991); Campbell v. State, 207 Ga. App. 902, 429 S.E.2d 538 (1993); Pardue v. State, 214 Ga. App. 690, 448 S.E.2d 768 (1994); Cox v. State, 216 Ga. App. 86, 453 S.E.2d 471 (1995); Selman v. State, 267 Ga. 198, 475 S.E.2d 892 (1996); McCracken v. State, 224 Ga. App. 356, 480 S.E.2d 361 (1997); Crawford v. State, 267 Ga. 543, 480 S.E.2d 573 (1997); Young v. State, 229 Ga. App. 497, 494 S.E.2d 226 (1997); Nguyen v. State, 234 Ga. App. 185, 505 S.E.2d 846 (1998); Hodo v. State, 272 Ga. 272, 528 S.E.2d 250 (2000); Etheridge v. State, 249 Ga. App. 111, 547 S.E.2d 744 (2001); Smith v. State, 249 Ga. App. 736, 550 S.E.2d 106 (2001); Harris v. State, 274 Ga. 422, 554 S.E.2d 458 (2001); Daniley v. State, 274 Ga. 474, 554 S.E.2d 483 (2001); Price v. State, 280 Ga. 193, 625 S.E.2d 397 (2006); Dukes v. State, 285 Ga. App. 172, 645 S.E.2d 664 (2007); McClendon v. State, 287 Ga. App. 238, 651 S.E.2d 165 (2007); Branton v. State, 292 Ga. App. 104, 663 S.E.2d 414 (2008); State v. Burks, 285 Ga. 781, 684 S.E.2d 269 (2009).

### Fear of Reasonable Man

**O.C.G.A. § 16-3-21 is a recodification of reasonable belief test**, which was stated in former Code 1933, § 26-1012 as it read prior to revision of title by Ga. L. 1968, p. 1249. Daniels v. State, 248 Ga. 591, 285 S.E.2d 516 (1981).

**Fear justifying homicide refers to fear of reasonable man.** — In cases of homicide, the law does not consider actual fears of slayer, but considers all circumstances with reference to determination as to whether they were sufficient to excite fears of a reasonable person. Bivins v. State, 200 Ga. 729, 38 S.E.2d 273 (1946)

**Fear of Reasonable Man (Cont'd)**

(decided under former Code 1933, §§ 26-1011, 26-1012).

**Standard of reasonable fear determined by jurors' observations, common knowledge and experience.** — Standard of a reasonable man, as related to defense of reasonable fears in trial for murder, is one which jury must determine from their own observation and their common knowledge and experience. *Fudge v. State*, 190 Ga. 340, 9 S.E.2d 259 (1940) (decided under former Code 1933, §§ 26-1011, 26-1012).

**To establish plea of self-defense**, defendant must show that circumstances were such as to excite fears of a reasonable man that his life was in danger; a mere unreasonable apprehension or suspicion of harm being insufficient. *Young v. State*, 160 Ga. App. 51, 286 S.E.2d 54 (1981).

**Homicide justified where caused by victim's threats inducing reasonable fear.** — If threats and menaces of the victim were found by the jury to be sufficient to arouse, in a reasonable man, fears for his life or great bodily injury and that he acted from such fears, they would be authorized to find the homicide was justified as self-defense. *Facison v. State*, 152 Ga. App. 645, 263 S.E.2d 523 (1979).

**Force likely to cause death may be justified where it appears necessary to repel assault.** — One who is assaulted by another need no longer stop and determine whether assault constitutes attempt to commit felony upon him or a mere misdemeanor upon him but may use such force in defense of his person as seems to him to be necessary even though such force may be intended to, or likely will, cause death or great bodily harm to the other. *Henderson v. State*, 227 Ga. 68, 179 S.E.2d 76 (1970).

**Fears causing use of force must be those of a reasonable man**, and not just defendant's fears based on prior experiences. *Moore v. State*, 228 Ga. 662, 187 S.E.2d 277 (1972).

**Doctrine of reasonable fears inapplicable when danger apprehended not urgent and pressing actually or apparently at time of homicide.** *Jackson v.*

*State*, 91 Ga. 271, 18 S.E. 298, 44 Am. St. R. 22 (1893) (decided under former Penal Code 1895, §§ 70, 71); *Williams v. State*, 120 Ga. 870, 48 S.E. 368 (1904) (decided under former Penal Code 1895, §§ 70, 71); *Ellison v. State*, 137 Ga. 193, 73 S.E. 255 (1911) (decided under former Penal Code 1910, §§ 70, 71); *Short v. State*, 140 Ga. 780, 80 S.E. 8 (1913) (decided under former Penal Code 1910, §§ 70, 71); *Elrod v. State*, 27 Ga. App. 265, 108 S.E. 67 (1921) (decided under former Penal Code 1910, §§ 70, 71); *Martin v. State*, 36 Ga. App. 288, 136 S.E. 324 (1927) (decided under former Penal Code 1910, §§ 70, 71).

**Fear in reasonable man justifying deadly force is jury question.** — Applicable standard under O.C.G.A. § 16-3-21 is whether circumstances of case are such that the circumstances would excite fears of a reasonable man, and whether the circumstances did so to the point that it would have been necessary to use deadly force, is a question for the jury. *Anderson v. State*, 245 Ga. 619, 266 S.E.2d 221 (1980); *Darden v. State*, 271 Ga. 449, 519 S.E.2d 921 (1999).

Sufficiency of an alleged provocation by the victim and the questions of reasonableness of fears and "cooling time" are the jury's to determine. *Hagans v. State*, 187 Ga. App. 216, 369 S.E.2d 536 (1988).

Whether the circumstances are such to justify the defendant's response is a question for the jury. *McMichael v. State*, 194 Ga. App. 225, 390 S.E.2d 120 (1990); *Nolley v. State*, 240 Ga. App. 382, 523 S.E.2d 579 (1999).

Contrary to the defendant's contention, the jury was not required to believe that the defendant acted in defense of the defendant's parent when the defendant picked up a cinder block and threw it at the victim; it is for the jury to decide whether the defendant reasonably believed that the use of deadly force was necessary to defend the defendant's parent from the victim. *Smith v. State*, 261 Ga. App. 781, 584 S.E.2d 29 (2003).

**Unreasonable or delusory fear.** — Unreasonable or delusory fear, while not that of a reasonable man and therefore not sufficient to constitute justification, may negative idea of malicious and intentional wrongdoing. *Perry v. State*, 104 Ga.

App. 383, 121 S.E.2d 692 (1961) (decided under former Code 1933, §§ 26-1011, 26-1012).

Offense of shooting at another may be committed by defendant who is acting under fears, although they are not fears of a reasonable man, and an unreasonable or delusory fear, while not that of a reasonable man and therefore not sufficient to constitute justification, may negative idea of malicious and intentional wrongdoing. *Saylor v. State*, 93 Ga. App. 895, 93 S.E.2d 196 (1956) (decided under former Code 1933, §§ 26-1011, 26-1012).

#### **Psychologist's opinion irrelevant.**

— State's motion in limine seeking to exclude the testimony of a defendant's psychologist was properly granted as the defendant claimed that the defendant shot the victim in self-defense; the defendant's psychological state was irrelevant. *Lott v. State*, 281 Ga. App. 373, 636 S.E.2d 102 (2006).

**Evidence of victim's prior child molestation against defendant not admitted.** — In a defendant's trial for aggravated battery against a victim more than 65 years of age in violation of O.C.G.A. § 16-5-24(a) and (d), evidence that the victim had fondled the defendant's genitals when the defendant was 15 was not admissible under O.C.G.A. § 24-2-2 to support the defendant's claim of justification under O.C.G.A. § 16-3-21. *Strozier v. State*, 300 Ga. App. 199, 685 S.E.2d 743 (2009).

#### **Mutual Combat**

**Mutual combat situation contemplated by section.** — Designed to simplify and give order to previously disparate points of law, former Code 1933, § 26-902 contemplates situation of mutual combat where the defendant reasonably believes that use of deadly force to prevent death or great bodily harm to self or a third person, is necessary. *Trask v. State*, 132 Ga. App. 645, 208 S.E.2d 591 (1974) (see O.C.G.A. § 16-3-21).

**What constitutes mutual combat.** — Mutual combat appears sufficiently where it is shown that there was a mutual intent to fight, and one or more blows were struck. *Bailey v. State*, 148 Ga. 401, 96

S.E. 862 (1918) (decided under former Penal Code 1910, §§ 70, 71).

Mutual combat exists where there is a fight and both parties are willing to fight. *Slocumb v. State*, 157 Ga. 131, 121 S.E. 116 (1923) (decided under former Penal Code 1910, §§ 70, 71).

Mutual combat exists where there is a fight with dangerous or deadly weapons, and when both parties are at fault and are willing to fight because of a sudden quarrel. *Langford v. State*, 212 Ga. 364, 93 S.E.2d 1 (1956) (decided under former Code 1933, §§ 26-1011, 26-1012).

In order for mutual combat to exist in murder case, there must be mutual intent to fight on part of both parties. It is not necessary that mutual blows be exchanged, nor is it material who strikes the first blow or fires the first shot, nor is it necessary that both parties strike blows or fire shots. This intent, like any other intent, may be manifested by acts and conduct of parties and circumstances surrounding them at time of combat, as well as circumstances leading up to and culminating in such combat. Question of intent is peculiarly for the jury. *Norris v. State*, 93 Ga. App. 641, 92 S.E.2d 537 (1956) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Mutual combat is a mutual fight following mutual intention to fight** with felonious purpose. *Warnack v. State*, 3 Ga. App. 590, 60 S.E. 288 (1908), later appeal, 5 Ga. App. 816, 63 S.E. 935 (1909) (decided under former Penal Code 1895, §§ 70, 71).

**An essential element of mutual combat** is that both parties intend to engage in fight. *Roberts v. State*, 189 Ga. 36, 5 S.E.2d 340 (1939) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Mutual combat requires willingness, readiness, and intent of both parties to fight.** — Essential ingredient, mutual intent, in order to constitute mutual combat, must be a willingness, a readiness, and intention upon part of both parties to fight. Reluctance, or fighting to repel unprovoked attack is self-defense and is authorized by the law, and should not be confused with mutual combat. *Langford v. State*, 212 Ga. 364, 93 S.E.2d 1 (1956) (decided under former Code 1933,

**Mutual Combat (Cont'd)**

§§ 26-1011, 26-1012).

**Mutual combat requires intent to fight, but not that any blows actually be struck.** Roberts v. State, 189 Ga. 36, 5 S.E.2d 340 (1939) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Mutual blows are not always necessary to make mutual combat.** Tate v. State, 46 Ga. 148 (1872) (decided under former Code 1868, §§ 4264, 4265); Gresham v. Equitable Accident Ins. Co., 87 Ga. 497, 13 S.E. 752, 27 Am. St. R. 263, 13 L.R.A. 838 (1891) (decided under former Code 1882, §§ 4330, 4331).

**Mutual combat involves agreement to fight with deadly weapons.** — Mutual combat usually arises when parties are armed with deadly weapons and mutually agree or intend to fight with them. Mutual combat does not mean a mere fist fight or scuffle. Loudermilk v. State, 129 Ga. App. 552, 200 S.E.2d 302 (1973); Flowers v. State, 146 Ga. App. 692, 247 S.E.2d 217 (1978).

**If parties draw guns upon sudden quarrel, and one kills the other,** it is manslaughter upon theory that the parties engaged with each other in a mutual fight on equal terms. Williams v. State, 68 Ga. App. 558, 23 S.E.2d 205 (1942) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Homicide committed during mutual combat.** — If a killing is not in self-defense, or for some circumstances of justification, but in the course of an encounter in which participants engage with mutual intention to fight, the offense may be voluntary manslaughter as related to mutual combat. Shafer v. State, 191 Ga. 722, 13 S.E.2d 798 (1941) (decided under former Code 1933, §§ 26-1011, 26-1012).

When homicide is committed during mutual combat, since defendant willingly engaged in the affray, defendant is in equal fault with deceased, and, under such circumstances, it is not justifiable for defendant to slay adversary without more. Accordingly, killing under such circumstances is voluntary manslaughter. Cribb v. State, 71 Ga. App. 539, 31 S.E.2d 248 (1944) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Defense of withdrawal is applicable only in true cases of mutual combat.**

— Exercise of right of self-defense does not make one a mutual combatant. Otherwise the principle would be applicable in every case when a person unjustifiably and feloniously attacked undertook to defend oneself. Hill v. State, 211 Ga. 683, 88 S.E.2d 145 (1955) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Defendant must have attempted to decline further struggle.** — Before defendant can rely upon defense of mutual combat defendant must have declined further struggle. McDowell v. State, 78 Ga. App. 116, 50 S.E.2d 633 (1948) (decided under former Code 1933, §§ 26-1011, 26-1012).

When there is mutual fault, and mutual combat, in order for killing to be justified it must appear that slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given. Gordy v. State, 93 Ga. App. 743, 92 S.E.2d 737 (1956) (decided under former Code 1933, §§ 26-1011, 26-1012).

Person is not justified in using force which is intended or likely to cause death or great bodily harm when such person is the aggressor or was engaged in combat by agreement unless the person withdraws from the encounter and effectively communicates to the other person an intent to do so. Lancaster v. State, 250 Ga. 871, 301 S.E.2d 882 (1983).

Defendant's use of defensive force was not justified when the evidence demonstrated that defendant engaged in mutual combat for several minutes from which defendant did not withdraw until injured. Roberts v. State, 215 Ga. App. 881, 452 S.E.2d 570 (1994).

**Court must charge on voluntary manslaughter as related to mutual combat where required by evidence.**

— Where participants engage with mutual intention to fight, offense may be voluntary manslaughter as related to mutual combat. If evidence authorizes an inference that killing occurred in circumstances last mentioned, it is the duty of judge, even without request, to give in charge the law of voluntary manslaughter as related to mutual combat. Loudermilk v. State, 129 Ga. App. 552, 200 S.E.2d 302 (1973).

## Jury Charge

### 1. In General

**Requirement for self-defense charge.** — When there was some evidence supporting defendant's claim of self-defense, defendant's sole defense, the trial court erred in refusing to give a self-defense charge, even absent a written request. *Printup v. State*, 217 Ga. App. 495, 458 S.E.2d 662 (1995).

As an instruction on unjustified self defense closely tracked the language of O.C.G.A. § 16-3-21, giving that instruction was not harmful, even when the exceptions described by O.C.G.A. § 16-3-21(b) did not apply. *Reese v. State*, 270 Ga. App. 522, 607 S.E.2d 165 (2004).

**Defendant pleading self-defense is not entitled to instruction on involuntary manslaughter.** — Defendant who seeks to justify homicide under O.C.G.A. § 16-3-21 is not entitled to an additional instruction on involuntary manslaughter in the course of a lawful act, whatever the implement of death. *Thomas v. State*, 174 Ga. App. 560, 330 S.E.2d 777 (1985).

**Self-defense instruction not warranted.** — In a prosecution for various offenses committed against an officer involving the defendant and the defendant's mother, because self-defense was not their only defense and both denied ever touching the officer, the trial court did not err in failing to charge the jury on self-defense; moreover, aside from the aforementioned, an oral request for the instruction was insufficient to require that instruction. *Curtis v. State*, 285 Ga. App. 298, 645 S.E.2d 705 (2007).

Because no construction of the evidence would support a finding that the defendant shot in self-defense pursuant to O.C.G.A. § 16-3-21(a), the trial court properly refused to charge on that issue; the defendant pointed to no evidence that the defendant entered a fracas between the victim and the victim's friend in defense of the friend, and the unarmed victim was shot three times in the back as the victim was attempting to flee after the defendant assaulted the victim with a firearm. *Hicks v. State*, 287 Ga. 260, 695 S.E.2d 195 (2010).

**Jury charge on defense of habitation.** — In a prosecution for aggravated assault, while the trial court charged the jury regarding the details of the defense of justification, because the evidence did not authorize the charge of defense of habitation, the instruction was properly denied; moreover, no evidence was presented to suggest that the victim used coercion or threats to gain entry into the defendant's residence. *Brimidge v. State*, 287 Ga. App. 23, 651 S.E.2d 344 (2007).

**Charging language of Code section sufficient.** — When the trial court has charged on self-defense in the language of O.C.G.A. § 16-3-21(a) and has also charged on the presumption of innocence and the state's burden of proving every element of the offense charged beyond a reasonable doubt, the trial court does not err by refusing defendant's request to charge that once the issue of self-defense is raised, the state has the burden of proving that defendant was not justified in using force likely to cause death or great bodily harm. *Hudson v. State*, 171 Ga. App. 181, 319 S.E.2d 28 (1984).

Although the defendant contended the trial court erred by failing to give defendant's requested charge on self-defense, since the court charged the jury on self-defense in the language of O.C.G.A. §§ 16-3-21 and 16-3-23, which is the law in Georgia, and those code provisions cover the same principles requested by defendant, it was not error to deny defendant's request to charge. *Cade v. State*, 180 Ga. App. 314, 348 S.E.2d 769 (1986).

Trial court did not err in charging the jury on self-defense even though the charge related to matters not in evidence since the charge to the jury was almost verbatim the pattern jury instruction contained in the Suggested Pattern Jury Instructions and was also almost verbatim to the provisions of O.C.G.A. § 16-3-21. *Washington v. State*, 194 Ga. App. 756, 391 S.E.2d 718 (1990).

When a defendant was charged with malice murder and possession of a firearm by a convicted felon, the charge given to the jury clearly provided a legal theory upon which the jury could acquit. *Cauley v. State*, 260 Ga. 324, 393 S.E.2d 246 (1990).

**Jury Charge (Cont'd)**  
**1. In General (Cont'd)**

Charge containing nearly precise language of O.C.G.A. § 16-3-21 and covering same principles as requested charge is adequate, and contention that the trial court did not give defendant's requested charge on the justifiable use of force in the defense of self or others is without merit. *Strickland v. State*, 250 Ga. 624, 300 S.E.2d 156 (1983).

In a case charging malice murder and felony murder, where the court instructed the jury in almost the exact language of O.C.G.A. § 16-3-21 and instructed that, if the defendant raised the issue of self-defense, the state would have the burden of proving that the accused did not act in self-defense and also that the state had the burden of proof and responsibility to prove each element beyond a reasonable doubt, it was not error for the court not to instruct the jury that if they believed the accused to have been justified, it would be their duty to acquit the accused. *Doss v. State*, 262 Ga. 499, 422 S.E.2d 185 (1992).

Trial court did not improperly instruct the jury on self-defense and using force to prevent a forcible felony in defendant's aggravated battery case, as the trial court gave defendant's requested instruction, which tracked the statutory language, and a defendant could not complain that an instruction that the defendant requested was improper. *Colbert v. State*, 263 Ga. App. 193, 587 S.E.2d 300 (2003).

In an aggravated assault case, contrary to defendant's assertion that the trial court's jury instruction on the law of self-defense erroneously imposed a requirement of absolute necessity, rather than reasonable necessity, the instruction, taken as a whole, was not reversible error because it included the statutory language of O.C.G.A. § 16-3-21(a), regarding justification. *Bailey v. State*, 263 Ga. App. 614, 588 S.E.2d 807 (2003).

**Charging entire Code section where only part is applicable.** — When evidence would have authorized jury finding that O.C.G.A. § 16-3-21(b)(1) is applicable, the trial court did not commit reversible error by charging entirety of section, which sets out circumstances

upon which defendant's use of force could not be said to have been justified. *Guevara v. State*, 151 Ga. App. 444, 260 S.E.2d 491 (1979).

Trial court's charging jury as to the entire language of O.C.G.A. § 16-3-21, even though the exceptions in subsection (b) were inapplicable under the facts of the case, did not impermissibly shift the burden of proof to defendant to disprove the existence of those exceptions. *Jolley v. State*, 254 Ga. 624, 331 S.E.2d 516 (1985).

It was not reversible error for the trial judge to give a charge on O.C.G.A. § 16-3-21, parts of which were applicable to the factual situation, even though a portion thereof was not specifically pertinent. *Diaz v. State*, 194 Ga. App. 577, 391 S.E.2d 140 (1990).

In a prosecution for felony murder, it was not error for the trial court to instruct the jury on all subsections of O.C.G.A. § 16-3-21 even though a part of the charge may have been inapplicable under the facts in evidence. *Lee v. State*, 265 Ga. 112, 454 S.E.2d 761 (1995).

Even though there was no evidence or contention that defendant initially provoked the victim's use of force with intent to use that force as an excuse to shoot the victim, inclusion of the instruction on that principle in the context of the entirety of the charge on justification did not mislead the jury or violate defendant's due process rights. *Lowe v. State*, 267 Ga. 410, 478 S.E.2d 762 (1996).

**Charge on self-defense and accident appropriate.** — In a murder case, the trial court did not err in charging the jury on both self-defense and accident because the evidence supported both charges. The defendant testified that the victim was threatening the defendant and that the defendant used a knife to force the victim to get back; the defendant also testified that the defendant did not mean to stab the victim and that the defendant did not understand how the knife became lodged in the victim's chest. *Hudson v. State*, 284 Ga. 595, 669 S.E.2d 94 (2008).

**When testimony shows appellant was aggressor, charge of justification is unnecessary absent request.** *Corder v. State*, 134 Ga. App. 316, 214 S.E.2d 404 (1975).

**Lack of evidence to support jury charge on justification.** — Because the defendant was on the victim's premises unlawfully and initiated violence by lunging at the victim, pursuant to O.C.G.A. §§ 16-3-23 and 16-3-24, the victim's efforts to defend the house and a mail truck were entirely legal; consequently, there was no evidence to support a jury charge on justification under O.C.G.A. § 16-3-21(a). *Robinson v. State*, 270 Ga. App. 869, 608 S.E.2d 544 (2004).

Trial court did not err in failing to instruct the jury on the defense of justified use of force in self-defense as defendant did not request the instruction and the trial court was not required to sua sponte instruct the jury on the defense as it was not defendant's sole defense; further, the evidence did not support giving the charge as the officers were making a lawful arrest based on probable cause, they had the right to use force reasonably necessary to make the arrest, and defendant had no right to resist the use of such reasonable force. *Mayfield v. State*, 276 Ga. App. 544, 623 S.E.2d 725 (2005).

When there was no evidence of any second encounter between the defendant and a victim involving a handgun, either in a codefendant's testimony or in another victim's testimony, and there was no evidence of any threat so as to have given rise to a reasonable belief that the defendant must shoot the victim in the back of the head to avoid death or great bodily harm, the trial court did not err by not charging the jury on justification during the defendant's trial for malice murder. *Hunter v. State*, 281 Ga. 693, 642 S.E.2d 668 (2007).

Trial court did not err in refusing to give a jury charge on justification because there was no evidence of any imminent threat of harm; although the defendant argued that the defendant's actions were justified because the defendant was trying to prevent the victim from using methamphetamine, which could cause harm to the victim and their unborn baby, the defendant pointed to no evidence that the victim used or threatened to use methamphetamine while the victim was pregnant with the child or to otherwise harm herself or the baby. *Morgan v. State*, 303 Ga. App. 358, 693 S.E.2d 504 (2010).

**Trial counsel not ineffective.** — Trial counsel did not provide ineffective assistance of counsel in failing to request a jury instruction on specific forcible felonies since even assuming that trial counsel was deficient, the defendant could not show prejudice as the trial court charged the jury on the presumption of innocence, reasonable doubt, the burden of proof, and the defense of justification, including that the definition of a forcible felony; the jury was fairly informed as to when a homicide was justified and there was not a reasonable probability that the jury would have reached a different result if an instruction on specific forcible felonies had also been given. *Lott v. State*, 281 Ga. App. 373, 636 S.E.2d 102 (2006).

## 2. Content

**Erroneous version of charge.** — Defendant was not entitled to a new trial on the basis that the court charged the jury with a garbled version of O.C.G.A. § 16-3-21(b)(1) and (b)(2), which addresses the circumstances under which a person is not justified in using force, since just before giving the garbled charge the trial court gave the defendant's requested charge on justification and the court's misstatement could not have harmed the defendant. *Boxer X v. State*, 237 Ga. App. 526, 515 S.E.2d 668 (1999).

**Charge covering elements of justifiable homicide need not include language of this section and O.C.G.A. § 16-3-24.** — When the charge given sufficiently instructed the jury on elements of justifiable homicide, in absence of any request to charge, or objection to charge, it was not error to fail to charge in language of former Code 1933, §§ 26-902 and 26-904. *Brooks v. State*, 227 Ga. 339, 180 S.E.2d 721 (1971) (see O.C.G.A. §§ 16-3-21 and 16-3-24).

**Failure to define "felony" as used in section.** — Failure to define word "felony", in jury charge in absence of request, is not such error as requires grant of new trial. *Fountain v. State*, 207 Ga. 144, 60 S.E.2d 433 (1950), overruled on other grounds, *Lavender v. State*, 234 Ga. 608, 216 S.E.2d 855 (1975) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Jury Charge (Cont'd)**  
**2. Content (Cont'd)**

**Word “excusable” should not be used in instruction on justifiable homicide.** Mixon v. State, 123 Ga. 581, 51 S.E. 580, 107 Am. St. R. 149 (1905) (decided under former Penal Code 1895, §§ 70, 71).

**Instruction which incorrectly imposed a higher threshold for justification of the killing, i.e., that the necessity for it be “absolute,” prejudiced defendants.** Gerald v. State, 189 Ga. App. 155, 375 S.E.2d 134 (1988); Bracewell v. State, 243 Ga. App. 792, 534 S.E.2d 494 (2000).

**Charge on preponderance of evidence to support defense under former Code 1933, § 26-902,** although authorized, is not required. Smith v. State, 232 Ga. 99, 205 S.E.2d 188 (1974) (see O.C.G.A. § 16-3-21).

**Charge need not instruct jury that it must acquit if it finds homicide justifiable.** — It is not error, in charging as to justifiable homicide, to fail to tell jury in general or specific terms that, if they find homicide justifiable, it is their duty to acquit. Lavender v. State, 234 Ga. 608, 216 S.E.2d 855 (1975).

**Self-defense killing need not be “absolutely necessary.”** — It is error to add to the charge of self-defense that the killing must have been “absolutely necessary” to save the slayer’s life. Murray v. State, 254 Ga. 351, 329 S.E.2d 485 (1985).

**Charge requiring flight or retreat and fear for own life.** — Trial court’s charge places a heavier burden on defendant than the law requires when it limits defense to consideration of whether defendant was in fear of own life and imposes a requirement of flight or retreat. Scott v. State, 141 Ga. App. 848, 234 S.E.2d 685 (1977).

**Defense entitled to jury charge as to retreat.** — When self-defense is the sole defense, and the issue of retreat is raised by the evidence or placed in issue, the defense is entitled to a charge on the principles of retreat even though O.C.G.A. § 16-3-21 is silent on the duty to retreat. Johnson v. State, 253 Ga. 37, 315 S.E.2d 871 (1984).

**Instruction on retreat not required absent evidence.** — Instruction on the

principle that a person who is not the original aggressor is under no duty to retreat was not required since “self-defense” was not the “sole defense” and the issue of retreat was not raised by the evidence or placed in issue. Wainwright v. State, 197 Ga. App. 43, 397 S.E.2d 456 (1990).

Since the issue of retreat was not raised by the evidence or placed in issue, the trial court did not err in failing to charge the jury on the duty to retreat. Ellis v. State, 245 Ga. App. 807, 539 S.E.2d 184 (2000).

Neither the prosecution nor the evidence raised the issue of retreat; thus, the trial court’s excessive force instruction without a no duty to retreat charge did not unduly stress the state’s contentions. Dukes v. State, 256 Ga. App. 236, 568 S.E.2d 151 (2002).

**Charge may include exceptions to justification.** — Even though justification can be a defense to felony murder in some situations, it was not error to include the exceptions of O.C.G.A. § 16-3-21(b)(2) in the jury charge where the court also charged the jury that “the defense of justification applies to each of the counts alleged ... except that charge dealing with theft by taking.” Williams v. State, 274 Ga. 371, 552 S.E.2d 814 (2001).

Because an instruction recited the language of O.C.G.A. § 16-3-21, giving that charge was not harmful, even when the exceptions described by § 16-3-21(b) did not apply. Hayles v. State, 287 Ga. App. 601, 651 S.E.2d 860 (2007).

**Instruction that justification was possible defense unwarranted.** — Since the Supreme Court has ruled that prevention of adultery does not justify the killing of an illicit lover by a spouse, and the Court of Appeals has ruled that mental anguish does not rise to the level of “great bodily harm” as it is used in O.C.G.A. § 16-3-21, an instruction that justification was a possible defense under O.C.G.A. § 16-3-20(6) was not authorized, and the trial court committed no error in refusing to give it. Chancellor v. State, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

Trial court was not obligated to instruct the jury as to a justification defense where the defendant tried to remain locked in defendant’s prison cell and injured a cor-

rections officer when the officer tried to get defendant out of the cell after the officer threatened to place the defendant in a padded cell if the defendant did not quit yelling. *Grant v. State*, 257 Ga. App. 678, 572 S.E.2d 38 (2002).

In a malice murder prosecution, the defendant's testimony that an unarmed person approached the defendant aggressively with the person's hands up did not establish that the defendant had a reasonable belief that stabbing the person in a manner likely to, and which did, cause death was necessary to prevent the defendant's own death or great bodily injury. Thus, the defendant was not entitled to a justification instruction under O.C.G.A. § 16-3-21(a). *Boyd v. State*, 284 Ga. 46, 663 S.E.2d 218 (2008).

**Defendant entitled to justification charge.** — Where the defendant's testimony provided "some" evidence in support of defendant's justification defense based on a claim of self-defense, the trial court's refusal to charge the jury on defendant's sole defense was reversible error, even though the defendant was a convicted felon and not authorized by law to possess a firearm. *Jones v. State*, 220 Ga. App. 784, 470 S.E.2d 326 (1996).

In a murder prosecution, the defendant was not entitled to a charge on self-defense, under O.C.G.A. § 16-3-21, because the trial court gave a complete charge on justification, much of which was in the language the defendant requested. *Gabriel v. State*, 280 Ga. 237, 626 S.E.2d 491 (2006).

**Defendant entitled to justification charge under § 16-3-20(6).** — Even though the trial court charged the jury on justification in the specific context of defense of self or a third person as provided in O.C.G.A. § 16-3-21(a) and defense of property as provided in O.C.G.A. § 16-3-24, such instruction alone failed to fairly present to the jury the law on defendant's theory of the case and defendant's defense of justification. The trial court erred in failing to charge justification under O.C.G.A. § 16-3-20(6) and in failing to charge the jury on the state's burden of proving the absence of the elements of a justification defense. *Nelson v. State*, 213 Ga. App. 641, 445 S.E.2d 543 (1994).

**Defendant not entitled to justification charge.** — Without any evidence that defendant's actions were justified, the trial court's obligation to instruct the jury on the defendant's sole defense of justification dissolved. The defendant must present some evidence justifying the use of deadly force and only then must the state disprove that defense beyond a reasonable doubt. *Porter v. State*, 272 Ga. 533, 531 S.E.2d 97 (2000).

Jury charge on self-defense, which informed the jury that an accused was not justified in committing an assault to avenge past wrongs, was adjusted to the evidence that the defendant had previous confrontations with the victim over a person of the opposite sex and that the defendant had threatened the victim via that person's cell phone before driving to the scene and confronting them; the trial court correctly instructed the jury that to the extent that the defendant's subsequent acts might have been motivated by resentment over the perceived slight, justification was not a viable defense. *Hall v. State*, 273 Ga. App. 203, 614 S.E.2d 844 (2005).

**When evidence indicated that defendant was aggressor**, charge on justification was gratuity to which defendant was not entitled, and the defendant could not therefore complain of any alleged error in the charge on justification. *Montgomery v. State*, 173 Ga. App. 570, 327 S.E.2d 770 (1985); *Park v. State*, 230 Ga. App. 274, 495 S.E.2d 886 (1998).

**Law of justifiable homicide and voluntary manslaughter need not be connected in charge.** — When law of voluntary manslaughter is involved under evidence, or is charged without exception by the defendant, and when law of justifiable homicide is involved, and instructions are given as to it, it is not error to fail to charge law of justifiable homicide in immediate connection with charge on general law of voluntary manslaughter. *Fann v. State*, 195 Ga. 368, 23 S.E.2d 399 (1942) (decided under former Penal Code 1895, §§ 70, 71).

**Charge covering self-defense, although inapplicable**, is not erroneous if not tending to destroy other defenses. *Adams v. State*, 214 Ga. 131, 103 S.E.2d

**Jury Charge (Cont'd)**  
**2. Content (Cont'd)**

550 (1958) (decided under former Code 1933, §§ 26-1011, 26-1012).

Although evidence would not have authorized verdict of justifiable homicide, where cross-examination of state's witnesses unsuccessfully attempted to show that deceased had a weapon, charge on justifiable homicide gave defendant benefit of defense to which defendant was not entitled and did not tend to destroy other defenses, and court did not err in so charging. Jones v. State, 197 Ga. 604, 30 S.E.2d 192 (1944) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Erroneous charge on justifiable homicide not cured by verdict of lesser grade of murder.** — Erroneous charge or failure to charge on accused's defense or defenses of justifiable homicide is not cured by verdict finding accused guilty of some lesser grade of offense than murder. McKibben v. State, 88 Ga. App. 466, 77 S.E.2d 86 (1953) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Charge on justifiable homicide not reversible error.** — When the defendant was charged with murder by shooting the deceased, and defendant denied any knowledge or connection therewith, thus making an issue of murder or nothing, it was error to submit by charge the question of justifiable homicide, but this was not reversible error as defendant was not injured thereby. Claybourn v. State, 190 Ga. 861, 11 S.E.2d 23 (1940) (decided under former Code 1933, §§ 26-1011, 26-1012).

When, in trial for murder, state proves killing as alleged in indictment, and accused defends upon ground that the accused did not commit the crime, and was not present at time of the crime's commission, it is not reversible error for the court to charge the law of justifiable homicide, when no injury is shown as a result thereof. Williams v. State, 199 Ga. 504, 34 S.E.2d 854 (1945) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Charge on mutual combat authorized by evidence.** — See McMichael v. State, 252 Ga. 305, 313 S.E.2d 693 (1984).

**Charge regarding mutual combat when there is no evidence of mutual**

**combat** is reversible error. Bivins v. State, 200 Ga. 729, 38 S.E.2d 273 (1946) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Defendant's claim of error in a mutual combat charge was rejected** as the charge redounded to the defendant's advantage as the charge enabled the jury to find a criminal defendant guilty of voluntary manslaughter in lieu of murder. Hall v. State, 273 Ga. App. 203, 614 S.E.2d 844 (2005).

**Erroneous charge on mutual combat related to self-defense not cured by verdict of voluntary manslaughter.** — If under facts of case a charge on mutual combat as applied to self-defense is required, and court fails so to charge or charges erroneously, verdict of voluntary manslaughter will not cure error. McKibben v. State, 88 Ga. App. 466, 77 S.E.2d 86 (1953); Patton v. State, 93 Ga. App. 575, 92 S.E.2d 219 (1956) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Failure to charge mutual combat and self defense.** — The trial court did not err by failing to charge the jury on mutual combat and self defense where the defendant and three other men entered a barber shop, demanded money, and started fighting with people in the barber shop resulting in one of the other men shooting and killing a person when the person attempted to flee and the defendant shooting and seriously wounding another person who threw a radio at the defendant in an attempt to prevent the defendant from injuring the person's nephew. Johnson v. State, 275 Ga. 630, 570 S.E.2d 309 (2002).

**Charge to jury on self-defense in relation to mutual combat** was incorrect where it did not set forth the standard by which the jury was to judge the defendant's behavior if mutual intention to fight was present. McCord v. State, 176 Ga. App. 505, 336 S.E.2d 371 (1985).

**Evidence supported decision to instruct jury on self-defense.** — Evidence that a person who was engaged to marry the mother of the defendant's child got into a fight with the defendant was sufficient to warrant an instruction on self-defense, even though the defendant

testified that the defendant did not fire the shot that struck the mother's fiancé, and the trial court did not err because it instructed the jury on self-defense, even though the defendant did not request that instruction. *Hendrix v. State*, 268 Ga. App. 455, 602 S.E.2d 133 (2004).

**Court's refusal to charge on involuntary manslaughter not erroneous.**

— See *Lancaster v. State*, 250 Ga. 871, 301 S.E.2d 882 (1983); *Rhodes v. State*, 170 Ga. App. 473, 317 S.E.2d 285 (1984).

**Charge on specific forcible felony.**

— When prevention of a forcible felony is charged as justification and defendant requests a charge on the specific forcible felony of which there is evidence, it is error to fail to charge the elements of such a felony as it relates to justification. *Wiseman v. State*, 249 Ga. 559, 292 S.E.2d 670 (1982).

When the defendant did not testify that the fatal shot was fired to prevent the commission of a forcible felony against the defendant, this legal concept was not reasonably raised by the evidence, and the trial court, in omitting the words "or to prevent the commission of a forcible felony" from the court's charge to the jury, did not err, since a court can decline to give a charge that is misleading, confusing, or not adequately raised or authorized by the evidence. *Brown v. State*, 236 Ga. App. 166, 511 S.E.2d 276 (1999).

On appeal from a conviction for voluntary manslaughter as a lesser-included offense of malice murder, the appeals court found that no error or prejudice resulted from the trial court's denial of the defendant's request for an aggravated battery charge as a forcible felony in support of the defendant's justification claim, and affirmed the trial court's choice to charge on aggravated assault and rape as the defendant failed to present evidence of any reasonable belief that the use of force was necessary to prevent the commission of an aggravated battery. *Wicker v. State*, 285 Ga. App. 294, 645 S.E.2d 712 (2007).

In an aggravated assault case in which the defense was justification under O.C.G.A. § 16-3-21(a), trial counsel was not ineffective for failing to request a charge defining aggravated battery under O.C.G.A. § 16-5-24(a), as a forcible felony

for which the use of force was justified. Also, there was no showing that the outcome of the trial would have been different if such a charge had been given. *Lewis v. State*, 302 Ga. App. 506, 691 S.E.2d 336 (2010).

**Charge as to felony after charge that force is not justified before, at, or after felony.** — The trial court did not err in charging the jury that the sale of marijuana is a felony after charging that a person is not justified in using force if the person "is attempting to commit, committing, or fleeing after the commission of a felony." The latter portion of the charge tracks O.C.G.A. § 16-3-21(b)(2). *Howard v. State*, 165 Ga. App. 555, 301 S.E.2d 910 (1983).

**Defense of third party charge not justified.** — Trial court did not err in failing to give a jury charge on the defense of a third party; as defendant was a party to an armed robbery, the evidence did not show that defendant was justified in the use of deadly force and the evidence did not warrant such charge. *Reynolds v. State*, 275 Ga. 548, 569 S.E.2d 847 (2002).

**Family violence or child abuse.** — Modified jury instruction on justification should be given in all battered person syndrome cases, when authorized by the evidence and requested by defendant, to assist the jury in evaluating the battered person's defense of self-defense. *Smith v. State*, 268 Ga. 196, 486 S.E.2d 819 (1997), reversing *Smith v. State*, 222 Ga. App. 412, 474 S.E.2d 291 (1996).

**Charge on battered person syndrome.** — Because the evidence showed that defendant had been abused by the victim, defendant's stepfather, and an expert witness testified that defendant suffered from battered person syndrome, the requirements for requesting a charge on battered person syndrome were met. *Freeman v. State*, 269 Ga. 337, 496 S.E.2d 716 (1998).

Defendant who sought to justify killing a victim by battered person syndrome was not entitled to an additional instruction on involuntary manslaughter resulting from the commission of a lawful act in an unlawful manner under O.C.G.A. § 16-5-3(b) because if the act was justified, it was not a crime, and if not justified,

**Jury Charge (Cont'd)**  
**2. Content (Cont'd)**

it was not a lawful act. *Demery v. State*, 287 Ga. 805, 700 S.E.2d 373 (2010).

A "first aggressor" charge was justified by evidence that the victim's verbal tirade was delivered from the victim's own property, a substantial distance from defendant's home, and that defendant drove to a location adjacent to the victim's property and gestured the victim to come to where the defendant was located. *Johnson v. State*, 229 Ga. App. 586, 494 S.E.2d 382 (1997).

**Jury instruction on voluntary manslaughter not erroneous.** — When there is evidence raising doubt, however slight, as to whether a homicide was murder or voluntary manslaughter, it is not error for the court to instruct the jury upon the law of voluntary manslaughter. *Lee v. State*, 167 Ga. App. 59, 306 S.E.2d 57 (1983).

Fact that the defendant claimed self-defense under O.C.G.A. § 16-3-21 did not preclude a charge on voluntary manslaughter. The defendant was in effect asking the court to re-weigh the evidence to give greater credence to the defendant's self-defense justification than did the jury. *Branford v. State*, 299 Ga. App. 890, 685 S.E.2d 731 (2009).

**Defendant not entitled to instruction on involuntary manslaughter.** — Defendant who seeks to justify homicide under O.C.G.A. § 16-3-21 is not entitled to an additional instruction on involuntary manslaughter in the course of a lawful act, O.C.G.A. § 16-5-3(b), whatever the implement of death. For if defendant is justified in killing under O.C.G.A. § 16-3-21, defendant is guilty of no crime at all. If defendant is not so justified, the homicide does not fall within the "lawful act" predicate of § 16-5-3(b), for the jury, in rejecting defendant's claim of justification, has of necessity determined thereby that the act is not lawful. *Saylor v. State*, 251 Ga. 735, 309 S.E.2d 796 (1983); *Thompson v. State*, 257 Ga. 481, 361 S.E.2d 154 (1987); *Kennedy v. State*, 193 Ga. App. 784, 389 S.E.2d 350, cert. denied, 193 Ga. App. 910, 389 S.E.2d 350 (1989); *Nobles v. State*, 201 Ga. App. 483, 411 S.E.2d 294,

cert. denied, 201 Ga. App. 904, 411 S.E.2d 294 (1991).

Defendant in a murder trial who argued that defendant's actions were lawful in defending self with an ax but did so in an unlawful manner, in that the force used was excessive, and who received a self-defense instruction, was not entitled to an additional charge of the lesser included offense of involuntary manslaughter in the commission of a lawful act in an unlawful manner. *Jordan v. State*, 171 Ga. App. 558, 320 S.E.2d 395 (1984); *Wilson v. State*, 176 Ga. App. 322, 335 S.E.2d 888 (1985).

In a murder prosecution, as defendant claimed the defendant killed the victim in self-defense, the defendant was not entitled to an additional instruction on involuntary manslaughter in the course of a lawful act under O.C.G.A. § 16-5-3(b) since if the defendant was justified in killing under the self-defense statute, O.C.G.A. § 16-3-21, the defendant was guilty of no crime at all; but if the defendant was not so justified, the homicide did not occur in the course of a lawful act. *Hooper v. State*, 284 Ga. 824, 672 S.E.2d 638 (2009).

**Failure to charge on self-defense when it constitutes defendant's only defense is reversible error.** *Jackson v. State*, 154 Ga. App. 867, 270 S.E.2d 76 (1980).

**Failure to charge on defense of others constituted error.** — Trial court erred in failing to give a requested charge on the right to use force in the defense of others, where a jury question existed as to whether defendant reasonably believed it was necessary to shoot the victim in order to prevent "great bodily injury" to the defendant's sons, which was the defendant's principal defense at trial. *Wainwright v. State*, 197 Ga. App. 43, 397 S.E.2d 456 (1990).

**Charge on self-defense unauthorized where defendant returned to scene after imminent danger had passed.** — When any imminent danger justifying self-defense passed by the time the defendant returned to the scene of the altercation, the evidence was insufficient to authorize a requested charge on self-defense. *Loggins v. State*, 147 Ga.

App. 122, 248 S.E.2d 191 (1978).

**Defendant not entitled to instruction on self-defense or mutual combat.** — See *Penn v. State*, 224 Ga. App. 616, 481 S.E.2d 602 (1997).

**Court need not charge paragraph (b)(3) absent withdrawal or communication of intent to withdraw.** — Court is not required to charge former Code 1933, § 26-902 when there was never any withdrawal by defendant, nor any communication from defendant that defendant so intended when defendant continued to hold a gun aimed at another party and that party, in obedience to defendant's command, had put the gun in that party's pocket. *Hall v. State*, 124 Ga. App. 381, 183 S.E.2d 917 (1971) (see O.C.G.A. § 16-3-21(b)(3)).

**Recharge.** — Trial court did not err in failing to recharge the entire Suggested Pattern Jury Charge on justification. The jury asked the trial court to redefine justification, not to repeat the entire charge. *Branford v. State*, 299 Ga. App. 890, 685 S.E.2d 731 (2009).

### Application

**Burden of proof.** — When the defense of self-defense is made, the better practice is to specifically advise the jury that the burden of proof with regard to the offense is on the state and is not on the defendant to prove the defense. *Jolly v. State*, 164 Ga. App. 240, 296 S.E.2d 784 (1982).

Because the defendant failed in the burden of proving that the evidence of specific acts of violence by the victim should be admitted, and testimony did not establish that the event occurred before the defendant's attack on the victim, the trial court's ruling that there was no evidence to support a defense of justification was not clearly erroneous. *Cross v. State*, 285 Ga. App. 518, 646 S.E.2d 723 (2007), cert. denied, 2007 Ga. LEXIS 680 (Ga. 2007).

Trial court did not err by granting the defendant's motion for immunity from prosecution pursuant to O.C.G.A. § 16-3-24.2 because the court's determination that the defendant was immune from prosecution since the defendant acted in self-defense under O.C.G.A. § 16-3-21(a) in discharging the defendant's service weapon, although based

upon conflicting evidence, was supported by a preponderance of the evidence. *State v. Bunn*, 288 Ga. 20, 701 S.E.2d 138 (2010).

**Justifiable homicide may exist when one kills another other than in defense of own life.** — *Smith v. State*, 215 Ga. 51, 108 S.E.2d 688 (1959) (decided under former Code 1933, §§ 26-1011, 26-1012).

**One may kill to protect sister from death or serious bodily injury, real or apparent,** and may be justified. *Willingham v. State*, 72 Ga. App. 372, 33 S.E.2d 721 (1945) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Killing in defense of another requires same danger as killing in self-defense.** — To justify homicide in defense of relative, danger must be impending. *Hill v. State*, 64 Ga. 453 (1880) (decided under former Code 1873, §§ 4330, 4331).

In order for defendant to be justified in killing deceased to protect defendant's sister, the sister's life or person would have to be in same sort of peril that defendant's own life would be in if defendant was killing in defense of self. *Moody v. State*, 47 Ga. App. 1, 169 S.E. 541 (1933) (decided under former Penal Code 1910, §§ 70, 71).

**Former Code 1933 § 26-1015 was inapplicable where facts show that danger to relative was not impending.** *Ingram v. State*, 204 Ga. 164, 48 S.E.2d 891 (1948) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Absolute necessity to kill is not test** by which to determine whether homicide was justifiable when defense of justifiable homicide under fears of a reasonable man is involved. *McCray v. State*, 134 Ga. 416, 68 S.E. 62, 20 Ann. Cas. 101 (1910) (decided under former Penal Code 1895, §§ 70, 71).

**It is unnecessary that slayer retreat where the slayer is free from fault and acts under fears of a reasonable man.** *Glover v. State*, 105 Ga. 597, 31 S.E. 584 (1898) (decided under former Penal Code 1895, §§ 70, 71).

**Assertion of self-defense by provoker.** — When it was the defendant who began hitting the victim, pinned the vic-

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tim to the floor, and continued to administer a beating, the evidence presented was sufficient to prove defendant did not act in self-defense in subsequently stripping victim of the unloaded shotgun and employing the shotgun upon the victim as a club. *Syfrett v. State*, 210 Ga. App. 185, 435 S.E.2d 470 (1993).

Evidence was sufficient to support a defendant's convictions for aggravated assault because the defendant was involved with other members of a rap group in settling a previous altercation with a rival rap group, the defendant and others drove into an assigned park where the meeting was to be held, the defendant admitted to firing gunshots, and although others also had guns and fired shots, the defendant was liable under O.C.G.A. § 16-2-20 for injuries and a death to bystanders; the defendant could not assert self-defense under O.C.G.A. § 16-3-21(b)(3) because the defendant was the aggressor. *Taylor v. State*, 296 Ga. App. 212, 674 S.E.2d 81 (2009).

**To deliberately kill in revenge for past injury**, however heinous, cannot be justifiable after reason has had time to resume its sway. *Mize v. State*, 135 Ga. 291, 69 S.E. 173 (1910) (decided under former Penal Code 1895, §§ 70, 71); *Ward v. State*, 25 Ga. App. 296, 103 S.E. 726 (1920) (decided under former Penal Code 1910, §§ 70, 71).

**Aggressor may defend himself where provoked party responds with disproportionate force.** — One who provokes a difficulty may yet defend self against violence on part of one provoked, if violence is disproportionate to seriousness of provocation or greater in degree than the law recognizes as justifiable under the circumstances. *Sams v. State*, 124 Ga. 25, 52 S.E. 18 (1905) (decided under former Penal Code 1895, §§ 70, 71); *Bennett v. State*, 19 Ga. App. 442, 91 S.E. 889 (1917) (decided under former Penal Code 1910, §§ 70, 71).

**Homicide to prevent serious personal injury not amounting to felony upon person killing** is not justified. *Carter v. State*, 92 Ga. App. 68, 87 S.E.2d 655 (1955) (decided under former Code

1933, §§ 26-1011, 26-1012).

**Killing committed under fears of injury less than a felony is manslaughter.** — If one kills another, under fears of a reasonable man, that deceased was manifestly intending to commit a personal injury upon the defendant, amounting to felony, the killing is justifiable homicide; if one is under similar fears of some injury less than a felony, the offense is manslaughter, and not murder. *McDaniel v. State*, 209 Ga. 827, 76 S.E.2d 500 (1953) (decided under former Code 1933, §§ 26-1011, 26-1012).

**Words, threats, and other verbal menaces may be sufficient to justify homicide.** Cumming v. State, 99 Ga. 662, 27 S.E. 177 (1896); Holland v. State, 3 Ga. App. 465, 60 S.E. 205 (1908); Fallon v. State, 5 Ga. App. 659, 63 S.E. 806 (1909); Davis v. State, 7 Ga. App. 822, 68 S.E. 319 (1910); Griggs v. State, 17 Ga. App. 301, 86 S.E. 726 (1915).

**Words, threats and other verbal menaces must be accompanied by immediate danger to justify homicide.** Roberts v. State, 65 Ga. 430 (1880).

**Killing must stem from reasonable fears and not from spirit of revenge.** — It must appear that circumstances were sufficient to excite fears of a reasonable man, and that party killing really acted under influence of those fears, and not in a spirit of revenge. *Gordy v. State*, 93 Ga. App. 743, 92 S.E.2d 737 (1956).

**Unreasonable apprehension or suspicion of harm.** — Juvenile defendant was not authorized to stab the victim under O.C.G.A. § 16-3-21(a), where defendant was attacked by the victim from behind with the victim's fists, and could see that the victim did not have a weapon; defendant's belief that defendant's own life was in danger was a mere unreasonable apprehension or suspicion of harm which was insufficient to justify the use of deadly force, and defendant was properly adjudicated a delinquent for aggravated assault under O.C.G.A. § 16-5-21(a)(2) and for carrying a weapon onto a school bus under O.C.G.A. § 16-11-127.1(b). In re Q.M.L., 257 Ga. App. 22, 570 S.E.2d 92 (2002).

**Battered woman syndrome** does not stand as a separate defense but rather is

evidentiary support for a claim of justification under O.C.G.A. § 16-3-21(d). *Adame v. State*, 244 Ga. App. 257, 534 S.E.2d 817 (2000).

Since the evidence did not rise to the level of battering necessary to rely on the battered person syndrome as a basis for a self-defense claim, the trial court did not err in preventing defendant's expert from giving an opinion that defendant suffered from the battered person syndrome. *Adame v. State*, 244 Ga. App. 257, 534 S.E.2d 817 (2000).

**When presence of spirit of revenge does not preclude justification.** — When one contends that one acted under fears of a reasonable man, it must appear that one did act under such fears, and not in a spirit of revenge. However, if one must take one's adversary's life in order to save one's own or to prevent commission of a felony upon one's person, property, or habitation, then it matters not what feelings of malice or revenge one may also entertain. *Crolger v. State*, 88 Ga. App. 566, 77 S.E.2d 98 (1953).

**Section applies to force used in making lawful arrest.** — One making a lawful arrest is justified in killing under fears of a reasonable man that a felony is about to be committed upon self or a fellow officer. *Gordy v. State*, 93 Ga. App. 743, 92 S.E.2d 737 (1956).

**Section applies to force used in resisting unlawful arrest.** — Citizen upon whom an unlawful arrest is attempted has a right to resist force with force proportionate to that being used to arrest that citizen, and if, in exercise of such right of resistance, the citizen kills an officer who is unlawfully attempting to arrest the citizen, then the citizen is guilty of no offense. *Perdue v. State*, 5 Ga. App. 821, 63 S.E. 922 (1909), later appeal, 134 Ga. 300, 67 S.E. 810; 135 Ga. 277, 69 S.E. 184 (1910).

If arrest sought to be made is unlawful, person sought to be arrested has right to resist, and, if such person is in the right, and under fears of a reasonable man expects a felony to be committed upon self, then the person has the right to resist up to point of slaying those seeking unlawfully to arrest the person. *Mullis v. State*, 196 Ga. 569, 27 S.E.2d 91 (1943); *Gordy v.*

*State*, 93 Ga. App. 743, 92 S.E.2d 737 (1956).

**Homicide in defending self against robbery may be justified.** — Violent taking of money or property from person of another by force or intimidation for purpose of applying same to payment of debt, to which money or property taker has no bona fide claim of title or right of possession, constitutes offense of robbery. Resistance by armed force of an actual attempt to commit such a robbery would be justifiable provided that "the circumstances were sufficient to excite the fears of a reasonable man" that such an offense was about to be committed, and that the party killing really acted under influence of those fears, and not in a spirit of revenge. *Daniel v. State*, 187 Ga. 411, 1 S.E.2d 6 (1939).

**When blow with fist may be repelled by stabbing.** — Unless there is great superiority in physical strength of assailant, who strikes another a blow with the assailant's fist, or ill-health in the assailed at the time, or other circumstance producing relatively great inequality between them in combat, the assailed party cannot justifiably repel the blow by stabbing the assailant. The general rule is, that whether stabbing is in self-defense depends on nature and violence of assault made on the person who stabs. *Hix v. State*, 48 Ga. App. 845, 174 S.E. 157 (1934).

**Admissibility of uncommunicated threat by deceased against defendant.** — Threat made by deceased against defendant, uncommunicated before homicide, is not admissible on trial of case involving question whether or not slayer was justified in taking life of deceased, unless there is evidence tending to show that deceased began mortal conflict, and that defendant killed in self-defense. *Slater v. State*, 76 Ga. App. 209, 45 S.E.2d 106 (1947).

**Previous, uncommunicated threats are not admissible to show justification.** *Hoye v. State*, 39 Ga. 718 (1869).

**Admissibility of conduct and condition of deceased and its influence upon accused.** — Conduct and condition of deceased shortly before fatal encounter, and influence of this conduct or condition

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upon mind of accused, are relevant as being illustrative not only of reasonableness of the accused's fears, but also as indicating the motive of deceased, although previous difficulty may have been between deceased and a third person. Dunn v. State, 16 Ga. App. 9, 84 S.E. 488 (1915).

**Jury might consider size and physical condition of parties**, but it would be erroneous for judge to instruct them that they should consider such disparity. Alexander v. State, 118 Ga. 26, 44 S.E. 851 (1903).

**Defenselessness of person whose life is in danger may be considered.** Gillis v. State, 8 Ga. App. 696, 70 S.E. 53 (1911).

**Whether fists and feet can be dangerous weapons under certain circumstances** is not material to the issue of self-defense. The determining factor in self-defense is not whether the victim was using a deadly weapon, but whether the actor reasonably believed the amount of force used was necessary to prevent death or great bodily harm to self. Ellis v. State, 168 Ga. App. 757, 309 S.E.2d 924 (1983).

**Defendant may establish self-defense with same type evidence that prosecution uses in establishing guilt.** — If state can exhibit victim's ear to jury, and can exhibit gruesome pictures of victim to jury, then defendant should be allowed to show jury a picture of defendant's chest. If state can prove defendant's prior crimes to show defendant's intent and motive, then defendant should be allowed to prove crimes previously committed against the defendant to show defendant's intent and motive in defending self. The jury can decide, when informed of all circumstances surrounding attack, whether defendant's actions meet "reasonable man" standard. Daniels v. State, 248 Ga. 591, 285 S.E.2d 516 (1981).

**Evidence of specific acts of violence of victim known to defendant admissible.** — Defendant on trial for murder of stepfather was entitled to introduce evidence of specific acts of violence of defendant's stepfather, directed at defendant's mother, of which defendant had knowl-

edge. Strickland v. State, 250 Ga. 624, 300 S.E.2d 156 (1983).

**When use of force not justified.** — Person is not justified in using force if the person initially provokes the use of force against self with the intent to use such force as an excuse to inflict bodily harm upon the assailant; or if the person was the aggressor or was engaged in a combat by agreement unless the person withdraws from the encounter and effectively communicates to such other person an intent to do so and the other, notwithstanding, continues or threatens to continue the use of unlawful force. Lee v. State, 167 Ga. App. 59, 306 S.E.2d 57 (1983).

Defendant convicted of aggravated assault was not entitled to a new trial based on self-defense because a jury could find that: (1) the defendant had no reasonable belief that it was necessary to shoot the victim to protect the defendant; (2) the defendant started the argument and used it as an excuse to shoot the victim; or (3), the two were engaged in mutual combat from which the defendant did not withdraw, each of which negated a self-defense claim. Giddens v. State, 276 Ga. App. 353, 623 S.E.2d 204 (2005).

**Lawful arrest.** — Where the arrest of the defendant's spouse is legal, the defendant's actions in obstructing an officer in "defense" of the spouse are not "justified." Perano v. State, 167 Ga. App. 560, 307 S.E.2d 64 (1983).

**When force used exceeds that necessary for self-defense, the law considers the defender the aggressor** and if the defensive act results in homicide the offense is at least manslaughter. Spradlin v. State, 151 Ga. App. 585, 260 S.E.2d 517 (1979), overruled on other grounds, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599 (1991), overruled on other grounds, Stewart v. State, 262 Ga. App. 426, 585 S.E.2d 622 (2003).

**Continued firing on fatally wounded person.** — Person who fatally wounds another, even in self-defense, is not entitled to hasten the victim's death by continuing to pump bullets into the victim's body. Brown v. State, 249 Ga. 805, 294 S.E.2d 510 (1982).

**From evidence, jury could believe defendant provoked victim's attack**

**as an excuse to kill her.** — See *Taylor v. State*, 252 Ga. 125, 312 S.E.2d 311 (1984).

**Admissibility of evidence of deceased's prior use of weapons in assaulting defendant.** — When the defendant has made a *prima facie* showing of basis for reasonable belief that defendant had to use deadly force to defend self, defendant is entitled to introduce in evidence own testimony and that of defendant's witnesses to prove specific instances in which deceased had used a firearm or other weapons or object to assail defendant, even in cases of doubt. The lapse of time between prior occurrences and homicide, conduct of parties toward each other during intervals between occurrences, and other such matters go to weight and credit to be accorded testimony by jury and not to its admissibility. *Milton v. State*, 245 Ga. 18, 262 S.E.2d 789 (1980).

**Exclusion of tape-recorded threats by victim held harmless error.** — Erroneous exclusion of a tape recording in which the victim allegedly made threats against defendant and defendant's girl friend was harmless, where the victim appeared to have been intoxicated and it was doubtful whether the victim's statements would have aroused the fears of a reasonable man. *McDonald v. State*, 182 Ga. App. 509, 356 S.E.2d 264 (1987).

**There is no substantial difference between phrases "serious personal injury" and "great bodily injury."** *Williams v. State*, 126 Ga. App. 454, 191 S.E.2d 100 (1972).

**Stabbing of victim not self-defense.** — The state presented sufficient evidence that defendant did not act in self-defense and that defendant was guilty of aggravated assault, where defendant attempted to justify stabbing the victim by stating that on a previous occasion, the victim displayed a sawed-off shotgun and that on the night of the assault, defendant thought the victim had a knife. *Parham v. State*, 204 Ga. App. 659, 420 S.E.2d 356 (1992).

Despite the defendant's claim that the state failed to disprove a claim of self-defense, the appeals court upheld the defendant's aggravated assault conviction, because sufficient evidence was pre-

sented by the state to allow the jury to decide that the defendant's act of stabbing the weaponless victim amounted to excessive force. Thus, the defendant's motion for a new trial on the issue was properly denied. *Richards v. State*, 288 Ga. App. 814, 655 S.E.2d 690 (2007).

Defendant was not entitled to a directed verdict of acquittal on a voluntary manslaughter count predicated on the defendant's claim of self-defense, O.C.G.A. § 16-3-21(a), because the evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of voluntary manslaughter in violation of O.C.G.A. § 16-5-2(a) and to enable a rational trier of fact to find that the defendant's stabbing of the victim was not justified as an act of self-defense; under O.C.G.A. § 24-4-8, a neighbor's eyewitness testimony, standing alone, was sufficient to support a finding that the defendant was the aggressor, continued to use force after any imminent danger posed by the victim had passed, or used excessive force, and the jury also was entitled to rely upon evidence that the defendant lied to the police about the stabbing and hid the knife. *Muckle v. State*, 307 Ga. App. 634, 705 S.E.2d 721 (2011).

**Self-defense may be a defense to felony murder.** *Heard v. State*, 261 Ga. 262, 403 S.E.2d 438 (1991).

**Homicide resulting solely from resentment of provoking threats is not justified.** — Provocation by threats is insufficient to free person killing from crime of murder, nor will it reduce homicide from murder to manslaughter, when killing is done solely for purpose of resenting provocation thus given. *Davenport v. State*, 245 Ga. 845, 268 S.E.2d 337 (1980).

**Trespass amounts only to a misdemeanor and does not justify killing the trespasser.** *Washington v. State*, 245 Ga. 117, 263 S.E.2d 152 (1980).

**When one intentionally shoots at another in self-defense,** defense of accidental killing is generally not involved. *Henderson v. State*, 153 Ga. App. 801, 266 S.E.2d 522 (1980).

**Evidence authorized jury to believe that the defendant did not act in self-defense.** — See *Steele v. State*, 166

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Ga. App. 24, 303 S.E.2d 462 (1983); *Knight v. State*, 271 Ga. 557, 521 S.E.2d 819 (1999); *Williams v. State*, 245 Ga. App. 670, 538 S.E.2d 544 (2000).

Whether defendant was justified in using force that was intended or likely to cause death or great bodily injury to defend another or oneself, under O.C.G.A. § 16-3-21(a), was a matter for the jury to determine, and it reasonably found that defendant was not justified in using such force. *Gray v. State*, 257 Ga. App. 393, 571 S.E.2d 435 (2002).

Jury was free to accept the evidence that the shootings were not done in self-defense or in defense of another person, including the defendant's own inculpatory statements, and to reject any evidence offered by the defendant in support of a justification defense. *Harris v. State*, 279 Ga. 304, 612 S.E.2d 789 (2005).

Evidence was sufficient for the jury to reject the defendant's claim of self-defense and to support the defendant's aggravated assault and possession of a firearm during the commission of a crime conviction because, *inter alia*, two witnesses yelled at the defendant to put the gun away, but the defendant shot the victim a second time, the defendant testified that the defendant believed that the victim was holding a weapon behind the victim's leg when the victim got out of the car and that the defendant heard someone yell "bust," which the defendant understood to mean "shoot," and another witness heard no such statement and did not see anything in the victim's hands when the victim exited the car. *Hill v. State*, 276 Ga. App. 874, 625 S.E.2d 108 (2005).

While the defendant and the codefendant insisted that their victim had a gun, no other witness saw the victim with a gun, and no such gun was found at the scene of the victim's shooting death; there was evidence that the defendant chased the victim as the victim ran away and shot the victim from behind, so the jury was entitled to reject the defendant's claims of self-defense and defense of another, and the evidence supported the defendant's convictions of voluntary manslaughter, O.C.G.A. § 16-5-3, and possession of a

firearm during the commission of a crime, O.C.G.A. § 16-11-106. *Windham v. State*, 278 Ga. App. 663, 629 S.E.2d 837 (2006).

When the unarmed victim advanced on the defendant, who had a baseball bat, and the defendant swung twice at the victim, then hit the victim on the head with the bat after the victim lost the victim's balance, the jury at the defendant's aggravated assault trial was entitled to conclude that the defendant was not justified in using force greater than that necessary for self-defense; the evidence, including the defendant's bragging at a party that night about the incident and telling an acquaintance a few days later that the acquaintance was "riding with a murderer," supported the conviction. *Fields v. State*, 285 Ga. App. 345, 646 S.E.2d 326 (2007).

There was sufficient evidence for the jury to find the defendant guilty of felony murder and of aggravated assault and to reject the defendant's self-defense claim; the defendant, who had broken up with the victim, followed the victim as the victim left defendant's apartment, stabbed the victim twice with a nine-inch knife when the victim turned to face defendant without the victim striking the defendant, pulling a weapon, or yelling at the defendant, and the defendant claimed that the defendant had retrieved the knife in self-defense, then followed the victim out of the apartment, down the stairs, and into a parking lot where the defendant stabbed the victim. *Ganaway v. State*, 282 Ga. 297, 647 S.E.2d 590 (2007).

Evidence was sufficient to support a jury's determination that the defendant's fatal shooting of a victim following the parties' altercation and the victim's subsequent punch in the defendant's face constituted voluntary manslaughter, in violation of O.C.G.A. § 16-5-2(a), as there was no evidence that the victim had a gun at the time of the shooting incident and the defendant gave conflicting versions of the incident; the jury acted within the jury's province in rejecting the defendant's claim of self-defense pursuant to O.C.G.A. § 16-3-21(a). *Thomas v. State*, 296 Ga. App. 231, 674 S.E.2d 96 (2009).

Evidence plainly was sufficient to authorize a rational trier of fact to find the

defendant guilty beyond a reasonable doubt of aggravated assault with a deadly weapon in violation of O.C.G.A. § 16-5-21(a)(2) and battery in violation of O.C.G.A. § 16-5-23.1(a) because the state presented more than ample evidence that the defendant's use of force was not justified under O.C.G.A. § 16-3-21(a); based upon the victim's testimony and the victim's prior statement to the responding officer, the jury clearly was authorized to find that the defendant's acts of grabbing the victim by the hair, throwing the victim to the ground, and choking the victim to the point of unconsciousness constituted excessive force, and the prior and subsequent difficulties evidence and the similar transaction evidence the state presented supported the jury's decision to give little credence to the defendant's self-defense claim. *Whitley v. State*, 307 Ga. App. 553, 707 S.E.2d 375 (2011).

**Evidence authorized jury to believe defendant used excessive force.** — In a case in which the only issue was whether, under O.C.G.A. § 16-3-21(a), the defendant was justified in shooting the victim, the jury was authorized to conclude that the defendant used excessive force because the defendant shot the victim in response to the victim having punched the defendant; thus, the evidence was sufficient to support the defendant's felony murder conviction based on the underlying felony of aggravated assault. *Nelson v. State*, 283 Ga. 119, 657 S.E.2d 201 (2008).

**Evidence of the dangerous environment surrounding defendant's apartment complex**, offered to prove defendant's defense of justification when defendant fired at police officers who were serving a warrant, was properly excluded absent testimony showing defendant had the requisite state of mind to support a self-defense theory. *Bowman v. State*, 222 Ga. App. 893, 476 S.E.2d 608 (1996).

**Actions deemed attempt to escape not self-defense.** — Defendant's use of force that damaged a police car and which was not against another person and occurred sometime after the alleged unlawful arrest could not be said to have been in self-defense, but was actually an attempt to escape. *Hack v. State*, 168 Ga. App. 927,

311 S.E.2d 211 (1983).

**No evidence of confrontation.** — In a prosecution for malice murder, evidence that the murder victim refused to remove the victim's hand from pants pocket upon request and possibly threw a paper cup at defendant is not evidence of a confrontation between the two men sufficient to support a charge on justification. *Burgess v. State*, 264 Ga. 777, 450 S.E.2d 680 (1994), cert. denied, 515 U.S. 1133, 115 S. Ct. 2559, 132 L. Ed. 2d 813 (1995).

**Evidence of justification.** — Trial court properly held that the defendant, who was charged with family violence battery and simple battery under O.C.G.A. §§ 16-5-23.1(f) and 16-5-23, was immune from prosecution under O.C.G.A. § 16-3-24.2. The testimony of the defendant's friend that the defendant restrained the friend after the friend broke the defendant's windshield and kicked a car seat, knocking the defendant into the steering wheel, provided some evidence that the defendant's actions were justified under O.C.G.A. § 16-3-21(a). *State v. Yapo*, 296 Ga. App. 158, 674 S.E.2d 44 (2009).

**Prima facie showing of justification.** — Defendant, who claimed to have acted in self-defense when the defendant beat the victim with a pipe, made a prima facie showing of justification. The defendant testified that the victim approached the defendant, uttered a racial epithet, and threatened to shoot the defendant, and the defendant claimed that the defendant feared for the defendant's life because the defendant knew of the victim's reputation and had previously seen the victim with a pistol in the victim's jeans. *Bennett v. State*, 298 Ga. App. 464, 680 S.E.2d 538 (2009).

**Evidence sufficient to disprove justification defense.** — See *Andrews v. State*, 267 Ga. 473, 480 S.E.2d 29 (1997); *Silas v. State*, 247 Ga. App. 792, 545 S.E.2d 358 (2001).

Trial court properly instructed the jury as to defendant's justification defense under O.C.G.A. § 16-3-21 and the state's burden to show the lack of justification beyond a reasonable doubt; there was ample evidence from which the jury could reject defendant's justification defense

**Application (Cont'd)**

and find defendant guilty of voluntary manslaughter where: (1) defendant and the victim fought earlier in the evening, during which the victim disarmed defendant; (2) defendant returned to the tavern later in the evening with an assault rifle, and pointed it at the occupants; (3) the occupants fled to the kitchen, and defendant demanded to see the victim; (4) the victim grabbed a knife and lunged at the defendant; and (5) when the victim came within defendant's sight again, defendant shot the victim, twice. Cameron v. State, 262 Ga. App. 296, 585 S.E.2d 209 (2003).

There was no showing of ineffective assistance in counsel's failure to pursue a justification defense pursuant to O.C.G.A. § 16-3-21(a) because, although the defendant claimed that the defendant shot the victim to protect the defendant's father, *inter alia*, the facts did not show that the father was in imminent danger, and the victim's threat against the father was made 30 minutes before the fatal shooting; at the time of the shooting, both men had fought in the street outside the father's home, the father was inside the home and not with them, and the victim was running away from the defendant. Even if the victim, who may have been carrying a knife, was going towards the father's house, the victim was shot before reaching the front yard. Carter v. State, 285 Ga. 565, 678 S.E.2d 909 (2009).

**Self defense claim rejected.** — Evidence that, after a fistfight, the defendant pursued and shot the defendant's victim in the back while the victim was unarmed and attempting to flee to safety authorized a jury to reject the defendant's self-defense claim and find the defendant guilty of aggravated assault. Aldridge v. State, 267 Ga. App. 489, 600 S.E.2d 439 (2004).

Evidence was sufficient to convict the defendant of aggravated assault, a violation of O.C.G.A. § 16-5-21(a)(2), because the state presented evidence that the defendant stabbed the defendant's love interest's child several times with a butcher knife. Even though the defendant argued that the defendant was merely defending the defendant against the child's attack

with a bat, the jury was authorized by O.C.G.A. § 16-3-21(b)(2) to reject the defendant's justification claim; the evidence showed that the love interest's son hit the defendant with a bat to protect the defendant's love interest from the defendant, who forcefully entered their house and then charged the love interest's child, pushed the child down, and stabbed the child. Williams v. State, 268 Ga. App. 384, 601 S.E.2d 833 (2004).

Evidence presented by the state was sufficient to convict a defendant of felony murder despite the defendant's evidence of justification and battered person syndrome pursuant to O.C.G.A. §§ 16-3-21(d) and 19-13-1, including testimony that the defendant had been the victim of acts of violence and expert testimony that the defendant suffered from the syndrome. The jury could disbelieve the defense witnesses. Demery v. State, 287 Ga. 805, 700 S.E.2d 373 (2010).

**Claims of self-defense raised by co-defendants.** — In a prosecution for aggravated assault, arising out of a fight outside a restaurant, although both codefendants claimed they had acted in self-defense it was not incumbent upon the jury to decide which of the defendants was the aggressor and which acted in self-defense rather than disbelieving both and convicting both. The jury could have concluded, from the evidence about the acts and the circumstances surrounding the fight, that both codefendants intended to fight and agreed to fight, and thus neither was entitled to the defense of justification. Pendergrass v. State, 199 Ga. App. 467, 405 S.E.2d 297 (1991).

**Self-defense applicable to delusional compulsion defense.** — General law of self-defense was properly applied to determine whether the defendant had met the justification criteria for delusional compulsion defense. Dutton v. State, 225 Ga. App. 67, 483 S.E.2d 305 (1997).

**Child molestation is a forcible felony.** — Child molestation constitutes a forcible felony for the purpose of establishing the defense of justification pursuant to O.C.G.A. § 16-3-21(a). Brown v. State, 268 Ga. 154, 486 S.E.2d 178 (1997).

**Motion for directed verdict of acquittal based on justification defense**

**was properly denied.** — When the defendant was tried on two counts of battery in violation of O.C.G.A. § 16-5-23.1(a) in relation to an altercation in a movie theater, the trial court properly denied the defendant's motion for a directed verdict of acquittal, which was based on the defendant's claim of justification under O.C.G.A. § 16-3-21(a), even though the defendant presented the testimony of two witnesses who said that the defendant only struck the victim after the victim grabbed the defendant's throat as the victim denied choking the defendant and the

defendant had earlier entered into a written restitution agreement with the victim in which the defendant had admitted that the defendant approached and struck the seated victim, inflicting a forehead laceration; the conflicting testimony on the justification defense presented credibility issues for the jury to resolve and there was ample evidence from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Tahantan v. State*, 260 Ga. App. 861, 581 S.E.2d 373 (2003).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Assault and Battery, §§ 57, 60 et seq. 40A Am. Jur. 2d, Homicide, §§ 134 et seq., 170 et seq.

**Am. Jur. Proof of Facts.** — Self Defense, 33 POF2d 211.

**Am. Jur. Trials.** — Self-Defense in Homicide Cases, 42 Am. Jur. Trials 151.

**C.J.S.** — 40 C.J.S., Homicide, §§ 151, 172 et seq., 184 et seq.

**ALR.** — Duty to retreat to wall as affected by illegal character of premises on which homicide occurs, 2 ALR 518.

Acquittal on charge as to one as bar to charge as to the other, where one person is killed or assaulted by acts directed at another, 2 ALR 606.

Civil liability growing out of mutual combat, 6 ALR 388; 30 ALR 199; 47 ALR 1092.

Right of self-defense as affected by defendant's violation of law only casually related to the encounter, 10 ALR 861.

Homicide: duty to retreat when not on one's own premises, 18 ALR 1279.

Wanton or willful misconduct by person killed or injured as defense to an action based on wanton or willful misconduct of defendant, 41 ALR 1379.

Evidence of improper conduct by deceased toward defendant's wife as admissible in support of plea of self-defense, 44 ALR 860.

Right of self-defense by officer attempting illegal arrest, 46 ALR 904.

Self-defense by one who has rightfully entered on premises of his assailant, 53 ALR 486.

Danger or apparent danger of death or great bodily harm as condition of self-defense in prosecution for assault as distinguished from prosecution for homicide, 114 ALR 634.

Admissibility on issue of self-defense (or defense of another), on prosecution for homicide or assault, of evidence of specific acts of violence by deceased, or person assaulted, against others than defendant, 121 ALR 380.

Proof to establish or negative self-defense in civil action for death from intentional act, 17 ALR2d 597.

Danger or apparent danger of great bodily harm or death as condition of self-defense in civil action for assault and battery, personal injury, or death, 25 ALR2d 1215.

Homicide: extent of premises which may be defended without retreat under right of self-defense, 52 ALR2d 1458.

Pleading self-defense or other justification in civil assault and battery action, 67 ALR2d 405.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for homicide, 98 ALR2d 6.

Civil liability for use of firearm in defense of habitation or property, 100 ALR2d 1021.

Admissibility of evidence as to other's character or reputation for turbulence on question of self-defense by one charged with assault or homicide, 1 ALR3d 571.

Relationship with assailant's wife as provocation depriving defendant of right of self-defense, 9 ALR3d 933.

Homicide: duty to retreat where assailants and assailed share the same living quarters, 26 ALR3d 1296.

Homicide: modern status of rules as to burden and quantum of proof to show self-defense, 43 ALR3d 221.

Unintentional killing of or injury to third person during attempted self-defense, 55 ALR3d 620.

Right to resist excessive force used in accomplishing lawful arrest, 77 ALR3d 281.

Modern status: right of peace officer to use deadly force in attempting to arrest fleeing felon, 83 ALR3d 174.

Homicide: duty to retreat where assailant is social guest on premises, 100 ALR3d 532.

Construction and application of statutes justifying the use of force to prevent the use of force against another, 71 ALR4th 940.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary — modern cases, 73 ALR4th 993.

Admissibility of evidence of battered child syndrome on issue of self-defense, 22 ALR5th 787.

Admissibility of threats to defendant made by third-parties to support claim of self-defense in criminal prosecution for assault or homicide, 55 ALR5th 449.

## **16-3-22. Immunity from criminal liability of persons rendering assistance to law enforcement officers.**

(a) Any person who renders assistance reasonably and in good faith to any law enforcement officer who is being hindered in the performance of his official duties or whose life is being endangered by the conduct of any other person or persons while performing his official duties shall be immune to the same extent as the law enforcement officer from any criminal liability that might otherwise be incurred or imposed as a result of rendering assistance to the law enforcement officer.

(b) The official report of the law enforcement agency shall create a rebuttable presumption of good faith and reasonableness on the part of the person who assists the law enforcement officer.

(c) The purpose of this Code section is to provide for those persons who act in good faith to assist law enforcement officers whose health and safety is being adversely affected and threatened by the conduct of any other person or persons. This Code section shall be liberally construed so as to carry out the purposes thereof. (Code 1933, § 27-219, enacted by Ga. L. 1967, p. 745, §§ 1, 2.)

**Cross references.** — Exercise of power of arrest by private persons generally, § 17-4-60 et seq.

## **JUDICIAL DECISIONS**

**Cited** in Carter v. State, 129 Ga. App. 536, 199 S.E.2d 925 (1973).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 5 Am. Jur. 2d, Arrest, §§ 24, 127. 70 Am. Jur. 2d, Sheriffs, Police, and Constables, §§ 38, 61 et seq.

**C.J.S.** — 6A C.J.S., Arrest, § 53.

**ALR.** — Accident insurance: aiding peace officer as voluntary exposure to unnecessary danger, 17 ALR 191.

### 16-3-23. Use of force in defense of habitation.

A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to prevent or terminate such other's unlawful entry into or attack upon a habitation; however, such person is justified in the use of force which is intended or likely to cause death or great bodily harm only if:

(1) The entry is made or attempted in a violent and tumultuous manner and he or she reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person dwelling or being therein and that such force is necessary to prevent the assault or offer of personal violence;

(2) That force is used against another person who is not a member of the family or household and who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using such force knew or had reason to believe that an unlawful and forcible entry occurred; or

(3) The person using such force reasonably believes that the entry is made or attempted for the purpose of committing a felony therein and that such force is necessary to prevent the commission of the felony. (Laws 1833, Cobb's 1851 Digest, p. 785; Code 1863, § 4229; Code 1868, § 4266; Code 1873, § 4332; Code 1882, § 4332; Penal Code 1895, § 72; Penal Code 1910, § 72; Code 1933, § 26-1013; Code 1933, § 26-903, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2001, p. 1247, § 2.)

**Cross references.** — Criminal trespass, § 16-7-21. Habitation and personal property defined, § 16-3-24.1. Immunity from civil liability for using force in defense of habitation, § 51-11-9.

**Law reviews.** — For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004). For annual survey on criminal law, see 61 Mercer L. Rev. 79 (2009).

For note on the 2001 amendment to this Code section, see 18 Georgia St. U.L. Rev.

(2001). For note, "Cops or Robbers? How Georgia's Defense of Habitation Statute Applies to No-Knock Raids by Police," see 26 Georgia St. U.L. Rev. 585 (2010).

For article, "Vigilant or Vigilante? Procedure and Rationale for Immunity in Defense of Habitation and Defense of Property Under the Official Code of Georgia Annotated §§ 16-3-23, 16-3-24, 16-3-24.1, and 16-3-24.2," see 59 Mercer L. Rev. 629 (2008).

## JUDICIAL DECISIONS

## ANALYSIS

GENERAL CONSIDERATION  
WHAT CONSTITUTES HABITATION**General Consideration**

**Editor's notes.** — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 26-1011 and 26-1012, are included in the annotations for this Code section.

**Rules governing liability of one injuring trespasser are same whether proceedings are civil or criminal.** — Rules of law governing liability of one who injures another in an attempt to prevent or end a trespass on one's property are same whether proceedings are civil or criminal in nature. Goerndt v. State, 144 Ga. App. 93, 240 S.E.2d 711 (1977).

**When relevant, principle of justifiable homicide should be charged, even without request.** — When evidence renders principle relating to justifiable homicide in preventing forceful attack and invasion of property or habitation applicable, court should charge justifiable homicide, even without written request. Frazier v. State, 88 Ga. App. 82, 76 S.E.2d 70 (1953).

**Charging justifiable homicide where not applicable is not harmful error.** — Even where provisions regarding justifiable homicide in repelling forcible attack and invasion of property of another are not applicable to facts of case, inclusion of such charge is not harmful error. Grier v. State, 212 Ga. 248, 91 S.E.2d 749 (1956) (decided under former Code 1933, § 26-1011).

**Justification, if established, should always result in acquittal.** Gordy v. State, 93 Ga. App. 743, 92 S.E.2d 737 (1956) (decided under former Code 1933, § 26-1011).

**Erroneous charge on justification not cured by verdict of guilty of lesser grade of offense.** — Erroneous charge or failure to charge on accused's defense or defenses of justifiable homicide is not cured by verdict finding accused guilty of some lesser grade of offense than murder. McKibben v. State, 88 Ga. App. 466, 77

S.E.2d 86 (1953) (decided under former Code 1933, § 26-1011).

**Defense of habitation makes it necessary that forcible attack and invasion concur** in order for that defense to apply. Gresham v. State, 70 Ga. App. 80, 27 S.E.2d 463 (1943).

**Fear justifying homicide must be that of a reasonable man.** — When justification for a homicide is sought in defense of oneself or one's property, against one who manifestly intends or endeavors by violence or surprise to commit felony on either, it is proper for trial court in connection therewith to charge provisions to the effect that bare fear of any of the offenses, to prevent which homicide is alleged to have been committed, shall not be sufficient to justify killing, but that it must appear that circumstances were sufficient to excite fears of a reasonable man, and that party killing really acted under those fears and not in spirit of revenge. Crolger v. State, 88 Ga. App. 566, 77 S.E.2d 98 (1953) (decided under former Code 1933, § 26-1012).

**Unreasonable or delusory fear may negate malicious intent.** — Unreasonable or delusory fear, while not that of a reasonable man and therefore not sufficient to constitute justification, may negate idea of malicious and intentional wrongdoing. Perry v. State, 104 Ga. App. 383, 121 S.E.2d 692 (1961) (decided under former Code 1933, § 26-1012).

**Homicide may be justified to prevent nonfelonious assault upon defendant in his habitation.** — One may permissibly, acting under fears of a reasonable man, kill to prevent commission of a felony in defense of habitation, property, or person; one may also kill one riotously attempting to enter one's habitation for purpose of assaulting one, although assault be less than a felony. Leverette v. State, 104 Ga. App. 743, 122 S.E.2d 745 (1961) (decided under former Code 1933, § 26-1011).

**Feelings of malice or revenge on part of one defending self or habita-**

**tion.** — When one contends that one acted under fears of a reasonable man, that is, under apparent rather than absolute necessity, it must appear that one did act under such fears and not in a spirit of revenge. However, if one must take one's adversary's life in order to save own or to prevent commission of a felony upon one's person, property, or habitation, then it matters not what feelings of malice or revenge one may also entertain. Crolger v. State, 88 Ga. App. 566, 77 S.E.2d 98 (1953) (decided under former Code 1933, § 26-1012).

**Use of force caused by something wholly independent of trespass.** — When difficulty resulting in homicide was purely of a personal nature and had no connection with the house where the homicide occurred, former Code 1873, § 4332 was not relevant. Wilson v. State, 69 Ga. 224 (1882).

When difficulty was caused by a matter wholly independent of invasion, mere fact that person assaulted entered habitation of assailant would be no defense. Love v. State, 14 Ga. App. 49, 80 S.E. 209 (1913).

Where difficulty during which fatal shot was fired, killing an innocent bystander, was caused by profane and unbecoming language wholly independent of and disconnected from invasion of property by defendant's antagonist, mere fact that this person entered yard or premises of defendant and that fight occurred in yard would be no defense upon theory of invasion of property. Jackson v. State, 69 Ga. App. 707, 26 S.E.2d 485 (1943) (decided under former Code 1933, § 26-1013).

**Section inapplicable where deceased was guest or visitor of defendant.** — Section refers only to homicides having their origin in forcible attack and invasion of property or habitation of another and, where there was no evidence tending to show that any attack or invasion of habitation of defendant was intended by deceased, as where deceased was a guest or visitor at defendant's residence before beginning of difficulty, a charge upon former Code 1933, § 26-1013 was unauthorized and erroneous. Stephens v. State, 71 Ga. App. 417, 31 S.E.2d 217 (1944) (decided under former Code 1933, § 26-1013).

**O.C.G.A. § 16-3-23 inapplicable if deceased was visitor or guest of roommate.** — Defense of habitation was not available to defendant since the victim was already in defendant's apartment when shot, there was no evidence that the victim made any threats against the habitation, and further, the victim was there as a guest of defendant's roommate, who was a resident of the apartment and signer of the apartment's lease. Stobbart v. State, 272 Ga. 608, 533 S.E.2d 379 (2000).

**Justifiable homicide did not exist** when the defendant invited the victim into defendant's home, and when there was no evidence the victim entered the house for the purpose of obtaining money from the defendant by committing a felony. Lee v. State, 202 Ga. App. 708, 415 S.E.2d 290, cert. denied, 202 Ga. App. 906, 415 S.E.2d 290 (1992).

#### **Section does not provide justification for homicide to prevent adultery.**

— Purpose of section is to provide justification only for repulsion of forcible felonies. Adultery, in addition to fact that it is not a felony, is a consensual and nonviolent crime. Except in extreme circumstances, adultery cannot stand as a complete justification for homicide, although always relevant to degree of the crime. Henderson v. State, 136 Ga. App. 490, 221 S.E.2d 633 (1975).

**No evidence of forcible entry.** — Where there was no evidence that the deceased was attempting to force entry into defendant's habitation and the defendant testified that the victim stood outside and called to appellant to come out, charge of use of force in defense of habitation was not authorized by the evidence. Harvard v. State, 162 Ga. App. 218, 290 S.E.2d 202 (1982).

O.C.G.A. § 16-3-23 did not apply where evidence showed that the victim was not attempting to enter defendant's house when defendant stepped outside and shot the victim. Darden v. State, 233 Ga. App. 353, 504 S.E.2d 256 (1998).

**Houseguest.** — Evidence was sufficient to support a conviction for aggravated assault in a case where the defendant, an occasional houseguest, became angry at a relative, retrieved a meat

**General Consideration (Cont'd)**

cleaver, and attacked the relative, who grabbed a pool cue to defend against the attack; the defendant's conduct amounted to a reasonable imminent threat of the use of deadly force and the relative, under the circumstances, was entitled to use force in defense of habitation pursuant to O.C.G.A. § 16-3-23. Robison v. State, 277 Ga. App. 133, 625 S.E.2d 533 (2006).

**Excessive force used against lessor.**

— Evidence supported a simple battery conviction under O.C.G.A. § 16-5-23 when the defendant slammed a door on the victim, the defendant's lessor, knocking the victim down a short flight of stairs. As the defendant's oral tenancy had always been subject to the right of realtors to enter the residence, the victim, who sought to enter the home upon two hours' notice to show the property to a new realtor, was within the victim's rights to enter the premises; even if this were not the case, because the defendant might have simply denied the victim reentry by warning the victim not to proceed further and closing the door, the defendant's use of force exceeded that permissible under O.C.G.A. § 16-3-23 had there been no right of reentry. Young v. State, 291 Ga. App. 460, 662 S.E.2d 258 (2008).

**"Tumultuous" entry by unarmed victim.** — Defendant's voluntary manslaughter conviction was affirmed, where, although there was evidence that the victim's entry into defendant's home was "tumultuous," the jury was authorized to conclude that the victim was unarmed and that deadly force was not necessary for defendant's protection. Zachery v. State, 199 Ga. App. 891, 406 S.E.2d 243 (1991).

**Homicide resulting from use of "spring gun" to defend habitation** was not justified where defendant was working and not at home when the gun activated. Bishop v. State, 257 Ga. 136, 356 S.E.2d 503 (1987).

**Use of force not justified.** — Defendant was not entitled to a directed verdict of acquittal on a voluntary manslaughter count predicated on the defendant's claim of defense of habitation, O.C.G.A. § 16-3-23, because the evidence was suf-

ficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of voluntary manslaughter in violation of O.C.G.A. § 16-5-2(a) and to find that the defendant's stabbing of the victim was not justified in defense of the defendant's habitation; the jury was authorized to rely upon the defendant's prior inconsistent statement to the defendant's relative to conclude that the victim's entry into the defendant's apartment was not "violent and tumultuous," and based upon the eyewitness testimony of a neighbor, the jury also was authorized to find that the victim was unarmed and that deadly force was not necessary for the defendant's protection. Muckle v. State, 307 Ga. App. 634, 705 S.E.2d 721 (2011).

**Charge using statutory language.**

— Where defendant contended the trial court erred by failing to give defendant's requested charge on self-defense, since the court charged the jury on self-defense in the language of O.C.G.A. §§ 16-5-21 and 16-5-23, which is the law in Georgia, and those code provisions cover the same principles requested by defendant, it was not error to deny defendant's request to charge. Cade v. State, 180 Ga. App. 314, 348 S.E.2d 769 (1986).

**No evidence existed to support jury charge on justification** under O.C.G.A. § 16-3-21 because the defendant was on the victim's premises unlawfully and initiated violence by lunging at the victim; pursuant to O.C.G.A. §§ 16-3-23 and 16-3-24, the victim's efforts to defend the house and a mail truck were entirely legal. Robinson v. State, 270 Ga. App. 869, 608 S.E.2d 544 (2004).

**Officers' entry lawful.** — In a capital murder case involving the shooting death of a deputy while executing a no-knock warrant with other officers involved in a drug task force, the immunity from prosecution prescribed by O.C.G.A. § 16-3-24.2 did not apply to the defendants because the officers' entry was lawful. Fair v. State, 288 Ga. 244, 702 S.E.2d 420 (2010).

**Jury charge on defense of habitation.** — If the jury had been properly charged on defense of habitation (as opposed to only a self-defense instruction), it was reasonably probable that they would

have accepted the substantial evidence that the victim unlawfully entered the defendant's car in a violent and tumultuous manner for the purpose of offering personal violence to the occupants, and that the defendant was justified under the circumstances in using deadly force to repel the attack; thus, the defendant established that but for counsel's error there was a reasonable probability the result of the proceeding would have been different and that counsel was ineffective. Benham v. State, 277 Ga. 516, 591 S.E.2d 824 (2004).

Because the defendant challenged one of the victims to get the victim's guns, adding that the defendant was already carrying a pistol, the defendant was an aggressor who was engaged in mutual combat, and the defendant was not justified in using force in defense of habitation when the defendant then began shooting, wounding one victim and killing another; the trial court did not err in refusing the defendant's request to charge on defense of habitation; if even that refusal was error, there was no reversible error because the trial court charged the jury on self-defense and justifiable homicide and the evidence of the defendant's guilt was overwhelming. McKee v. State, 280 Ga. 755, 632 S.E.2d 636 (2006).

In a prosecution for aggravated assault, while the trial court charged the jury regarding the details of the defense of justification, because the evidence did not authorize the charge of defense of habitation, the instruction was properly denied; moreover, no evidence was presented to suggest that the victim used coercion or threats to gain entry into the defendant's residence. Brimidge v. State, 287 Ga. App. 23, 651 S.E.2d 344 (2007).

Trial court did not err in refusing to instruct the jury on the law of defense of habitation in the context of an automobile because under the facts of the case there could be no reasonable belief that firing a pistol at the driver of another car while driving on the road was necessary to prevent or terminate the driver's unlawful entry into or attack upon a motor vehicle as that term was used in the pattern jury instructions; the evidence showed that the defendant did not use deadly force until

the justification for the use of deadly force was over. Kendrick v. State, 287 Ga. 676, 699 S.E.2d 302 (2010).

Trial court did not err in refusing to instruct the jury on the law of defense of habitation in the context of an automobile because the defendant did not supply the trial court with a written request to charge specific language on the legal concept of defense of habitation; the defendant's only written submission stated that the defendant wished the trial court to give the "following pattern requests to charge numbered 1 through 23," and then "22. Justification: Use of Force in Defense of Motor Vehicle," but such a request failed to comply with the requirements of Ga. Unif. Super. Ct. R. 10.3. Kendrick v. State, 287 Ga. 676, 699 S.E.2d 302 (2010).

**Counsel was not ineffective for failing to present defense.** — Defendant did not receive ineffective assistance of counsel during a trial on a charge of felony murder; trial counsel properly declined to request an instruction on use of force in defense of habitation, O.C.G.A. § 16-3-23, as it was sound strategy to try to steer the jury away from thinking that the defendant shot the victim for breaking into a storage building. Patel v. State, 279 Ga. 750, 620 S.E.2d 343 (2005).

Defendant and codefendant were not denied their constitutional right to effective assistance of counsel due to trial counsel's failure to request a jury instruction on the use of force in defense of habitation found in O.C.G.A. § 16-3-23 because the defendant's testimony did not provide the slight evidence necessary to support a charge on defense of habitation, and in light of the evidence that the codefendant exited the codefendant's vehicle and repeatedly shot an unarmed man, there was no reasonable probability that instructing the jury on the law of defense of habitation would have resulted in a different outcome; while counsel's failure to request an instruction constituted deficient performance, it did not constitute ineffective assistance of counsel in light of the evidence against the codefendant since there did not exist a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different. Coleman v. State, 286 Ga. 291, 687 S.E.2d 427 (2009).

**General Consideration (Cont'd)**

Trial counsel was not ineffective for failing to request a charge on the defense of habitation, O.C.G.A. § 16-3-23, because there was no evidence that the victim attempted to enter an apartment to harm anyone inside the building, and the evidence demonstrated that the victim went inside the apartment to escape from the defendant when the victim saw that the defendant had a gun; the evidence did not reflect that the victim's intent was other than to change the locks of the apartment. *Mubarak v. State*, 305 Ga. App. 419, 699 S.E.2d 788 (2010).

**Cited** in *White v. State*, 129 Ga. App. 353, 199 S.E.2d 624 (1973); *Chambers v. State*, 134 Ga. App. 53, 213 S.E.2d 158 (1975); *Colson v. State*, 138 Ga. App. 366, 226 S.E.2d 154 (1976); *Murray v. State*, 138 Ga. App. 776, 227 S.E.2d 428 (1976); *Adams v. State*, 139 Ga. App. 670, 229 S.E.2d 142 (1976); *Johnson v. State*, 142 Ga. App. 526, 236 S.E.2d 493 (1977); *Leach v. State*, 143 Ga. App. 598, 239 S.E.2d 177 (1977); *Aufderheide v. State*, 144 Ga. App. 877, 242 S.E.2d 758 (1978); *Todd v. State*, 149 Ga. App. 574, 254 S.E.2d 894 (1979); *Burton v. State*, 151 Ga. App. 176, 259 S.E.2d 176 (1979); *Washington v. State*, 245 Ga. 117, 263 S.E.2d 152 (1980); *Lemley v. State*, 245 Ga. 350, 264 S.E.2d 881 (1980); *Davis v. State*, 158 Ga. App. 594, 281 S.E.2d 344 (1981); *Brown v. State*, 163 Ga. App. 209, 294 S.E.2d 305 (1982); *Rivers v. State*, 250 Ga. 288, 298 S.E.2d 10 (1982); *Fannin v. State*, 165 Ga. App. 24, 299 S.E.2d 72 (1983); *Price v. State*, 175 Ga. App. 780, 334 S.E.2d 711 (1985); *Parrish v. State*, 182 Ga. App. 247, 355 S.E.2d 682 (1987); *Hicks v. State*, 211 Ga. App. 370, 439 S.E.2d 56 (1993); *Gilchrist v. State*, 270 Ga. 287, 508 S.E.2d 409 (1998); *Fair v. State*, 284 Ga. 165, 664 S.E.2d 227 (2008); *Bunn v. State*, 284 Ga. 410, 667 S.E.2d 605 (2008); *State v. Burks*, 285 Ga. 781, 684 S.E.2d 269 (2009).

**What Constitutes Habitation**

**Trailer which is home of defendant is a habitation**, and right to defend it against trespassers is same as for any

other habitation. *Goerndt v. State*, 144 Ga. App. 93, 240 S.E.2d 711 (1977).

**Landlord cannot forcibly enter rented premises without right of re-entry.** — As against tenant in possession, where right of reentry is not contained in rental agreement, landlord is without right to force the landlord's way into rented premises. *Goerndt v. State*, 144 Ga. App. 93, 240 S.E.2d 711 (1977).

Forcible entry without legal process by landlord against will of tenant renders landlord mere trespasser. *Goerndt v. State*, 144 Ga. App. 93, 240 S.E.2d 711 (1977).

**Motor vehicles.** — Defendant's own testimony established that the victim was not directing any threats upon defendant's vehicle at the time defendant struck the victim; thus, O.C.G.A. § 16-3-23 was not applicable. If, in fact, dirt was thrown on defendant's vehicle, the attack had ended before defendant exited the vehicle to inspect it. Indeed, that defendant's first inclination was to inspect the vehicle, rather than protect it by restraining the victim from committing further violence against the vehicle, belies any argument that any action was needed on defendant's part to stop the victim from attacking defendant's vehicle. Defendant's proper defense was self-defense, not defense of habitation and the court's failure to instruct on habitation was not error. *Wike v. State*, 262 Ga. App. 444, 585 S.E.2d 742 (2003).

Because trial counsel was not ineffective for failing to predict either the addition of the definition of habitation (which included automobiles) to the statutory scheme, or Georgia Supreme Court precedent, appellate counsel was not ineffective for failing to argue that trial counsel was ineffective on that ground. *Cochran v. Frazier*, No. 09-14520, 2010 U.S. App. LEXIS 9108 (11th Cir. May 3, 2010) (Unpublished).

**Space in jointly occupied dwelling.** — For purposes of O.C.G.A. § 16-3-23, a person's habitation can be a particular space in a jointly-occupied dwelling provided that such person has obtained the right to occupy that space and exclude co-inhabitants therefrom. *Hammock v. State*, 277 Ga. 612, 592 S.E.2d 415 (2004).

### RESEARCH REFERENCES

**ALR.** — Duty to retreat to wall as affected by illegal character of premises on which homicide occurs, 2 ALR 518.

Homicide or assault in defense of habitation or property, 25 ALR 508; 32 ALR 1541; 34 ALR 1488.

Pleading self-defense or other justification in civil assault and battery action, 67 ALR2d 405.

Homicide: duty to retreat as condition of self-defense when one is attacked at his office, or place of business or employment, 41 ALR3d 584.

Use of set gun, trap, or similar device on defendant's own property, 47 ALR3d 646.

Unintentional killing of or injury to third person during attempted self-defense, 55 ALR3d 620.

Homicide: duty to retreat where assailant is social guest on premises, 100 ALR3d 532.

Homicide: duty to retreat where assailant and assailed share the same living quarters, 67 ALR5th 637.

#### **16-3-23.1. No duty to retreat prior to use of force in self-defense.**

A person who uses threats or force in accordance with Code Section 16-3-21, relating to the use of force in defense of self or others, Code Section 16-3-23, relating to the use of force in defense of a habitation, or Code Section 16-3-24, relating to the use of force in defense of property other than a habitation, has no duty to retreat and has the right to stand his or her ground and use force as provided in said Code sections, including deadly force. (Code 1981, § 16-3-23.1, enacted by Ga. L. 2006, p. 477, § 1/SB 396.)

### JUDICIAL DECISIONS

**Cited** in Webb v. State, 284 Ga. 122, 663 S.E.2d 690 (2008).

#### **16-3-24. Use of force in defense of property other than a habitation.**

(a) A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such threat or force is necessary to prevent or terminate such other's trespass on or other tortious or criminal interference with real property other than a habitation or personal property:

(1) Lawfully in his possession;

(2) Lawfully in the possession of a member of his immediate family; or

(3) Belonging to a person whose property he has a legal duty to protect.

(b) The use of force which is intended or likely to cause death or great bodily harm to prevent trespass on or other tortious or criminal

interference with real property other than a habitation or personal property is not justified unless the person using such force reasonably believes that it is necessary to prevent the commission of a forcible felony. (Code 1933, § 26-904, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — Criminal trespass, § 16-7-21. Habitation and personal property defined, § 16-3-24.1.

**Law reviews.** — For annual survey on criminal law, see 61 Mercer L. Rev. 79 (2009).

For note, "Cops or Robbers? How Georgia's Defense of Habitation Statute Applies to No-Knock Raids by Police," see 26 Georgia St. U.L. Rev. 585 (2010).

For article, "Vigilant or Vigilante? Procedure and Rationale for Immunity in Defense of Habitation and Defense of Property Under the Official Code of Georgia Annotated §§ 16-3-23, 16-3-24, 16-3-24.1, and 16-3-24.2," see 59 Mercer L. Rev. 629 (2008).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 26-1011 are included in the annotations for this Code section.

**Justifiable homicide is in law itself a substantive and affirmative defense**, and, if found well supported in fact, accused is entitled to acquittal without reference to evidence which apparently tends to convict the accused of offense of murder or voluntary manslaughter. Fountain v. State, 207 Ga. 144, 60 S.E.2d 433 (1950), overruled on other grounds, Lavender v. State, 234 Ga. 608, 216 S.E.2d 855 (1975) (decided under former Code 1933, § 26-1011).

**Purpose of former Code 1933, § 26-904(b)** is to provide justification only for repulsion of a forcible felony. Adultery, in addition to fact that it is not a felony, is a consensual and nonviolent crime. It appears unlikely, in view of the trend of modern law, that except in extreme circumstances, it can stand as a complete justification for homicide, although always relevant to degree of crime. Henderson v. State, 136 Ga. App. 490, 221 S.E.2d 633 (1975) (see O.C.G.A. § 16-3-24(b)).

**Justification, if established, should always result in acquittal.** Gordy v. State, 93 Ga. App. 743, 92 S.E.2d 737 (1956) (decided under former Code 1933, § 26-1011).

**Resistance by armed force of actual attempt to commit robbery is justifi-**

able and one cannot create emergency which renders it necessary for another to defend self, and then take advantage of effort of such other person to do so. Hill v. State, 211 Ga. 683, 88 S.E.2d 145 (1955) (decided under former Code 1933, § 26-1011).

**Homicide in resisting robbery may be justified.** — Violent taking of money or property from person of another by force or intimidation for purpose of applying same to payment of a debt, to which money or property taker has no bona fide claim of title or right of possession, constitutes offense of robbery. Resistance by armed force of actual attempt to commit such a robbery would be justifiable provided that "circumstances were sufficient to excite fears of a reasonable man" that such an offense was about to be committed, and that party killing really acted under influence of those fears, and not in a spirit of revenge. Daniel v. State, 187 Ga. 411, 1 S.E.2d 6 (1939) (decided under former Code 1933, § 26-1011).

**When presence of spirit of revenge does not preclude justification.** — When one contends that one acted under the fears of a reasonable man, that is, under apparent rather than absolute necessity, it must appear that one did act under such fears and not in a spirit of revenge. However, if one must take one's adversary's life in order to save own or to prevent commission of felony upon one's person, property, or habitation, then it

matters not what feelings of malice or revenge one may also entertain. Crolger v. State, 88 Ga. App. 566, 77 S.E.2d 98 (1953) (decided under former Code 1933, § 26-1011).

**One entering another's property intending to commit imprudent and felonious act assumes risk of consequences.** Johnson v. Jackson, 140 Ga. App. 252, 230 S.E.2d 756 (1976).

**Name-calling not trespass.** — When a defendant is provoked to assault a trespasser by the trespasser's name-calling and not out of an intent to prevent a trespass, O.C.G.A. § 16-3-24 does not justify the assault. Dalton v. State, 187 Ga. App. 569, 370 S.E.2d 823 (1988).

**One cannot use deadly force in arresting or preventing escape of misdemeanant,** even though no other means is available. Johnson v. Jackson, 140 Ga. App. 252, 230 S.E.2d 756 (1976).

**Landowner has right to shoot person who is or reasonably appears to be a burglar.** Johnson v. Jackson, 140 Ga. App. 252, 230 S.E.2d 756 (1976).

**Former Code 1933, § 26-904 does not authorize destructive removal of fence and locked gate blocking driveway.** State v. Moore, 243 Ga. 594, 255 S.E.2d 709 (1979) (see O.C.G.A. § 16-3-24).

**Husband was not justified in using physical force against wife** in defense of prosecution for simple battery because the property she took was not the "property of another" within the definition provided by O.C.G.A. § 16-8-1(3), applying to theft, and her conduct was not cognizable as tortious interference due to application of the doctrine of interspousal tort immunity. Barron v. State, 219 Ga. App. 481, 465 S.E.2d 529 (1995).

**Nature of issues for jury determination arising under section.** — Relation between landowner and burglar or felon, owner's right and authority to arrest felon and allowable force in effectuation thereof, and duty owed by landowner to one who is there for purpose of committing a felony are questions for determination of jury. Johnson v. Jackson, 140 Ga. App. 252, 230 S.E.2d 756 (1976).

Whether force used was reasonable or whether killing was necessary are for jury

determination. Johnson v. Jackson, 140 Ga. App. 252, 230 S.E.2d 756 (1976).

**When charge covers elements of justifiable homicide, language of subsection (b) need not be charged.** — When charge given sufficiently instructs jury on elements of justifiable homicide, in absence of any request to charge, or objection to charge, it is not error to fail to charge in language of former Code 1933, § 26-904(b). Brooks v. State, 227 Ga. 339, 180 S.E.2d 721 (1971) (see O.C.G.A. § 16-3-24(b)).

**Erroneous charge on justifiable homicide not cured by verdict of guilty of lesser grade than murder.** — Erroneous charge or failure to charge on accused's defense or defenses of justifiable homicide is not cured by verdict finding accused guilty of some lesser grade of offense than murder. McKibben v. State, 88 Ga. App. 466, 77 S.E.2d 86 (1953) (decided under former Code 1933, § 26-1011).

**In charging justifiable homicide, failure to define felony,** absent request, does not require new trial. Fountain v. State, 207 Ga. 144, 60 S.E.2d 433 (1950), overruled on other grounds, Lavender v. State, 234 Ga. 608, 216 S.E.2d 855 (1975) (decided under former Code 1933, § 26-1011).

**Failure to give an instruction** as to the elements of a forcible felony, which felony the defendant asserts as justification for the shooting of the alleged felon, is error which is substantial and harmful as a matter of law, so that defendant's failure to request such instruction does not preclude defendant's raising on appeal the issue of the court's failure to make such instruction. Laney v. State, 184 Ga. App. 463, 361 S.E.2d 841 (1987).

Because the defendant was on the victim's premises unlawfully and initiated violence by lunging at the victim, pursuant to O.C.G.A. §§ 16-3-23 and 16-3-24, the victim's efforts to defend the house and a mail truck were entirely legal; consequently, there was no evidence to support a jury charge on justification under O.C.G.A. § 16-3-21(a). Robinson v. State, 270 Ga. App. 869, 608 S.E.2d 544 (2004).

**Cited** in Carlton v. Geer, 138 Ga. App. 304, 226 S.E.2d 99 (1976); Colson v. State,

138 Ga. App. 366, 226 S.E.2d 154 (1976); Adams v. State, 139 Ga. App. 670, 229 S.E.2d 142 (1976); Williams v. State, 144 Ga. App. 72, 240 S.E.2d 591 (1977); Reinertsen v. Porter, 242 Ga. 624, 250 S.E.2d 475 (1978); Moore v. State, 148 Ga. App. 469, 251 S.E.2d 376 (1978); Powell v. State, 154 Ga. App. 568, 269 S.E.2d 70

(1980); Radney v. State, 156 Ga. App. 442, 274 S.E.2d 800 (1980); Rivers v. State, 250 Ga. 288, 298 S.E.2d 10 (1982); Nelson v. State, 213 Ga. App. 641, 445 S.E.2d 543 (1994); Denny v. State, 226 Ga. App. 432, 486 S.E.2d 417 (1997); Fair v. State, 284 Ga. 165, 664 S.E.2d 227 (2008); Bunn v. State, 284 Ga. 410, 667 S.E.2d 605 (2008).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Assault and Battery, § 71 et seq. 40A Am. Jur. 2d, Homicide, § 174 et seq.

**Am. Jur. Proof of Facts.** — Justified Use of Force in Defense of Private Property, 38 POF2d 731.

**C.J.S.** — 40 C.J.S., Homicide, § 163.

**ALR.** — Duty to retreat to wall as affected by illegal character of premises on which homicide occurs, 2 ALR 518.

Homicide or assault in defense of habitation or property, 25 ALR 508; 32 ALR 1541; 34 ALR 1488.

Right to use force to obtain possession of

real property to which one is entitled, 141 ALR 250.

Homicide: duty to retreat as condition of self-defense when one is attacked at his office, or place of business or employment, 41 ALR3d 584.

Use of set gun, trap, or similar device on defendant's own property, 47 ALR3d 646.

Unintentional killing of or injury to third person during attempted self-defense, 55 ALR3d 620.

Homicide: duty to retreat where assailant is social guest on premises, 100 ALR3d 532.

### 16-3-24.1. Habitation and personal property defined.

As used in Code Sections 16-3-23 and 16-3-24, the term "habitation" means any dwelling, motor vehicle, or place of business, and "personal property" means personal property other than a motor vehicle. (Code 1981, § 16-3-24.1, enacted by Ga. L. 1998, p. 1153, § 1.1.)

**Law reviews.** — For article, "Vigilant or Vigilante? Procedure and Rationale for Immunity in Defense of Habitation and Defense of Property Under the Official

Code of Georgia Annotated §§ 16-3-23, 16-3-24, 16-3-24.1, and 16-3-24.2," see 59 Mercer L. Rev. 629 (2008).

## JUDICIAL DECISIONS

**Motor vehicles.** — Because trial counsel was not ineffective for failing to predict either the addition of the definition of habitation (which included automobiles) to the statutory scheme, or Georgia Supreme Court precedent, appellate counsel was not ineffective for failing to argue that trial counsel was ineffective on that

ground. *Cochran v. Frazier*, No. 09-14520, 2010 U.S. App. LEXIS 9108 (11th Cir. May 3, 2010) (Unpublished).

**Cited** in *Wike v. State*, 262 Ga. App. 444, 585 S.E.2d 742 (2003); *Coleman v. State*, 286 Ga. 291, 687 S.E.2d 427 (2009); *Smith v. State*, No. A10A2204, 2011 Ga. App. LEXIS 229 (Mar. 17, 2011).<sup>v</sup>

### 16-3-24.2. Immunity from prosecution; exception.

A person who uses threats or force in accordance with Code Section 16-3-21, 16-3-23, 16-3-23.1, or 16-3-24 shall be immune from criminal

prosecution therefor unless in the use of deadly force, such person utilizes a weapon the carrying or possession of which is unlawful by such person under Part 2 or 3 of Article 4 of Chapter 11 of this title. (Code 1981, § 16-3-24.2, enacted by Ga. L. 1998, p. 1153, § 1.2; Ga. L. 1999, p. 81, § 16; Ga. L. 2006, p. 477, § 2/SB 396.)

**Cross references.** — Possession of dangerous weapons, § 16-11-120 et seq. Carrying concealed firearms, § 16-11-126 et seq.

**Law reviews.** — For annual survey on criminal law, see 61 Mercer L. Rev. 79 (2009). For annual survey on death penalty law, see 61 Mercer L. Rev. 99 (2009).

For article, “Vigilant or Vigilante? Procedure and Rationale for Immunity in Defense of Habitation and Defense of Property Under the Official Code of Georgia Annotated §§ 16-3-23, 16-3-24, 16-3-24.1, and 16-3-24.2,” see 59 Mercer L. Rev. 629 (2008).

## JUDICIAL DECISIONS

**Applicability.** — O.C.G.A. § 16-3-24.2 did not apply to defendant who was acting in self-defense. *Boggs v. State*, 261 Ga. App. 104, 581 S.E.2d 722 (2003).

**Preponderance of evidence standard applies.** — To avoid trial, a defendant bears the burden of showing that the defendant is entitled to immunity under O.C.G.A. § 16-3-24.2 by a preponderance of the evidence. *Bunn v. State*, 284 Ga. 410, 667 S.E.2d 605 (2008).

**Jury instructions.** — Defendant was not entitled to an immunity statute instruction at trial. *Boggs v. State*, 261 Ga. App. 104, 581 S.E.2d 722 (2003).

Because the issue of immunity under O.C.G.A. § 16-3-24.2 was a question of law for the trial court to decide, it was not error for the trial court to refuse to give a defendant's requested jury charge on immunity in the defendant's prosecution for involuntary manslaughter. *Campbell v. State*, 297 Ga. App. 387, 677 S.E.2d 312 (2009), cert. denied, No. S09C1263, 2009 Ga. LEXIS 411 (Ga. 2009).

**Motion must be decided pre-trial.** — In two related cases in which the state sought the death penalty against two defendants, and in a case of first impression interpreting the immunity from prosecution statute set forth in O.C.G.A. § 16-3-24.2, it was determined that the trial court erred by refusing to rule pre-trial on the defendants' motions for immunity from prosecution under § 16-3-24.2. *Fair v. State*, 284 Ga. 165, 664 S.E.2d 227 (2008).

**Immunity properly found.** — Trial court properly held that the defendant, who was charged with family violence battery and simple battery under O.C.G.A. §§ 16-5-23.1(f) and 16-5-23, was immune from prosecution under O.C.G.A. § 16-3-24.2. The testimony of the defendant's friend that the defendant restrained the friend after the friend broke the defendant's windshield and kicked a car seat, knocking the defendant into the steering wheel, provided some evidence that the defendant's actions were justified under O.C.G.A. § 16-3-21(a). *State v. Yapo*, 296 Ga. App. 158, 674 S.E.2d 44 (2009).

Trial court did not err by granting the defendant's motion for immunity from prosecution pursuant to O.C.G.A. § 16-3-24.2 because the court's determination that the defendant was immune from prosecution since the defendant acted in self-defense under O.C.G.A. § 16-3-21(a) in discharging the defendant's service weapon, although based upon conflicting evidence, was supported by a preponderance of the evidence; the trial court expressly adopted the factual findings that were made by the original trial judge in the judge's previous order denying the defendant's motion, and the original trial judge's error in assessing evidentiary conflicts in light of the judge's improper legal conclusion that the defendant was required to prove “as a matter of law” that the defendant was justified in killing the victim were corrected when the

supreme court held that the proper standard of review was the preponderance of the evidence. *State v. Bunn*, 288 Ga. 20, 701 S.E.2d 138 (2010).

**Immunity improperly found.** — In a case in which the evidence showed that defendant, a convicted felon, used a firearm to shoot the deceased, a trial court erred in granting defendant's motion to quash the indictment under O.C.G.A. § 16-3-24.2. Since defendant possessed the firearm in violation of O.C.G.A. § 16-11-131, defendant was not entitled to the immunity offered by § 16-3-24.2. *State v. Burks*, 285 Ga. 781, 684 S.E.2d 269 (2009).

Because the trial court failed to consider O.C.G.A. § 16-3-21(a) when the court found that the defendant was immune from prosecution under O.C.G.A. § 16-3-24.2, the trial court used the wrong legal standard in reaching the court's decision; accordingly, the matter was remanded for further proceedings. *State v. Green*, 288 Ga. 1, 701 S.E.2d 151 (2010).

**Immunity motion properly denied.** — Trial court's apparent finding that defendant did not reasonably believe that the force defendant used was necessary to terminate a patron's entry into the restricted bakery area was supported by the patron's deposition testimony that defendant, without provocation, without warning that the bakery area was restricted, and without declaring the back door as off-limits, grabbed and struck the patron for no apparent reason other than perhaps believing that the patron was shoplifting food, despite defendant's admission that the patron had a receipt; although the trial court's ruling on defendant's immunity motion under O.C.G.A. § 16-3-24.2 was based on written deposition testimony, it could not be reviewed de novo, and as the trial court's ruling was supported by the patron's deposition testi-

mony, the ruling had to be affirmed. *Blazer v. State*, 266 Ga. App. 743, 598 S.E.2d 338 (2004).

Trial court did not err in denying a defendant's motion for immunity under O.C.G.A. § 16-3-24.2 made by a police officer who fired at and killed a fleeing suspect who was alleged to have been involved in a car theft and/or a hit and run accident. *State v. Thompson*, 288 Ga. 165, 702 S.E.2d 198 (2010).

**Immunity from prosecution did not apply when executing no-knock warrant.** — In a capital murder case involving the shooting death of a deputy while executing a no-knock warrant with other officers involved in a drug task force, the immunity from prosecution prescribed by O.C.G.A. § 16-3-24.2 did not apply to the defendants because the officers' entry was lawful. *Fair v. State*, 288 Ga. 244, 702 S.E.2d 420 (2010).

**Appeal from finding of immunity from prosecution.** — Because O.C.G.A. § 5-7-1(a)(1) provides that the state may appeal an order dismissing "any count" of the indictment, the trial court's order that in effect dismissed two of the three counts by finding that the defendant was immune from prosecution under O.C.G.A. § 16-3-24.2 was appealable. *State v. Yapo*, 296 Ga. App. 158, 674 S.E.2d 44 (2009).

**Appeal from order denying motion to dismiss indictment was dismissed.** — Because the trial court's order denying the defendant's motion to dismiss an indictment on immunity grounds under O.C.G.A. § 16-3-24.2 was not a final appealable order, the criminal matter was still pending below, and no other reason under O.C.G.A. § 5-6-34 was presented allowing an appeal from the same, the defendant's appeal was dismissed. *Crane v. State*, 281 Ga. 635, 641 S.E.2d 795 (2007).

**Cited in** *Smith v. State*, No. A10A2204, 2011 Ga. App. LEXIS 229 (Mar. 17, 2011).

## 16-3-25. Entrapment.

A person is not guilty of a crime if, by entrapment, his conduct is induced or solicited by a government officer or employee, or agent of either, for the purpose of obtaining evidence to be used in prosecuting the person for commission of the crime. Entrapment exists where the idea and intention of the commission of the crime originated with a

government officer or employee, or with an agent of either, and he, by undue persuasion, incitement, or deceitful means, induced the accused to commit the act which the accused would not have committed except for the conduct of such officer. (Code 1933, § 26-905, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For note, "Notice Requirements and the Entrapment Defense Under the Georgia Administrative Procedure Act" in light of *Schaffer v. State Bd. of*

Veterinary Medicine

143 Ga. App. 68, 237 S.E.2d 510 (1977), see 30 Mercer L. Rev. 347 (1978).

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### ANALYSIS

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APPLICATION

#### General Consideration

**Function of law enforcement is prevention, not manufacture, of crime.** *Thornton v. State*, 139 Ga. App. 483, 228 S.E.2d 919 (1976).

**Entrapment occurs** when criminal conduct is product of creative activity of law enforcement officials. *Brown v. State*, 132 Ga. App. 399, 208 S.E.2d 183 (1974).

Entrapment exists where idea and intention to commit act originate with police officer, who, by undue persuasion and deceitful means, induces defendant to violate the law. *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981).

**Entrapment defense does not rest on constitutional grounds.** *State v. Royal*, 247 Ga. 309, 275 S.E.2d 646 (1981).

**Elements.** — Entrapment defense consists of three distinct elements: (1) the idea for the commission of the crime must originate with the state agent; (2) the crime must be induced by the agent's undue persuasion, incitement, or deceit; and (3) the defendant must not be predisposed to commit the crime. *Keaton v. State*, 253 Ga. 70, 316 S.E.2d 452 (1984); *Hill v. State*, 261 Ga. 377, 405 S.E.2d 258 (1991); *Gilbert v. State*, 212 Ga. App. 308, 441 S.E.2d 785 (1994).

**Predisposition is key element.** — Under the majority view (which is fol-

lowed in Georgia), the predisposition of the defendant toward crime is the key element of the defense of entrapment. *Keaton v. State*, 253 Ga. 70, 316 S.E.2d 452 (1984).

**Focus of entrapment defense** is intent or predisposition of defendant to commit crime. *Johnson v. State*, 147 Ga. App. 92, 248 S.E.2d 168 (1978); *Bennett v. State*, 158 Ga. App. 421, 280 S.E.2d 429 (1981).

Entrapment defense focuses on defendant's intent and predisposition as well as upon conduct of government's agents. *Griffin v. State*, 154 Ga. App. 261, 267 S.E.2d 867 (1980).

**Effect of rebuttal by state.** — To the extent that the defendant, who met with an undercover officer who wanted to buy marijuana, raised an entrapment defense, the state rebutted that defense; while the idea for the drug deal originated with state agents, the state's evidence rebutted any claims by the defendant that the defendant was induced by undue persuasion and that the defendant was not predisposed to commit the crime. *Davis v. State*, 285 Ga. App. 460, 646 S.E.2d 342 (2007).

**Furnishing opportunity to predisposed defendant not entrapment.** — Entrapment does not exist where an ac-

**General Consideration (Cont'd)**

cused who is ready to commit an offense is merely furnished an opportunity to do so. Pennyman v. State, 175 Ga. App. 405, 333 S.E.2d 659 (1985).

**"Undue persuasion."** — Because the phrase "undue persuasion" is used in context with "incitement or deceitful means," it must mean something more than repeated requests for contraband drugs knowingly owned and possessed by one who at first demurs to the disposition of one's drugs. McQueen v. State, 185 Ga. App. 485, 364 S.E.2d 617 (1988); Gooch v. State, 188 Ga. App. 196, 372 S.E.2d 473 (1988); Wright v. State, 191 Ga. App. 392, 381 S.E.2d 601 (1989).

**Entrapment is not a rationale for suppressing evidence** but an affirmative defense to a criminal prosecution. State v. Baker, 216 Ga. App. 66, 453 S.E.2d 115 (1995).

**Defense of entrapment necessarily assumes that act charged was committed.** Gregoroff v. State, 248 Ga. 667, 285 S.E.2d 537 (1982).

In asserting defense of entrapment, defendant admits other elements of crime. Garrett v. State, 133 Ga. App. 564, 211 S.E.2d 584 (1974); Gregoroff v. State, 248 Ga. 667, 285 S.E.2d 537 (1982).

Normally a defendant must admit the commission of the crime in order to raise the defense of entrapment. Lawrence v. State, 174 Ga. App. 788, 331 S.E.2d 600 (1985).

**Asserting both entrapment and denial of acts constituting offense is illogical.** — It is illogical and impermissible for defendant to deny that defendant committed acts constituting crime and to simultaneously complain that defendant has been entrapped by improper governmental conduct into committing the acts. Gregoroff v. State, 248 Ga. 667, 285 S.E.2d 537 (1982).

**Exception to rule that criminal defendant may interpose inconsistent defenses.** — Rule that defendant must admit commission of crime in order to raise defense of entrapment is viewed as an exception to general rule that accused is permitted to interpose inconsistent defenses in criminal case. Gregoroff v. State,

248 Ga. 667, 285 S.E.2d 537 (1982).

**Exception to rule that accused must admit crime in order to rely on defense of entrapment** has been recognized where state, rather than defendant, injects evidence of entrapment into case and defendant offers no evidence of entrapment which contradicts defendant's primary defense that defendant did not commit crime charged. Gregoroff v. State, 248 Ga. 667, 285 S.E.2d 537 (1982).

**Use of defendant's common-law spouse** as an informant was not "entrapment per se." White v. State, 244 Ga. App. 475, 536 S.E.2d 180 (2000).

**Defense of entrapment requires that defendant admit elements of offense**, but affirmatively plead legal justification. Cowart v. State, 136 Ga. App. 528, 221 S.E.2d 649 (1975), overruled on other grounds, 137 Ga. App. 735, 224 S.E.2d 856, aff'd, 237 Ga. 282, 227 S.E.2d 248 (1976).

In asserting an entrapment defense, accused admits commission of offense while denying that accused was inclined to commit offense before intervention of law enforcement agent. Garrett v. State, 133 Ga. App. 564, 211 S.E.2d 584 (1974); Brooks v. State, 141 Ga. App. 725, 234 S.E.2d 541 (1977).

In order to raise defense of entrapment, defendant must admit commission of crime, but that defendant did so because of unlawful solicitation or inducement of law enforcement agent. Griffin v. State, 154 Ga. App. 261, 267 S.E.2d 867 (1980).

Assertion of defense of entrapment requires party to admit commission of offense charged in indictment. McDonald v. State, 156 Ga. App. 143, 273 S.E.2d 881 (1980).

**Jury issue.** — Because concept of entrapment involves predisposition of accused, issue is generally for jury determination. State v. Royal, 247 Ga. 309, 275 S.E.2d 646 (1981).

**Issue of entrapment cannot be presented to jury if accused denies guilt.** Mafnas v. State, 149 Ga. App. 286, 254 S.E.2d 409 (1979); Griffin v. State, 154 Ga. App. 261, 267 S.E.2d 867 (1980).

**Evidence raised entrapment defense and prompted jury charge.** — When the evidence included testimony of

informant and agent as well as taped conversations between them and the defendant, and this evidence sufficiently indicated the defendant's predisposition to consummate the crime, the evidence raised the defense of entrapment, necessitating a jury charge on the matter, but it did not demand a finding of entrapment. *Norley v. State*, 170 Ga. App. 249, 316 S.E.2d 808 (1984).

**Cited in** *Foskey v. State*, 125 Ga. App. 672, 188 S.E.2d 825 (1972); *Johnson v. State*, 128 Ga. App. 69, 195 S.E.2d 676 (1973); *Bennett v. State*, 130 Ga. App. 510, 203 S.E.2d 755 (1973); *Zinn v. State*, 134 Ga. App. 51, 213 S.E.2d 156 (1975); *Rucker v. State*, 135 Ga. App. 468, 218 S.E.2d 146 (1975); *Lentile v. State*, 136 Ga. App. 611, 222 S.E.2d 86 (1975); *Tolbert v. State*, 138 Ga. App. 724, 227 S.E.2d 416 (1976); *Philmore v. State*, 142 Ga. App. 507, 236 S.E.2d 180 (1977); *Schaffer v. State Bd. of Veterinary Medicine*, 143 Ga. App. 68, 237 S.E.2d 510 (1977); *Smith v. State*, 239 Ga. 477, 238 S.E.2d 116 (1977); *Bowman v. State*, 144 Ga. App. 681, 242 S.E.2d 480 (1978); *Glover v. State*, 145 Ga. App. 15, 243 S.E.2d 296 (1978); *White v. State*, 146 Ga. App. 810, 247 S.E.2d 536 (1978); *Jones v. State*, 154 Ga. App. 21, 267 S.E.2d 323 (1980); *Causey v. State*, 154 Ga. App. 76, 267 S.E.2d 475 (1980); *Ray v. State*, 157 Ga. App. 519, 277 S.E.2d 804 (1981); *Campbell v. State*, 160 Ga. App. 561, 287 S.E.2d 591 (1981); *Spruell v. Jarvis*, 654 F.2d 1090 (5th Cir. 1981); *Thurmond v. State*, 161 Ga. App. 602, 288 S.E.2d 780 (1982); *Ellis v. State*, 164 Ga. App. 366, 296 S.E.2d 726 (1982); *Noles v. State*, 164 Ga. App. 191, 296 S.E.2d 768 (1982); *Palmer v. State*, 250 Ga. 219, 297 S.E.2d 22 (1982); *Rivers v. State*, 250 Ga. 288, 298 S.E.2d 10 (1982); *Frazer v. State*, 165 Ga. App. 331, 299 S.E.2d 104 (1983); *Verble v. State*, 172 Ga. App. 321, 323 S.E.2d 239 (1984); *Tucker v. State*, 182 Ga. App. 559, 356 S.E.2d 559 (1987); *Lawson v. State*, 184 Ga. App. 204, 361 S.E.2d 210 (1987); *Pless v. State*, 187 Ga. App. 772, 371 S.E.2d 406 (1988); *Edmondson v. State*, 201 Ga. App. 566, 411 S.E.2d 879 (1991); *Wright v. State*, 232 Ga. App. 104, 501 S.E.2d 543 (1998); *Mitchell v. State*, 249 Ga. App. 520, 548 S.E.2d 469 (2001).

### What Constitutes Entrapment

**When officer merely offers opportunity.** — There is no entrapment when officer merely offers opportunity to one ready to commit offense. *Hill v. State*, 225 Ga. 117, 166 S.E.2d 338 (1969); *Thornton v. State*, 139 Ga. App. 483, 228 S.E.2d 919 (1976); *Daniels v. State*, 154 Ga. App. 323, 268 S.E.2d 376 (1980); *Johnson v. State*, 246 Ga. 126, 269 S.E.2d 18 (1980); *Paras v. State*, 247 Ga. 75, 274 S.E.2d 451 (1981); *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981); *Mason v. State*, 194 Ga. App. 152, 390 S.E.2d 246 (1990).

**Defendant approaching officer and offering to commit crime.** — It does not constitute entrapment when a defendant approaches a police officer or agent-informer with an offer to commit a crime, if that officer then plays a role in order to provide defendant with an opportunity to commit the intended offense. *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981); *Smith v. State*, 206 Ga. App. 138, 424 S.E.2d 371 (1992).

**Evidence of defendant's disposition to use and sell drugs.** — Entrapment defense unavailable where evidence reveals marked disposition of defendant to use and sell contraband. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

**Ready compliance with officer's request to purchase contraband.** — Absent other circumstances, it is generally held that where officer simply makes request, as to purchase contraband, and there is ready compliance, defense of entrapment is unavailable. *Thornton v. State*, 139 Ga. App. 483, 228 S.E.2d 919 (1976); *Griffin v. State*, 154 Ga. App. 261, 267 S.E.2d 867 (1980).

**Inducement by solicitation of one engaged in business of selling narcotics.** — If at time of solicitation for sale of narcotics defendant was engaged in business of selling and possessing narcotics, it is no defense for defendant that defendant was merely induced by solicitation and misrepresentation to sell or possess such narcotics. *Gibson v. State*, 133 Ga. App. 68, 209 S.E.2d 731 (1974).

**Repeated requests by officer or agent for contraband goods** does not constitute undue persuasion. *Johnson v. State*, 147 Ga. App. 92, 248 S.E.2d 168

**What Constitutes Entrapment (Cont'd)**

(1978); McDonald v. State, 156 Ga. App. 143, 273 S.E.2d 881 (1980).

**Meaning of "undue persuasion."** — Phrase "undue persuasion," used in context with "deceitful means," means something more than requests to purchase. Smith v. State, 141 Ga. App. 529, 233 S.E.2d 841, aff'd in part and rev'd in part, 239 Ga. 477, 238 S.E.2d 116 (1977).

Because phrase "undue persuasion" is used in context with "incitement or deceitful means," it must mean something more than repeated requests for contraband drugs knowingly owned and possessed by one who at first demurs to disposition of one's drugs. Bennett v. State, 158 Ga. App. 421, 280 S.E.2d 429 (1981); Martin v. State, 175 Ga. App. 704, 334 S.E.2d 32 (1985).

Phrase "undue persuasion" is something more than repeated requests for contraband goods. Murrell v. State, 166 Ga. App. 526, 304 S.E.2d 408 (1983); Evans v. State, 209 Ga. App. 340, 433 S.E.2d 426 (1993).

**Repeated requests and offers of money** do not establish entrapment as a matter of law. Paras v. State, 247 Ga. 75, 274 S.E.2d 451 (1981).

**Smile of policewoman is insufficient to constitute lure**, incitement, or persuasion to commit crime of kidnapping. Brown v. State, 132 Ga. App. 399, 208 S.E.2d 183 (1974).

**Government agent giving drugs to defendant with instructions to sell them.** — Unopposed testimony that government agent gave defendant drugs with instructions to sell them to two men who also were concealed agents under guise of helping former to trap criminals cannot support conviction. Thornton v. State, 139 Ga. App. 483, 228 S.E.2d 919 (1976).

**Evidence not sufficient.** — State's evidence showing only that agent offered defendant the opportunity to commit the offense could not reasonably be said to raise the issue of entrapment as a defense. Diana v. State, 164 Ga. App. 779, 298 S.E.2d 281 (1982).

In prosecution for escape from lawful confinement, when the defendant failed to

present any evidence that inmate who was allegedly encouraged by prison employees to entice defendant to escape was a government officer or employee, or an agent thereof, the trial court did not err in refusing to charge on the defense of entrapment. Johns v. State, 164 Ga. App. 133, 296 S.E.2d 638 (1982).

That police agent met defendant through an informant, denied being a police officer and shared beer with defendant to engender defendant's trust were not circumstances which, either alone or in conjunction with the agent's request for drugs, were sufficient to give rise to an entrapment defense. Adams v. State, 207 Ga. App. 119, 427 S.E.2d 90 (1993).

After the defendant gave a statement to the police admitting that the defendant intended to purchase cocaine from an undercover detective, and the detective's testimony showed the defendant's predisposition to commit the crime and willing participation in the crime, the evidence did not demand a finding of entrapment. Cody v. State, 222 Ga. App. 468, 474 S.E.2d 669 (1996).

In a defendant's prosecution on drug charges, entrapment was not established under O.C.G.A. § 16-3-25 because while a confidential informant (CI) initiated contact with the defendant, there was no evidence that the CI used undue persuasion to induce the defendant to commit a crime that the defendant was not predisposed to commit; the CI was not aware of the defendant's financial problems, and the defendant initiated contact with the CI on at least one occasion and talked with the CI on several occasions. Robinson v. State, 296 Ga. App. 561, 675 S.E.2d 298 (2009).

**Conduct of State Agents**

**Reasonable person standard applies.** — State agent's conduct is to be viewed objectively, and evaluated by the jury in light of the standard of conduct exercised by reasonable persons generally. Keaton v. State, 253 Ga. 70, 316 S.E.2d 452 (1984).

**Subjective state of mind irrelevant.** — While proof of a defendant's "innocent" state of mind (i.e., nonpredisposition) is essential to maintenance of a successful

entrapment defense, the state agent's subjective state of mind is irrelevant to the determination of whether the crime was induced by "undue persuasion, incitement, or deceitful means." Keaton v. State, 253 Ga. 70, 316 S.E.2d 452 (1984).

Portion of instruction which read "If an officer acts in good faith in the honest belief that the defendant is engaged in unlawful conduct of which the offense charged is a part, and the purpose of the officer is not to induce an innocent man to commit a crime, but to secure evidence upon which a guilty man can be brought to justice, the defense of entrapment is without merit" was erroneous and required reversal of defendant's conviction. Keaton v. State, 253 Ga. 70, 316 S.E.2d 452 (1984).

### Informants

**Informer need not be a paid informant** to fulfill agency role. Leonardi v. State, 154 Ga. App. 402, 268 S.E.2d 380 (1980).

**Discussion of disclosure of identity of confidential informant.** — See State v. Royal, 247 Ga. 309, 275 S.E.2d 646 (1981).

**Time to move for disclosure of informant's identity.** — Defendant raising entrapment as a defense may not wait until case is over to make proper motion for disclosure of identity of informant in absence of some justification for delay. State v. Royal, 247 Ga. 309, 275 S.E.2d 646 (1981).

**Officer's testimony denying entrapment is insufficient** where alleged entrapment was by informer outside officer's presence. Hughes v. State, 152 Ga. App. 262 S.E.2d 245 (1979).

**Testimony not required.** — Rule that the state's failure to produce a confidential informant to rebut a defendant's entrapment testimony requires a directed verdict of acquittal did not apply where an undercover investigator testified that the informant had nothing to do with setting up the sale of the pound of cocaine, and in fact did not know it was going on. Armand v. State, 164 Ga. App. 350, 296 S.E.2d 734 (1982).

**When the state produces rebuttal to testimony of party arguing entrap-**

**ment, informer need not testify.** Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42 (1980).

### Burden of Proof

**When evidence raises defense of entrapment, state must come forward with contrary proof.** — When evidence of defendant raises defense of entrapment and is uncontested or not rebutted by state, conviction cannot be upheld as state has duty to come forward with contrary proof. Hall v. State, 136 Ga. App. 622, 222 S.E.2d 140 (1975); Seabrooks v. State, 164 Ga. App. 747, 297 S.E.2d 745 (1982), aff'd, 251 Ga. 564, 308 S.E.2d 160 (1983).

When the defendant raised the defense of entrapment, contending that the defendant had been intimidated by the informant, who allegedly had a reputation for violent behavior, the trial court did not err in permitting the Georgia Bureau of Investigation agent to testify in rebuttal of the defendant's allegations regarding threats and intimidation. The state has the burden of presenting evidence in rebuttal of testimony offered in support of an affirmative defense. Meade v. State, 165 Ga. App. 556, 301 S.E.2d 912 (1983).

Defendants were entitled to a directed verdict of acquittal, where the state neither offered evidence to rebut defendants' testimony that they were entrapped, nor offered evidence showing their disposition to commit the drug possession charges with which they were charged. Emanuel v. State, 260 Ga. 425, 396 S.E.2d 225 (1990).

**Distinction between evidence raising defense of entrapment and evidence which demands finding of entrapment.** — Distinction must be made between evidence raising defense of entrapment and requiring that jury be charged as to law of entrapment and burden of proof thereon, and evidence which, would demand a finding of entrapment and, therefore, a directed verdict of acquittal. Childs v. State, 158 Ga. App. 376, 280 S.E.2d 401 (1981).

**Proof beyond reasonable doubt that entrapment did not exist.** — When evidence in criminal case warrants charge on law of entrapment, failure of trial judge to charge in conjunction with its instruction on that subject that prose-

**Burden of Proof (Cont'd)**

cution must carry burden to prove beyond reasonable doubt that such entrapment did not exist constitutes reversible error. *Reed v. State*, 130 Ga. App. 659, 204 S.E.2d 335 (1974).

After a defendant presents a prima facie case of entrapment, the burden is on the state to disprove entrapment beyond a reasonable doubt. *Hill v. State*, 261 Ga. 377, 405 S.E.2d 258 (1991).

**Rebuttal evidence.** — The state was not required to present rebuttal evidence demonstrating that defendant was not entrapped where sufficient evidence was presented by the state in its case-in-chief. *Hudson v. State*, 184 Ga. App. 245, 361 S.E.2d 240 (1987).

In prosecution for selling cocaine, even though defendant's testimony provided evidence of entrapment, the state was not required to call a particular witness in rebuttal since the evidence in the case did not demand a finding of entrapment and, therefore, a directed verdict of acquittal. *Finley v. State*, 214 Ga. App. 452, 448 S.E.2d 78 (1994).

**State rebuttal not needed where mere theory presented.** — Defendant's presentation of only a theory of entrapment, without a factual showing that a government agent had induced action, did not necessitate that the state present rebuttal evidence to avoid a directed verdict of acquittal. *Simmons v. State*, 208 Ga. App. 721, 431 S.E.2d 721 (1993).

**State's rebuttal must show predisposition of accused.** — After defendant presents a prima facie case that defendant was induced to commit an offense charged in the indictment, burden is upon government to prove beyond a reasonable doubt that accused was predisposed to commit the offense — i.e., that defendant was ready and willing without persuasion and awaiting a propitious opportunity to commit the crime. *Griffin v. State*, 154 Ga. App. 261, 267 S.E.2d 867 (1980).

Defendant's testimony, corroborated by a paid informant, established a prima facie case of entrapment. There was no evidence introduced that, prior to the defendant's entrapment, the defendant had a predisposition to deliver, sell, distribute,

or knowingly possess cocaine as forbidden by O.C.G.A. § 16-13-30(b). As the state failed to introduce evidence to rebut the affirmative defense of entrapment, the defendant was entitled to a directed verdict of acquittal. *Hill v. State*, 261 Ga. 377, 405 S.E.2d 258 (1991).

Trial court did not err in refusing the defendant's request to disclose the identity of a confidential informant in order to support an entrapment defense, as the defendant was unable to present an arguably persuasive case regarding the lack of a predisposition to commit the crime, based specifically on: (1) a discussion with a detective about the impending drug sale; (2) the defendant's act of displaying a weapon considered to be protection against a robbery; and (3) the defendant's act of coordinating the movements of the numerous participants in the large-scale transaction the defendant was a part of. *Griffiths v. State*, 283 Ga. App. 176, 641 S.E.2d 169 (2006).

**Jury Charge**

**Evidence raised entrapment defense and prompted jury charge.** — When the evidence included testimony of an informant and agent as well as taped conversations between them and the defendant, and this evidence sufficiently indicated the defendant's predisposition to consummate the crime, the evidence raised the defense of entrapment, necessitating a jury charge on the matter, but the evidence did not demand a finding of entrapment. *Norley v. State*, 170 Ga. App. 249, 316 S.E.2d 808 (1984).

**Instruction on entrapment properly refused absent supporting evidence.** — It is not error for the court to refuse to give instruction on entrapment where the uncontradicted testimony of the undercover officer shows that the officer did not induce or solicit appellant to commit the crime. *Lester v. State*, 174 Ga. App. 886, 332 S.E.2d 31 (1985).

In a prosecution for trafficking in cocaine, the trial court did not err in refusing to instruct the jury on the affirmative defense of entrapment, as: (1) sufficient evidence was presented that the defendant voluntarily committed the offense upon being given the opportunity to do so;

and (2) no evidence was presented to show that the informant employed undue persuasion, incitement or deceit to induce the defendant into selling drugs; thus, the defendant's claim of ineffective assistance of counsel for failing to present evidence to support an entrapment defense was rejected and did not warrant a new trial. *Campbell v. State*, 281 Ga. App. 503, 636 S.E.2d 687 (2006).

State's uncontradicted evidence showed that the idea to sell cocaine to an informant originated with the defendant, and the defendant was predisposed to commit the crime without any undue persuasion, incitement, or deceit by the state, and therefore supported the trial court's refusal to charge the jury on the defense of entrapment. *Lightsey v. State*, 289 Ga. App. 181, 656 S.E.2d 852 (2008).

Trial court did not err in failing to charge the jury on entrapment because there was no evidence that a deputy's undue persuasion, incitement, or deceit induced the defendant to sell cocaine or that the defendant was not predisposed to commit the crime. *Quarterman v. State*, 305 Ga. App. 686, 700 S.E.2d 674 (2010).

**Charging jury in language of law.** — Charge on entrapment substantially in language of O.C.G.A. § 16-3-25 was not inadequate by reason of omission of words "or solicited" following "induced." *Wallace v. State*, 162 Ga. App. 367, 291 S.E.2d 437 (1982).

Trial court did not err in instructing the jury on the defense of entrapment as the charge given: (1) was part of the standard instructions on the element of knowledge; (2) sufficiently advised the jury that the state bore the burden of proving beyond a reasonable doubt that the defendant was not entrapped; and (3) was legally correct and did not mislead a jury. *Griffiths v. State*, 283 Ga. App. 176, 641 S.E.2d 169 (2006).

**When charge must cover entrapment.** — In prosecution for sale of controlled substances, where there was no evidence of any predisposition on part of defendant to deal in drugs, defendant testified that state's informant created criminal design by undue persuasion, incitement, and deceitful means, and entrapment was sole defense relied upon

by defendant, trial court erred in failing to charge on entrapment. *Johnson v. State*, 147 Ga. App. 92, 248 S.E.2d 168 (1978).

**Court's failure to charge on entrapment is not reversible error** where the defendant rests without presenting any evidence, and the first criterion, that the state inject evidence of entrapment, has not been satisfied, since the uncontradicted testimony of the undercover officer showed that the officer did not induce or solicit defendant to commit the crime. *Menefield v. State*, 165 Ga. App. 545, 301 S.E.2d 902 (1983).

**No need to charge jury specifically that state must prove predisposition.**

— Jury charge on entrapment which did not specifically direct that the state had to prove predisposition beyond a reasonable doubt was sufficient because it is not necessary to charge on the state's burden of proof individually with regard to every element of a disputed matter. *Norley v. State*, 170 Ga. App. 249, 316 S.E.2d 808 (1984).

**Charge placing burden of proving entrapment upon defendant is erroneous.** *Thornton v. State*, 139 Ga. App. 483, 228 S.E.2d 919 (1976).

**Instruction which may confuse jury as to burden of proof is erroneous.** — When trial court properly instructed jury as to substantive law of entrapment and then charged jury as to burden of proof generally in criminal prosecution, the charge was both insufficient and prejudicial to defendant, for while it may not shift burden of proof to defendant, it is capable of confusing the jury. *Reed v. State*, 130 Ga. App. 659, 204 S.E.2d 335 (1974).

**Charge which adequately covers burden of proof as to offense generally is sufficient.** — When charge of court includes instruction as to entrapment but places burden of proof as to each essential element of crime, including intent, upon state beyond a reasonable doubt, it is not error for court not to instruct the jury specifically, absent request, as to any burden of proof regarding entrapment. *McDonald v. State*, 156 Ga. App. 143, 273 S.E.2d 881 (1980).

Trial court's jury charge on entrapment, which included statements that repeated requests by an officer or agent for contra-

**Jury Charge (Cont'd)**

band goods did not constitute undue persuasion and that entrapment was seduction or improper inducement to commit a crime and was not merely testing by trap, trickiness, or deceit of one who was suspected, was proper. *Manders v. State*, 280 Ga. App. 742, 634 S.E.2d 773 (2006).

**Pattern jury charge** fully and accurately charged the jury on the state's burden when the defense of entrapment was raised and the trial court properly refused to give a requested charge that the state must prove that defendant "was disposed to commit the criminal act prior to first being approached by agents of the state." *Haralson v. State*, 223 Ga. App. 787, 479 S.E.2d 115 (1996).

**Word "criminal" is inappropriate in an entrapment charge** (i.e., it is not entrapment where the officers merely furnish an opportunity to a criminal who is ready and willing to commit an offense). However, the charge is not incorrect as a matter of law. *Epps v. State*, 168 Ga. App. 79, 308 S.E.2d 234 (1983).

Trial court properly declined to instruct the jury on entrapment under O.C.G.A. § 16-3-25 in defendant's trial for trafficking in cocaine because although defendant claimed to only be arranging for a meeting between a police informant and a supplier because defendant was interested in a relationship with the informant, and did not know the supplier would bring cocaine to the meeting, and the idea for the crime did originate with the state agent, there was no evidence presented by the state of the other two elements, undue persuasion, incitement or deceit, or that defendant was not predisposed to commit the crime. *St. Jean v. State*, 255 Ga. App. 129, 564 S.E.2d 534 (2002).

**Application**

**Suspected person may be tested by being offered opportunity to transgress** in such manner as is usual therein, but may not be put under extraordinary temptation or inducement. *Webb v. State*, 136 Ga. App. 90, 220 S.E.2d 27 (1975).

**One suspected of being systematically guilty of a certain type of offense may be trapped.** — When officers

suspect a person of being systematically guilty of a certain type of offense, such as selling illegal liquor, setting of a trap by proposing to such person that the person sell to a decoy is not generally considered entrapment in the sense that it may be used as a legal defense for the reason that part of the law enforcement process involves apprehension and removal of known criminals. A different situation is presented when a person is persuaded into committing a crime in the first instance. *Brown v. State*, 132 Ga. App. 399, 208 S.E.2d 183 (1974).

**Discovery of crime and procurement of evidence by deception are not prohibited.** Entrapment is seduction or improper inducement to commit crime and not testing by trap, trickiness, or deceit of one suspected. *Thomas v. State*, 134 Ga. App. 18, 213 S.E.2d 129 (1975).

**When entrapment is apparent, there can be no conviction absent contradictory testimony.** — When it appears that entire plan and design of offense originates with government, and is effectuated by undue persuasion or deceitful means, there can be no conviction absent contradictory testimony. *Thornton v. State*, 139 Ga. App. 483, 228 S.E.2d 919 (1976).

In absence of some evidence by state directly contradicting testimony of defendant that defendant was induced by informer to make the sales on behalf of the state, defendant is entitled to judgment of acquittal. *Hughes v. State*, 152 Ga. App. 80, 262 S.E.2d 245 (1979).

**State's character evidence in rebuttal improperly admitted.** — Trial court erred in admitting evidence of a prior conviction and the defendant's involvement in other drug deals as the defendant offered no evidence in support of an entrapment defense and the state had no basis on which to admit the character evidence; however, the denial of the defendant's motion for mistrial was not an abuse of discretion in light of the overwhelming evidence of the defendant's guilt and a detailed curative instruction advising the jury not to consider the improperly-admitted character evidence. *Nettles v. State*, 276 Ga. App. 259, 623 S.E.2d 140 (2005).

**Evidence sufficient to raise defense.** — Defendant's testimony that defendant was unduly persuaded by an informant to sell marijuana, along with evidence of defendant's predisposition to sell marijuana limited to defendant's possession of the drug at the time of the sale, was sufficient to raise an entrapment defense, although the evidence did not demand a finding that defendant was entrapped. *Hattaway v. State*, 185 Ga. App. 607, 365 S.E.2d 480 (1988).

When defendant admitted to using amphetamines and that defendant agreed to deliver a small amount to a female acquaintance after she importuned defendant 15 times in three days to obtain the drug for her, there was evidence that the police used but one female confidential informant in the investigation, and that she had spoken with defendant moments before defendant was arrested, these circumstances authorized the inference that the female acquaintance was the informant who telephoned defendant just before defendant was arrested and her actions were sufficient to make her the agent of the state for purposes of establishing a *prima facie* case of entrapment. *Gilbert v. State*, 212 Ga. App. 308, 441 S.E.2d 785 (1994); *State v. Jackson*, 188 Ga. App. 259, 372 S.E.2d 823 (1988); *Boatright v. State*, 260 Ga. 534, 397 S.E.2d 689 (1990); *Williams v. State*, 205 Ga. App. 397, 422 S.E.2d 438 (1992); *Rutledge v. State*, 218 Ga. App. 130, 460 S.E.2d 551 (1995).

In a prosecution for solicitation of sodomy and solicitation of sexual intercourse for money, defendant's solicitation of a police officer, by handing the officer a business card, precluded a claim that the crime originated with the police. *Busener v. State*, 188 Ga. App. 392, 373 S.E.2d 81 (1988).

Defendant's testimony that undercover agents approached defendant rather than vice versa did not establish an entrapment defense, where defendant effectively admitted that defendant was ready and willing to cooperate with the agents in order to obtain drugs for defendant's own use. *Wyatt v. State*, 194 Ga. App. 159, 390 S.E.2d 85 (1990).

**Defendant was denied a meaningful opportunity to be heard and**

present an alibi defense where the court did not allow defendant to explore what the confidential informant said to persuade defendant to procure cocaine, defendant's relationship with the informant, or defendant's motive for participating in the transaction. *Brooks v. State*, 224 Ga. App. 829, 482 S.E.2d 725 (1997).

**Defendant was entitled to an instruction on entrapment** where evidence showed that the state, with knowledge that defendant was a cocaine addict who was trying to stay free of drugs, employed an informant who not only enticed defendant into procuring cocaine for an undercover agent but also into returning to the habit of use, and where entrapment was defendant's sole defense. *Wagner v. State*, 220 Ga. App. 71, 467 S.E.2d 385 (1996).

**Defendant's unrebuted testimony regarding entrapment does not necessarily require directed verdict of acquittal.** — Lack of conflict in evidence is only one criteria in O.C.G.A. § 17-9-1. Thus, defendant's testimony as to entrapment, even if unrebuted by any other witness to alleged misconduct, will not entitle defendant to directed verdict of acquittal unless unrebuted testimony, together with all reasonable deductions and inferences therefrom, demands finding that entrapment occurred. *State v. Royal*, 247 Ga. 309, 275 S.E.2d 646 (1981); *Houston v. State*, 175 Ga. App. 881, 334 S.E.2d 907 (1985); *Worley v. State*, 185 Ga. App. 528, 364 S.E.2d 897 (1988); *Rapier v. State*, 245 Ga. App. 211, 535 S.E.2d 860 (2000).

**For treatment of entrapment as affirmative defense.** — See *State v. McNeill*, 234 Ga. 696, 217 S.E.2d 281 (1975); *Webb v. State*, 136 Ga. App. 90, 220 S.E.2d 27 (1975).

**When police engage in illegal activity in concert with defendant.** — If police engage in illegal activity in concert with defendant beyond scope of their duties, remedy lies not in freeing equally culpable defendant, but in prosecuting police under applicable provisions of state or federal law. *Griffin v. State*, 154 Ga. App. 261, 267 S.E.2d 867 (1980).

**When testimony shows only that agent asked defendant to procure co-**

**Application (Cont'd)**

caine for the agent, but there is no evidence that the agent induced or solicited defendant to commit the crime charged by undue persuasion, incitement, or deceitful means, defendant could not utilize an entrapment defense. *Harold v. State*, 185 Ga. App. 481, 364 S.E.2d 615 (1988).

**Defendant not entrapped to traffic methamphetamine.** — Although the idea for the commission of the crime unquestionably originated with the state actors, the police and a confidential informant did not use undue persuasion, coercion, or deceit, and the defendant was predisposed to commit the crime of trafficking in methamphetamine; therefore, no entrapment was shown. *Graves v. State*, 274 Ga. App. 855, 619 S.E.2d 356 (2005).

**Evidence rebutted entrapment defense in sale of cocaine conviction.** — Trial court did not err in convicting the defendant of the sale of cocaine and in denying the defendant's motion for a directed verdict of acquittal because the jury was authorized to find that the state's evidence rebutted the defendant's case of entrapment beyond a reasonable doubt since the uncontested testimony of the informant and the surveillance recording showed that the defendant had the previously established ability to purchase cocaine from the drug dealer and that the defendant willingly participated in the drug deal; there is no entrapment where the informant merely furnishes an opportunity to a defendant who is ready to commit the offense. *Jackson v. State*, 305 Ga. App. 591, 699 S.E.2d 884 (2010).

**Evidence insufficient to grant directed verdict for defendant.** — Evidence did not authorize the granting of a directed verdict since, other than defendant's own uncorroborated testimony, defendant offered no evidence whatsoever in refutation of that presented by the prosecution and the entrapment defense which defendant attempted to raise was likewise unsupported by any evidence other than

defendant's own testimony that the informant had a reputation for violence, that the informant had uttered a threat during appellant's negotiations with the Georgia Bureau of Investigation agent, and that defendant had assumed that a bulge allegedly observed beneath the agent's clothing was a gun; and the testimony of the agent, who was present during all stages of the transaction, was sufficient to rebut the defense of entrapment and to create an issue of fact for the jury. *Meade v. State*, 165 Ga. App. 556, 301 S.E.2d 912 (1983).

Defendant's testimony that informant begged defendant to find the informant some crack, and that defendant was led to believe that sex would be received, in addition to money, for providing the crack was insufficient to support defendant's defense of entrapment. *Farrow v. State*, 222 Ga. App. 689, 475 S.E.2d 706 (1996).

**Evidence supported defendant's conviction for attempted prostitution** when the record showed that defendant worked for "escort services" listed under "massage parlors" in the telephone directory and a witness testified "the lady put a condom on me and put her mouth on my penis" while charging the witness about \$300 therefor. *Renz v. State*, 183 Ga. App. 108, 357 S.E.2d 843 (1987).

**Evidence was sufficient to sustain defendant's conviction for criminal attempt to kidnap**, since the victim was grabbed and restrained against the victim's will and there was evidence from which the jury could find that the defendant intended to take the victim away in the defendant's truck and was thwarted only by the victim's resistance. *McGinnis v. State*, 183 Ga. App. 17, 358 S.E.2d 269 (1987).

**Attorney disciplinary proceeding.** — Entrapment defense generally is not available in an attorney disciplinary proceeding; overruling *Schaffer v. State Bd. of Veterinary Medicine*, 143 Ga. App. 68, 237 S.E.2d 510 (1977). *In re Kennedy*, 266 Ga. 249, 466 S.E.2d 1 (1996), overruled on other grounds, *In re Henley*, 271 Ga. 21, 518 S.E.2d 418 (1999).

## OPINIONS OF THE ATTORNEY GENERAL

**Legislative intent.** — General Assembly intended former Code 1933, § 26-905 to be merely a codification of existing law regarding entrapment. 1969 Op. Att'y Gen. No. 69-430. (see O.C.G.A. § 16-3-25).

**Necessity of undue persuasion.** —

Purchase of liquor by agent of Department of Revenue from one suspected of selling it illegally, where that purchase does not involve undue persuasion, does not constitute entrapment. 1969 Op. Att'y Gen. No. 69-430.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 203 et seq.

**Am. Jur. Proof of Facts.** — Entrapment to Commit Narcotics Offense, 12 POF2d 237.

**C.J.S.** — 22 C.J.S., Criminal Law, § 67 et seq.

**ALR.** — Entrapment to commit crime with view to prosecution therefor, 18 ALR 146.

Entrapment to commit offense with respect to gambling or lotteries, 31 ALR2d 1212.

Entrapment to commit offense with respect to narcotics law, 33 ALR2d 883.

Entrapment to commit offense against laws regulating sales of liquor, 55 ALR2d 1322.

Entrapment to commit bribery or offer to bribe, 69 ALR2d 1397.

Entrapment with respect to violation of fish and game laws, 75 ALR2d 709.

Entrapment to commit offense against obscenity laws, 77 ALR2d 792.

Larceny: entrapment or consent, 10 ALR3d 1121.

Defense of entrapment in contempt proceedings, 41 ALR3d 418.

Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 ALR3d 948.

Admissibility of evidence of other of-

fenses in rebuttal of defense of entrapment, 61 ALR3d 293.

Entrapment as a defense in proceedings to revoke or suspend license to practice law or medicine, 61 ALR3d 357.

Modern status of the law concerning entrapment to commit narcotics offense — state cases, 62 ALR3d 110.

Availability in state court of defense of entrapment where accused denies committing acts which constitute offense charged, 5 ALR4th 1128.

Adequacy of defense counsel's representation of criminal client regarding entrapment defense, 8 ALR4th 1160.

Entrapment defense in sex offense prosecutions, 12 ALR4th 413.

Entrapment to commit traffic offense, 34 ALR4th 1167.

Burden of proof as to entrapment defense — state cases, 52 ALR4th 775.

Maintainability of burglary charge, where entry into building is made with consent, 58 ALR4th 335.

Entrapment as defense to charge of selling or supplying narcotics where government agents supplied narcotics to defendant and purchased them from him, 9 ALR5th 464.

Right of criminal defendant to raise entrapment defense based on having dealt with other party who was entrapped, 15 ALR5th 39.

## 16-3-26. Coercion.

A person is not guilty of a crime, except murder, if the act upon which the supposed criminal liability is based is performed under such coercion that the person reasonably believes that performing the act is the only way to prevent his imminent death or great bodily injury. (Laws 1833, Cobb's 1851 Digest, p. 780; Code 1863, § 4202; Code 1868, § 4238; Code 1873, § 4303; Code 1882, § 4303; Penal Code 1895, § 41;

Penal Code 1910, § 41; Code 1933, § 26-402; Code 1933, § 26-906, enacted by Ga. L. 1968, p. 1249, § 1.)

## JUDICIAL DECISIONS

**Constitutionality.** — Exclusion of murder from those crimes to which coercion is defense is constitutional, i.e., does not deny a defendant the right to equal protection of the law. *Luther v. State*, 255 Ga. 706, 342 S.E.2d 316 (1986).

**“Duress” as employed in civil law is not synonymous with “coercion,” as employed in criminal law.** *McCoy v. State*, 78 Ga. 490, 3 S.E. 768 (1887); *Montford v. State*, 144 Ga. 582, 87 S.E. 797 (1916).

**Defendant relying on defense of coercion admits elements of offense** but affirmatively pleads legal justification. *Cowart v. State*, 136 Ga. App. 528, 221 S.E.2d 649 (1975), overruled on other grounds, 137 Ga. App. 735, 224 S.E.2d 856, aff’d, 237 Ga. 282, 227 S.E.2d 248 (1976).

**Coercion not a defense to murder.** — Defense of coercion may not be raised by party to or actual perpetrator of murder. *Thomas v. State*, 246 Ga. 484, 272 S.E.2d 68 (1980).

One cannot successfully defend murder charge on ground that one was coerced. *Milton v. State*, 248 Ga. 192, 282 S.E.2d 90 (1981).

In an action in which the defendant alleged that the defendant was wrongfully threatened by a drug dealer that if the defendant did not fatally shoot a victim, then the dealer would harm the defendant and the defendant’s family members, and accordingly, the defendant shot the victim and then hid the victim’s body in a shallow grave until such time as the defendant confessed to the crime 10 years later, the trial court properly refused to instruct the jury on justification pursuant to O.C.G.A. § 16-3-20(6), as the defendant’s criminal acts were directed toward a non-aggressor victim and there was no evidence that the defendant or any family members were threatened with “imminent death or great bodily injury,” furthermore, a coercion defense under O.C.G.A. § 16-3-26 would not be applicable to a charge of murder.

*Gravitt v. State*, 279 Ga. 33, 608 S.E.2d 202 (2005).

Defendant’s counsel was not ineffective in adopting a coercion defense, although coercion was no defense to murder pursuant to O.C.G.A. § 16-3-26, because counsel was constrained by the defendant’s statements to police that another forced the defendant to beat the victim at gunpoint. Moreover, the evidence of guilt was overwhelming, and the defendant offered no alternate theory of defense. *Lambert v. State*, 287 Ga. 774, 700 S.E.2d 354 (2010).

**Coercion defense was not available to defendant who never admitted participation.** — In a joint trial wherein a defendant and two codefendants were convicted of armed robbery, the trial court did not err by failing to instruct the jury on one defendant’s sole defense of coercion and duress because the defendant never filed a written request for a charge on coercion or duress and a review of the defendant’s trial testimony showed that the defendant never admitted participating in the armed robbery, thus, the defense was not available to the defendant. *Mathis v. State*, No. A09A0215; No. A09A0308; No. A09A0358, 2009 Ga. App. LEXIS 586 (May 20, 2009).

**Defendant who admitted being party to armed robbery entitled to instruction on defense of coercion.** — Defendant who admitted the elements of armed robbery as a party to the crime, O.C.G.A. § 16-2-21, and who testified that the defendant committed such acts because a codefendant pointed a gun at the defendant and threatened to shoot the defendant or defendant’s family was entitled to a jury charge on coercion under O.C.G.A. § 16-3-26, and the trial court erred in failing to so instruct the jury even in the absence of a request by the defendant. *Mathis v. State*, 299 Ga. App. 831, 684 S.E.2d 6 (2009).

**In a prosecution for felony murder** the trial court did not commit reversible error by instructing the jury that coercion

is not a defense to murder where defendant produced no evidence that defendant was coerced into committing the underlying felonies to the felony murder conviction. *Kelly v. State*, 266 Ga. 709, 469 S.E.2d 653 (1996).

**Cofedendant's trial should have been severed.** — Trial court erred in denying a codefendant's motion to sever the trial from the defendant's trial because the codefendant was not allowed to introduce the exculpatory portions of the statements that explained the excerpted admissions introduced by the state, which supported the codefendant's antagonistic defense that the codefendant was present at the robberies due to coercion by the defendant. To avoid potential Bruton issues, the state introduced only those portions of the codefendant's 9-1-1 calls or custodial statements made establishing that the codefendant was at the scene of two robberies, that the codefendant's vehicles were used, and that the codefendant sent police to a motel room to investigate the robberies, but refused the additional portions of the statements that tended to support the codefendant's defense that the codefendant was coerced into participating in the crimes. *Bowe v. State*, 288 Ga. App. 376, 654 S.E.2d 196 (2007), cert. dismissed, sub. nom., *State v. Baker*, No. S08C0548, 2008 Ga. LEXIS 318 (Ga. 2008).

**Person coerced by another to commit a crime is not an accomplice.** *Beal v. State*, 72 Ga. 200 (1883); *Henderson v. State*, 5 Ga. App. 495, 63 S.E. 535 (1909).

**One charged as accomplice to murder may assert defense of coercion.** — Witness may be found not to be an accomplice due to coercion so as to eliminate requirement of corroboration in murder trial even though such person, if charged with murder, could not successfully use coercion as a defense to the charges. *Milton v. State*, 248 Ga. 192, 282 S.E.2d 90 (1981).

**Fear must be of present and immediate violence.** *Hill v. State*, 135 Ga. App. 766, 219 S.E.2d 18 (1975).

Danger must not be one of future violence, but of present and immediate violence at time of commission of forbidden act. *Williams v. State*, 69 Ga. 11 (1882);

*Burns v. State*, 89 Ga. 527, 15 S.E. 748 (1892); *Chambers v. State*, 154 Ga. App. 620, 269 S.E.2d 42 (1980); *Stitt v. State*, 190 Ga. App. 58, 378 S.E.2d 168 (1989).

Where none of the defendant's evidence related to present and immediate violence towards defendant at the time defendant procured cocaine for informants so as to justify defendant's criminal conduct, and there was no showing of a reasonable fear of immediate violence, the trial court did not err in refusing to give a requested charge under O.C.G.A. § 16-3-26. *Holder v. State*, 194 Ga. App. 790, 391 S.E.2d 808 (1990).

**Fear of injury must be reasonable.** *Hill v. State*, 135 Ga. App. 766, 219 S.E.2d 18 (1975).

In order for fear produced by threats or menaces to be a valid legal excuse for doing anything which would otherwise be criminal, the act must have been done under such threats or menaces as show that life or member was in danger, or that there was reasonable cause to believe that there was such danger. *Chambers v. State*, 154 Ga. App. 620, 269 S.E.2d 42 (1980).

Coercion defense requires that the fear of injury must be reasonable and the danger must not be one of future violence but of present and immediate violence at the time of the commission of the forbidden act. *Gordon v. State*, 234 Ga. App. 551, 507 S.E.2d 269 (1998).

**Action necessitated by direct danger to life or of great bodily injury.** — Coercion involves involuntary performance of criminal act under fear of threats or menaces involving a direct danger to life or great bodily injury where danger is abated only by performance of criminal act. *Chambers v. State*, 154 Ga. App. 620, 269 S.E.2d 42 (1980); *Stewart v. State*, 177 Ga. App. 681, 340 S.E.2d 283 (1986).

Coercion involves the involuntary performance of a criminal act under fear of threats or menaces involving a direct danger to life or great bodily injury where the danger is abated only by the performance of the criminal act. The danger must not be one of future violence but of present and immediate violence at the time of the commission of the forbidden act. *Slater v. State*, 185 Ga. App. 889, 366 S.E.2d 240 (1988).

**Exclusion of expert evidence regarding battered person's syndrome.**

— There was no error in the refusal to admit expert testimony regarding the battered person syndrome to support the defendant's justification defense of coercion at the defendant's trial for various assault crimes committed against the defendant's nine-year-old daughter. *Pickle v. State*, 280 Ga. App. 821, 635 S.E.2d 197 (2006), cert. denied, 2007 Ga. LEXIS 110, 111 (Ga. 2007).

**Coercion is no defense** if the person has any reasonable way, other than committing the crime, to escape the threat of harm. *Barnes v. State*, 178 Ga. App. 205, 342 S.E.2d 388 (1986); *Stitt v. State*, 190 Ga. App. 58, 378 S.E.2d 168 (1989); *Brinson v. State*, 244 Ga. App. 40, 537 S.E.2d 370 (2000).

When defendant testified that the codefendant conceived of the robbery without defendant's knowledge or participation and that only the codefendant was armed, defendant did acknowledge pretending to have a gun, and giving orders to the store occupants, defendant gave no indication that acts were out of fear that codefendant would harm defendant if defendant refused to cooperate thus, defendant's own testimony was sufficient to authorize a conviction for armed robbery and aggravated assault, and insufficient to support a defense of coercion. *House v. State*, 203 Ga. App. 55, 416 S.E.2d 108, cert. denied, 203 Ga. App. 906, 416 S.E.2d 108 (1992).

In a bench trial for armed robbery and aggravated assault, the evidence authorized the trial court to conclude that the state had sufficiently disproved the defendant's defense that the defendant had been coerced by one of the defendant's companions into committing the crimes; the defendant had not mentioned coercion in either of the defendant's two statements to police, one in which the defendant had admitted to committing the crimes, and it was not until trial that the defendant claimed coercion. *Edwards v. State*, 285 Ga. App. 227, 645 S.E.2d 699 (2007).

Appellate court chose not to disturb the jury's determination that the defendant was not coerced into driving while intoxicated because the defendant admitted

that the defendant was not coerced into driving a truck away from a restaurant; the defendant testified that an employee of the restaurant asked the defendant to leave; the defendant drove away to avoid a fight; the defendant had three or four beers before driving the truck; the defendant had a cell phone in the defendant's possession but the defendant did not attempt to call 9-1-1, nor did the defendant ask the restaurant's employees to call a cab for the defendant; and the person who was trying to fight the defendant was in the parking lot but was not armed. *Hines v. State*, 308 Ga. App. 299, 707 S.E.2d 534 (2011).

**Failure to raise coercion defense not ineffective assistance of counsel.**

— Defendant was not denied effective assistance of counsel based on counsel's failure to present a coercion defense to armed robbery, aggravated assault, and kidnapping charges as the decision about what defense to present was a matter of strategy; there was no evidence that the codefendant threatened defendant during the offenses or forced the defendant to drive the getaway car and the defendant did not testify about any coercion by the codefendant until the police chase. *Maxey v. State*, 272 Ga. App. 800, 613 S.E.2d 236 (2005).

**Charge properly refused when coercion subsequent to offense.** — Trial court properly refused to give a requested charge in regard to coercion when the events in question purportedly occurred subsequent to the events determinative of the defendant's guilt or innocence of the crime with which defendant is charged. *McDaniel v. State*, 169 Ga. App. 254, 312 S.E.2d 363 (1983).

**Issues of present O.C.G.A. § 16-3-26 are questions for jury.** *Hill v. State*, 135 Ga. App. 766, 219 S.E.2d 18 (1975).

**It is for jury to determine whether there was coercion.** *Syck v. State*, 130 Ga. App. 50, 202 S.E.2d 464 (1973).

**When specific instruction unnecessary.** — Court did not err in failing to specifically charge the jury on the law of justification and coercion when the charge and the evidence as a whole adequately and fairly presented the defendant's theories of the case, that is, that defendant

was only incidentally involved in the commission of the crimes (armed robbery and kidnapping), and defendant's testimony was not that defendant was coerced into commission of the crime, but that the codefendant on the codefendant's own initiative had robbed the victim and forced the victim into the automobile, that the defendant was at all times attempting to talk the codefendant out of committing the crime, and that the defendant had nothing to do with either the robbery or the kidnapping. *Mallory v. State*, 166 Ga. App. 812, 305 S.E.2d 656 (1983).

Unless the danger of present and immediate violence coincides with the commission of the forbidden act, a trial court may refuse to give a charge on coercion. *Gordon v. State*, 234 Ga. App. 551, 507 S.E.2d 269 (1998).

An instruction on coercion was properly denied with regard to charges of kidnapping and murder where the defendant admitted only to simple battery. *Hanifa v. State*, 269 Ga. 797, 505 S.E.2d 731 (1998).

Defendant was not entitled to a charge on coercion as the defendant did not admit to participating in the crimes. *Olarde v. State*, 273 Ga. App. 96, 614 S.E.2d 213 (2005).

Absent evidence presented by the defendant showing an immediate or future threat of violence at the time of the commission of the crime, the defendant was properly denied a jury charge on coercion. *Thomas v. State*, 285 Ga. App. 290, 645 S.E.2d 713 (2007), cert. denied, 2007 Ga. LEXIS 610 (Ga. 2007).

Trial court was not required to give a *sua sponte* charge on coercion since it was not supported in the case because the defendant did not testify at trial or at the hearing, and there was no other admissible evidence showing that an accomplice threatened the defendant with violence or that the defendant feared the accomplice; a codefendant testified that the accomplice never pointed a gun at the codefendant or the defendant, the victim testified that the accomplice's gun was constantly pointed at the victim, and police officers testified that, although the defendant told the officers that the defendant was the driver who pushed the victim out of the car, the defendant never stated to the

police that the defendant acted under gunpoint. *Clausell v. State*, 302 Ga. App. 472, 691 S.E.2d 312 (2010).

Trial court did not err in finding that trial counsel rendered effective assistance of counsel because trial counsel was not ineffective for failing to request a charge on coercion; there was no evidence of a threat of immediate violence at the time of the commission of the forbidden act, and the defendant failed to take advantage of the many opportunities the defendant had to walk away from the criminal enterprise. *Clausell v. State*, 302 Ga. App. 472, 691 S.E.2d 312 (2010).

**Coercion defense a matter of trial strategy.** — Trial court did not err in concluding that the defendant failed to carry the defendant's burden of showing ineffective assistance; trial counsel's decision to pursue the coercion defense, O.C.G.A. § 16-3-26, for armed robbery rather than a mistaken identity defense, was clearly a strategic decision based upon the evidence. *Lewis v. State*, 270 Ga. App. 48, 606 S.E.2d 77 (2004).

**Coercion is a jury issue.** — Defendant argued that given the conflicts in the evidence, the jury was not authorized to reject the defendant's coercion defense, however, the resolution of conflicts in the evidence is a matter for the jury and whether or not a defendant is coerced into acting is a question for the trier of fact; under the circumstances of this case including the defendant's youth, the jury certainly was authorized to conclude that the defendant was not coerced into robbing the victim. *Treadwell v. State*, 272 Ga. App. 508, 613 S.E.2d 3 (2005).

Evidence that the defendant and others approached two separate victims while the defendant brandished a shotgun, that the defendant threatened the victims with the gun, and that the defendant and the compatriots stole both of the victims' cars, sufficed to sustain the defendant's convictions of two counts of hijacking a motor vehicle, two counts of armed robbery, two counts of aggravated assault with a deadly weapon, and two counts of possession of a firearm during the commission of a felony; the jury was free to disbelieve the defendant's testimony that the defendant was coerced into threatening the victims

at gunpoint and participating in the car thefts, and was authorized to find the defendant guilty based on the evidence presented at trial. *Martinez v. State*, 278 Ga. App. 500, 629 S.E.2d 485 (2006).

**Cited** in *Ivie v. State*, 131 Ga. App. 201, 205 S.E.2d 529 (1974); *Dobbs v. State*, 132 Ga. App. 614, 208 S.E.2d 624 (1974); *Orkin v. State*, 236 Ga. 176, 223 S.E.2d 61 (1976); *Mason v. Balcom*, 531 F.2d 717 (5th Cir. 1976); *Wilson v. State*, 151 Ga. App. 501, 260 S.E.2d 527 (1979); *Herring v. State*, 152 Ga. App. 150, 262 S.E.2d 529 (1979); *Jones v. State*, 154 Ga. App. 806, 270 S.E.2d 201 (1980); *Kennedy v. State*,

156 Ga. App. 792, 275 S.E.2d 339 (1980); *Coile v. State*, 161 Ga. App. 51, 288 S.E.2d 859 (1982); *Young v. State*, 163 Ga. App. 507, 295 S.E.2d 175 (1982); *Rivers v. State*, 250 Ga. 288, 298 S.E.2d 10 (1982); *Minton v. State*, 167 Ga. App. 114, 305 S.E.2d 812 (1983); *Head v. State*, 191 Ga. App. 262, 381 S.E.2d 519 (1989); *Rogers v. State*, 191 Ga. App. 353, 381 S.E.2d 545 (1989); *Aleman v. State*, 227 Ga. App. 607, 489 S.E.2d 867 (1997); *Norris v. State*, 227 Ga. App. 616, 489 S.E.2d 875 (1997); *Walsh v. State*, 269 Ga. 427, 499 S.E.2d 332 (1998); *Bailey v. State*, 245 Ga. App. 852, 539 S.E.2d 191 (2000).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 142 et seq.

**ALR.** — Effect of coverture upon the criminal responsibility of a woman, 4 ALR 266; 71 ALR 1116.

Coercion, compulsion, or duress as defense to criminal prosecution, 40 ALR2d 908.

Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime, 1 ALR4th 481.

Coercion, compulsion, or duress as de-

fense to charge of kidnapping, 69 ALR4th 1005.

Defense of necessity, duress, or coercion in prosecution for violation of state narcotics laws, 1 ALR5th 938.

Ineffective assistance of counsel: compulsion, duress, necessity, or "hostage syndrome" defense, 8 ALR5th 713.

Duress, necessity, or conditions of confinement as justification for escape from prison, 54 ALR5th 141.

### 16-3-27. Benefit of clergy.

Since it is no longer needed or appropriate, the ancient device of benefit of clergy shall not exist. (Laws 1833, Cobb's 1851 Digest, p. 837; Code 1863, § 4547; Code 1868, § 4567; Code 1873, § 4661; Code 1882, § 4661; Penal Code 1895, § 17; Penal Code 1910, § 17; Code 1933, § 26-102; Code 1933, § 26-202, enacted by Ga. L. 1968, p. 1249, § 1.)

### JUDICIAL DECISIONS

**Cited** in *Peavy v. State*, 159 Ga. App. 280, 283 S.E.2d 346 (1981).

### 16-3-28. Affirmative defenses.

A defense based upon any of the provisions of this article is an affirmative defense. (Code 1933, § 26-907, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For survey article on criminal law, see 60 Mercer L. Rev. 85 (2008).

## JUDICIAL DECISIONS

**Affirmative defense admits doing act charged,** but seeks to justify, excuse, or mitigate it. *Cowart v. State*, 136 Ga. App. 528, 221 S.E.2d 649 (1975), overruled on other grounds, 137 Ga. App. 735, 224 S.E.2d 856, aff'd, 237 Ga. 282, 227 S.E.2d 248 (1976).

**Burden of proof of affirmative defenses rests entirely upon state.** — Charges which place any burden of persuasion upon defendant in criminal cases shall not be given and such charges will be deemed erroneous and subject to reversal, absent harmless error and invited error; even when defendant raises one of the affirmative defenses defined in the Criminal Code (see O.C.G.A. Ch. 3, T. 16), the burden of proof still rest entirely upon the state as it does with all other issues in the case. *Perkins v. State*, 151 Ga. App. 199, 259 S.E.2d 193 (1979); *State v. McNeill*, 234 Ga. 696, 217 S.E.2d 281 (1975).

Trial court erred in failing to charge the jury that the state had the burden of disproving defendant's affirmative defense of accident beyond a reasonable doubt. *Griffin v. State*, 267 Ga. 586, 481 S.E.2d 223 (1997).

**Burden of putting forward affirmative defense is on defendant**, though the state has the burden of disproving the affirmative defense beyond a reasonable

doubt. *State v. McNeill*, 234 Ga. 696, 217 S.E.2d 281 (1975).

**Defendant need not negate any elements of crime** which state must prove to convict. *Holloway v. McElroy*, 241 Ga. 400, 245 S.E.2d 658 (1978).

**Burden placed on defendant to excuse homicide is an affirmative defense.** *Holloway v. McElroy*, 241 Ga. 400, 245 S.E.2d 658 (1978).

**Mistake of fact defense inapplicable.** — Mistake of fact defense was not applicable because the defendant did not admit participation in the murder and, in fact, denied any involvement. *Murphy v. State*, 280 Ga. 158, 625 S.E.2d 764 (2006).

**For discussion of entrapment as affirmative defense**, see *State v. McNeill*, 234 Ga. 696, 217 S.E.2d 281 (1975).

**Cited** in *Chambers v. State*, 127 Ga. App. 196, 192 S.E.2d 916 (1972); *Rivers v. State*, 250 Ga. 288, 298 S.E.2d 10 (1982); *Aleman v. State*, 227 Ga. App. 607, 489 S.E.2d 867 (1997); *Norris v. State*, 227 Ga. App. 616, 489 S.E.2d 875 (1997); *Manning v. State*, 231 Ga. App. 584, 499 S.E.2d 650 (1998); *Graham v. State*, 239 Ga. App. 429, 521 S.E.2d 249 (1999); *Bailey v. State*, 245 Ga. App. 852, 539 S.E.2d 191 (2000); *Mathis v. State*, No. A09A0215; No. A09A0308; No. A09A0358, 2009 Ga. App. LEXIS 586 (May 20, 2009); *Hines v. State*, 308 Ga. App. 299, 707 S.E.2d 534 (2011).

## RESEARCH REFERENCES

**ALR.** — Homicide: modern status of rules as to burden and quantum of proof to show self-defense, 43 ALR3d 221.

## ARTICLE 3

### ALIBI

#### 16-3-40. Alibi.

The defense of alibi involves the impossibility of the accused's presence at the scene of the offense at the time of its commission. The

range of the evidence in respect to time and place must be such as reasonably to exclude the possibility of presence. (Penal Code 1895, § 992; Penal Code 1910, § 1018; Code 1933, § 38-122.)

**Law reviews.** — For note discussing *Smith v. Smith*, 454 F.2d 572 (5th Cir. 1971), rehearing and rehearing en banc denied February 1, 1972, see 23 Mercer L. Rev. 977 (1972).

For comment on *Parham v. State*, 120 Ga. App. 723, 171 S.E.2d 911 (1969) and the rejection of charge that defendant

must prove alibi to the satisfaction of the jury, see 21 Mercer L. Rev. 511 (1970). For comment on *Bassett v. Smith*, 464 F.2d 347 (5th Cir. 1972), refusing to apply decision holding Georgia's alibi instruction unconstitutional retroactively, see 9 Ga. St. B.J. 500 (1973).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION  
WHEN CHARGE REQUIRED  
WHEN CHARGE NOT REQUIRED  
BURDEN OF PROOF  
APPLICATION

#### General Consideration

**Alibi is physical circumstance**, and derives its entire potency as a defense from fact that it involves physical impossibility of guilt of accused. An alibi which still leaves it possible for accused to be guilty is not an alibi at all. *Harris v. State*, 120 Ga. 167, 47 S.E. 520 (1904).

**Alibi is simply evidence in support of defendant's plea of not guilty**, and should be treated merely as evidence tending to disprove one of the essential factors in prosecution's case, that is, presence of defendant at time and place of alleged crime. *Parham v. State*, 120 Ga. App. 723, 171 S.E.2d 911 (1969), for comment, see 21 Mercer L. Rev. 511 (1970).

**Alibi is simply evidence rebutting case for prosecution** by denying charge against defendant. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972), for comment, see 23 Mercer L. Rev. 977 (1972).

**Defense of alibi is statutory in criminal cases**, but not in civil cases. *Roberts v. McClellan*, 80 Ga. App. 199, 55 S.E.2d 736 (1949).

**Alibi consists of proof that defendant was elsewhere when crime was committed.** — Alibi as a defense consists

of proof that at time when crime was committed, accused was at place different from that where it was committed, so as to preclude idea that accused was perpetrator. *Staton v. State*, 174 Ga. 719, 163 S.E. 901 (1932).

**Alibi is not a true affirmative defense.** *Parham v. State*, 120 Ga. App. 723, 171 S.E.2d 911 (1969), for comment, see 21 Mercer L. Rev. 511 (1970); *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972), for comment, see 23 Mercer L. Rev. 977 (1972).

**Failure to inform state of defendant's alibi defense.** — Defendant's assigned attorney did not render ineffective assistance for failing to inform the state of the defendant's alibi defense and witness, which resulted in the exclusion of the defendant's alibi defense at the defendant's criminal trial, as counsel indicated that counsel spoke with the alibi witness, the defendant's sibling, and counsel had concluded that the defendant could not provide testimony establishing an alibi defense because the defendant had no memory of the defendant's whereabouts on specific dates and times. *Rogers v. State*, 271 Ga. App. 698, 610 S.E.2d 679 (2005).

**Construction with O.C.G.A. § 17-16-5(a).** — Defendant, whose evidence was the sole evidence in support of an alibi defense, was required to file an intention to offer an alibi defense under O.C.G.A. § 17-16-5(a), even when the state was aware that the defendant claimed to be elsewhere on the day of the crime, and such did not affect the defendant's right to testify under the Sixth Amendment; moreover, any prejudice to the state was irrelevant, because the statute provided no exception for such prior knowledge, and because common sense dictated that the mere claim to be elsewhere when confronted by authorities was a far cry from intending to present the legal defense of alibi. *State v. Charbonneau*, 281 Ga. 46, 635 S.E.2d 759 (2006).

**Use of words "set up," in charging** that "the defendant has set up an alibi as a defense in this case," is not an expression by the trial court that the defendant's defense of alibi was a concocted matter. *Strozier v. State*, 165 Ga. App. 551, 301 S.E.2d 907 (1983).

**Cited in** *Williams v. State*, 123 Ga. 138, 51 S.E. 322 (1905); *Collier v. State*, 154 Ga. 68, 113 S.E. 213 (1922); *Jones v. State*, 68 Ga. App. 210, 22 S.E.2d 671 (1942); *Weaver v. State*, 199 Ga. 267, 34 S.E.2d 163 (1945); *Porter v. State*, 200 Ga. 246, 36 S.E.2d 794 (1946); *King v. State*, 77 Ga. App. 539, 49 S.E.2d 196 (1948); *Roberts v. McClellan*, 80 Ga. App. 199, 55 S.E.2d 736 (1949); *Perry v. State*, 105 Ga. App. 776, 125 S.E.2d 666 (1962); *Pryor v. State*, 113 Ga. App. 660, 149 S.E.2d 401 (1966); *Pippins v. State*, 224 Ga. 462, 162 S.E.2d 338 (1968); *Boyles v. State*, 120 Ga. App. 852, 172 S.E.2d 637 (1969); *Bridges v. State*, 123 Ga. App. 157, 179 S.E.2d 685 (1970); *Evans v. State*, 124 Ga. App. 723, 185 S.E.2d 805 (1971); *Johnson v. State*, 228 Ga. 860, 188 S.E.2d 859 (1972); *Bryant v. State*, 229 Ga. 60, 189 S.E.2d 435 (1972); *Welch v. State*, 130 Ga. App. 18, 202 S.E.2d 223 (1973); *Poole v. State*, 130 Ga. App. 603, 203 S.E.2d 886 (1974); *Peters v. State*, 131 Ga. App. 513, 206 S.E.2d 623 (1974); *Payne v. State*, 233 Ga. 294, 210 S.E.2d 775 (1974); *Bagby v. State*, 134 Ga. App. 263, 214 S.E.2d 11 (1975); *Billups v. State*, 236 Ga. 922, 225 S.E.2d 887 (1976);

*Abner v. State*, 139 Ga. App. 600, 229 S.E.2d 83 (1976); *Howard v. State*, 141 Ga. App. 238, 233 S.E.2d 58 (1977); *Cooper v. State*, 143 Ga. App. 246, 237 S.E.2d 715 (1977); *Johnson v. State*, 143 Ga. App. 516, 239 S.E.2d 201 (1977); *Cain v. State*, 144 Ga. App. 249, 240 S.E.2d 750 (1977); *Calloway v. State*, 144 Ga. App. 457, 241 S.E.2d 575 (1978); *Rice v. State*, 147 Ga. App. 643, 249 S.E.2d 694 (1978); *Colbert v. State*, 146 Ga. App. 266, 253 S.E.2d 882 (1979); *Patrick v. State*, 245 Ga. 417, 265 S.E.2d 553 (1980); *Hudgins v. State*, 153 Ga. App. 601, 266 S.E.2d 283 (1980); *Adams v. State*, 246 Ga. 119, 269 S.E.2d 11 (1980); *Whitt v. State*, 157 Ga. App. 10, 276 S.E.2d 64 (1981); *James v. State*, 162 Ga. App. 490, 292 S.E.2d 91 (1982); *Pearson v. State*, 164 Ga. App. 337, 297 S.E.2d 98 (1982); *Jones v. State*, 165 Ga. App. 498, 299 S.E.2d 576 (1983); *Kennedy v. State*, 172 Ga. App. 336, 323 S.E.2d 169 (1984); *Melton v. State*, 222 Ga. App. 555, 474 S.E.2d 640 (1996).

#### When Charge Required

**When evidence reasonably excludes possibility of defendant's presence at time of commission of offense, charge on alibi is warranted.** *Simmons v. State*, 149 Ga. App. 830, 256 S.E.2d 79 (1979).

**Defendant's testimony as to whereabouts at time of crime warrants charge on alibi.** — It is not error for court to charge law of alibi where defendant, testifying as witness in own behalf, states that defendant was at some place distant from where crime was committed at time it occurred. *Williams v. State*, 223 Ga. 773, 158 S.E.2d 373 (1967).

**When alibi is sole defense and is supported by evidence.** — It is error, even in absence of request, to fail to charge on law of alibi, if this is the defendant's sole defense and is supported not only by the defendant's statement but by the testimony of witnesses. *Cutts v. State*, 86 Ga. App. 760, 72 S.E.2d 565 (1952); *Jenkins v. State*, 96 Ga. App. 86, 99 S.E.2d 474 (1957); *Coppage v. State*, 113 Ga. App. 482, 148 S.E.2d 484 (1966); *Brown v. State*, 122 Ga. App. 470, 177 S.E.2d 509 (1970); *Silvey v. State*, 142 Ga. App. 699, 236 S.E.2d 869 (1977).

### When Charge Required (Cont'd)

When alibi is sole defense of the accused, the failure of the trial court to charge on defense of alibi, even in absence of request, is reversible error when there is some evidence to support the defense. *Dixon v. State*, 157 Ga. App. 550, 278 S.E.2d 130 (1981).

**In prosecution for burglary and rape, evidence was sufficient to support charge on alibi where, although the defendant testified to not remembering where defendant was on the day the crimes occurred, defendant also testified that on that day defendant did not see the victim, defendant did not break into the victim's home, and defendant did not see the codefendant.** *Boyd v. State*, 167 Ga. App. 799, 307 S.E.2d 725 (1983).

### When Charge Not Required

**Lack of supporting evidence.** — Although alibi constitutes the sole defense, the court need not charge thereon when not authorized by the evidence. *Sapp v. State*, 155 Ga. App. 485, 271 S.E.2d 19 (1980).

In prosecution for attempting to elude police officer, when defendant admitted to being present in the vicinity of the chase, defendant's explanation that defendant was at school moments before being stopped did not constitute an alibi so as to require an alibi charge. *Storey v. State*, 205 Ga. App. 610, 422 S.E.2d 879, cert. denied, 205 Ga. App. 901, 422 S.E.2d 879 (1992).

**Charge on alibi not authorized by evidence.** — Alibi was not an issue and the trial court was not required to give a charge on alibi since the charge was not authorized by the evidence when the evidence was uncontradicted that the defendant was not at the motel at the time of the drug transaction or when the contraband was discovered and seized, and the state never contended that defendant was present. The "alibi" witnesses for the defense testified only that they had seen defendant at another motel on some unspecified dates in March. *Mathis v. State*, 204 Ga. App. 896, 420 S.E.2d 788, cert. denied, 204 Ga. App. 922, 420 S.E.2d 788 (1992).

**Charge not requested.** — Absent request, court need not charge on alibi where evidence supporting it is manifestly insufficient. *Hornbuckle v. State*, 76 Ga. App. 111, 45 S.E.2d 98 (1947).

It is ordinarily not error to fail to charge specifically on alibi absent a request for such a charge. *Rivers v. State*, 250 Ga. 288, 298 S.E.2d 10 (1982); *Ashley v. State*, 240 Ga. App. 502, 523 S.E.2d 901 (1999).

Trial court did not err in failing to charge on alibi absent a request. *Johnson v. State*, 174 Ga. App. 751, 330 S.E.2d 925 (1985).

Even if the defense of alibi had been raised by the evidence, a specific charge on alibi was not required, absent a written request, if the court's charge as a whole covered such defense. *Hightower v. State*, 224 Ga. App. 703, 481 S.E.2d 867 (1997).

It was not error to fail to give a charge on alibi when a burglary defendant had not requested such a charge; the jury had been fully charged on the presumption of innocence and proof beyond a reasonable doubt, and moreover the defendant's alibi testimony did not establish the impossibility of the defendant's presence at the scene of the burglary at the time the burglary was committed. *Matthews v. State*, 285 Ga. App. 859, 648 S.E.2d 160 (2007).

**Trial court's refusal to give defendant's written request to charge the jury on the law of alibi** was not reversible error where the testimony of the witness for the defendant would have provided an alibi for the night before the actual commission of the crime. *Brewton v. State*, 174 Ga. App. 109, 329 S.E.2d 270 (1985).

**When defendant charged with setting up robbery.** — When the state never contended the defendant was actually present at the time of the robbery but that defendant had set up the robbery and left the scene shortly before the robbery took place, alibi was not in issue and therefore it was not error for the court to refuse an instruction on alibi. *Martin v. State*, 170 Ga. App. 854, 318 S.E.2d 724 (1984).

**When evidence of alibi is not of strong probative value, charge thereon is unnecessary.** — Failure to charge on alibi is not error, especially in

absence of written request, where evidence in support of alibi is not of clear and strong probative value. Cole v. State, 63 Ga. App. 418, 11 S.E.2d 239 (1940).

When evidence relating to alibi is not clear and of strong probative value, failure to charge thereon, in absence of proper request, will not be cause for reversal. Dixon v. State, 157 Ga. App. 550, 278 S.E.2d 130 (1981).

Trial court did not err in not charging the jury on the law on alibi notwithstanding the defendant's failure either to request such a charge or to object to the jury charge given when, because of the vagueness of the exact times of defendant's alibi and the wide span of time during which the crime occurred, the defendant's testimony, even if believed, did not necessarily or reasonably exclude the possibility of defendant's presence. Morris v. State, 166 Ga. App. 137, 303 S.E.2d 492 (1983).

**Failure to show impossibility of defendant's presence.** — When evidence in support of defense of alibi does not show impossibility of defendant's presence at scene of crime at time of the crime's commission, failure of the court to charge law of alibi, especially in absence of request for such charge, is not error. Plemons v. State, 155 Ga. App. 447, 270 S.E.2d 836 (1980).

**When only evidence of alibi is defendant's unsupported statement.** — In rape prosecution, when there was no evidence of alibi except a statement of defendant, even conceding that statement of defendant was sufficient to raise the defense, if evidence of sheriff, who arrested defendant, in no way supported defense of alibi, and no other evidence tending to do so was offered, the trial court did not err in failing to charge law of alibi, in the absence of a timely written request. Williams v. State, 207 Ga. 620, 63 S.E.2d 358 (1951).

It is not error to fail to charge on alibi when there is no request therefor and only basis for alibi consists of defendant's unsworn statement. Smith v. State, 155 Ga. App. 506, 271 S.E.2d 654 (1980), cert. denied, 450 U.S. 922, 101 S. Ct. 1372, 67 L. Ed. 2d 351 (1981).

**Unsworn statement of defendant, by itself, is insufficient to establish**

**alibi.** — With issue of alibi raised only by defendant's unsworn statement, it cannot be said there is strong and probative evidence which reasonably excludes possibility of defendant's presence at scene. Baker v. State, 127 Ga. App. 403, 194 S.E.2d 122 (1972).

**Defendant's prior statements repeated in court by state's witnesses** are insufficient to raise defense of alibi. Smith v. State, 155 Ga. App. 506, 271 S.E.2d 654 (1980), cert. denied, 450 U.S. 922, 101 S. Ct. 1372, 67 L. Ed. 2d 351 (1981).

**Defendant's unsworn statement that defendant was asleep in car used in robbery.** — When defendant in unsworn statement admitted being in an automobile allegedly used in a robbery but contended defendant was asleep from before until after the robbery took place, the statement was not sufficient to raise the issue of alibi so as to require that the trial court give the requested instruction on alibi. Hunsinger v. State, 225 Ga. 426, 169 S.E.2d 286 (1969).

**Testimony contradicting rape victim's evidence regarding time spent with defendant.** — Testimony which merely contradicted evidence of girl allegedly raped as to length of time she and defendant were together was insufficient to show impossibility of defendant's presence at scene of alleged offense at time of its commission; accordingly, court did not err in not charging on subject of alibi. Latimer v. State, 188 Ga. 775, 4 S.E.2d 631 (1939).

**When question of identity and fact of alibi are essentially the same.** — When the trial court charges the jury on the subject of identification of the defendant as the perpetrator of the charged offenses and when the question of identity of the perpetrator and the fact of alibi are essentially the same defense, the court's failure to charge on alibi is not error. Morris v. State, 166 Ga. App. 137, 303 S.E.2d 492 (1983).

**When personal identity and alibi are virtually the same defense,** the court need not instruct separately on alibi. Staton v. State, 174 Ga. 719, 163 S.E. 901 (1932).

**Counsel was not ineffective in failing to request an alibi charge** since the

**When Charge Not Required (Cont'd)**

defense witnesses' testimony did not reasonably exclude the possibility of the defendant's presence at the crime scene. *Moore v. State*, 268 Ga. App. 398, 601 S.E.2d 854 (2004).

**Burden of Proof**

**State must prove defendant's presence at commission of offense**, beyond reasonable doubt when it is an essential element of the crime. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972), commented on in 23 Mercer L. Rev. 977 (1972).

Since the true effect of an alibi defense is to traverse the state's proof that the defendant committed the crime, the charge that the burden is on the state to prove that the defendant committed the crime beyond a reasonable doubt itself necessarily covers the question of whether the evidence of alibi was sufficient to create a reasonable doubt. *Rivers v. State*, 250 Ga. 288, 298 S.E.2d 10 (1982).

**Burden of proving defendant's presence is on state throughout trial**, and evidence of defendant's absence tends merely to weaken or disprove testimony of state's witnesses on this point. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972), commented on in 23 Mercer L. Rev. 977 (1972).

**Defendant need not establish alibi by any particular quantum of proof.** — When state presents evidence of defendant's presence, the burden of going forward with evidence to contradict the state's evidence may shift to defendant but it must not carry with it the requirement that defendant establish own evidence by any quantum of proof. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972), commented on in 23 Mercer L. Rev. 977 (1972).

**Placing burden of proof or persuasion of alibi on defendant.** — Regardless of what quantum of proof is required,

practice of placing burden of proof or persuasion on defendant is unconstitutionally impermissible in cases involving alibi defense. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972), commented on in 23 Mercer L. Rev. 977 (1972).

**Requiring proof of alibi by preponderance of evidence is erroneous.** — To charge that defendant in criminal case must establish defense of alibi by preponderance of evidence would be erroneous as placing upon defendant a greater burden than is required by law. *Moultrie v. State*, 93 Ga. App. 396, 92 S.E.2d 33 (1956).

**Due process is violated** by charge that burden is upon criminal defendant to prove defense of alibi by preponderance of evidence. *Parham v. State*, 120 Ga. App. 723, 171 S.E.2d 911 (1969), commented on in 21 Mercer L. Rev. 511 (1970).

**Charge that alibi must be established to reasonable satisfaction of jury is error** for reason that it shatters presumption of innocence, creates confusion in minds of jury, shifts burden of persuasion to defendant on issue of defendant's presence at crime and requires defendant to establish innocence, is inconsistent with principle that state must prove defendant's guilt beyond reasonable doubt, and thereby violates fundamental rights incorporated in due process clause of U.S. Const., amend. 14. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972), commented on in 23 Mercer L. Rev. 977 (1972).

Charge to jury requiring that the defendant presenting alibi evidence must establish the defendant's alibi to a reasonable satisfaction of the jury violates due process because such highly ambiguous and contradictory charge might lead the jury to the erroneous belief that the jury was free to apply the lesser standard of proof to an essential element of the crime, i.e., defendant's presence. *Bassett v. Smith*, 464 F.2d 347 (5th Cir. 1972), cert. denied, 410 U.S. 991, 93 S. Ct. 1509, 36 L. Ed. 2d 190 (1973), commented on in 9 Ga. St. B.J. 500 (1973).

**Accused is only required to establish alibi to reasonable satisfaction of jury**, not beyond a reasonable doubt. Nevertheless, any evidence of alibi whatsoever is to be considered on the general case, with the rest of the testimony, and, if a reasonable doubt of guilt is raised by evidence as a whole, defendant should be acquitted. *Ranson v. State*, 2 Ga. App. 826, 59 S.E. 101 (1907). But see *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972), commented on in 23 *Mercer L. Rev.* 977 (1972).

Burden is upon defendant to establish defense of alibi to reasonable satisfaction of jury. However, if all evidence, including evidence introduced on question of alibi, creates in their minds a reasonable doubt as to guilt of defendant, it is their duty to give defendant benefit of doubt and acquit the defendant. *Stanford v. State*, 153 Ga. 219, 112 S.E. 130 (1922); *Eugee v. State*, 159 Ga. 604, 126 S.E. 471 (1925). But see *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972), commented on in 23 *Mercer L. Rev.* 977 (1972).

**Burden is on accused to sustain defense of alibi** to reasonable satisfaction of jury in order to overcome proof of guilt of crime with which defendant is charged. *Mills v. State*, 199 Ga. 211, 33 S.E.2d 702 (1945). But see *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972), commented on in 23 *Mercer L. Rev.* 977 (1972).

When issue of alibi is present, it is not error to instruct jury that alibi as a defense should be established to reasonable satisfaction of jury, but not necessarily beyond a reasonable doubt. *Merneigh v. State*, 123 Ga. App. 485, 181 S.E.2d 498 (1971). But see *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972), commented on in 23 *Mercer L. Rev.* 977 (1972).

### Application

**Defense of alibi is covered by general issue of not guilty** as a matter of pleading. *Kitchens v. State*, 209 Ga. 913, 76 S.E.2d 618 (1953).

**Evidence of alibi should come into case like any other evidence**, and should be submitted to jury for consideration of whether evidence as a whole proves defendant's guilt beyond a reasonable doubt. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972), commented on in 23 *Mercer L. Rev.* 977 (1972).

**Evidence most favorable to defendant must be considered** in determining whether charge on alibi required. *Cutts v. State*, 86 Ga. App. 760, 72 S.E.2d 565 (1952).

**Distance from victim is of slight, if any, importance.** *Harris v. State*, 120 Ga. 167, 47 S.E. 520 (1904).

**Defendant claiming alibi defense entitled to continuance.** — Approximately one week before trial, the defendant filed a notice of alibi with the state; at the beginning of the trial, the state announced that the state intended to prove that the alleged drug trafficking occurred within two weeks of the date alleged in the indictment, not on that date exactly. It was reversible error to deny the defendant's subsequent motion for continuance as the defendant had relied on the date in the indictment for the defendant's trial preparation. *Bradford v. State*, 285 Ga. 1, 673 S.E.2d 201 (2009).

**Inadvertent use of "possibility" rather than "impossibility."** — When court charged that alibi as a defense involves "possibility" of presence of accused at scene of crime, and subsequently stated that jury should acquit defendant if the jury does not believe that defendant was present at the time and place of jury offense, the word "possibility" could not have misled the jury and is not ground for a new trial. *Evans v. State*, 222 Ga. 392, 150 S.E.2d 240, cert. denied, 385 U.S. 953, 87 S. Ct. 336, 17 L. Ed. 2d 231 (1966).

**Application (Cont'd)**

**Use of "defendant" for "accused" in jury charge not error.** — Substitution of the word "defendant" for the word "accused" in instruction on the affirmative defense of alibi did not constitute a "toxic" shift of the burden of proof from the state to the defendant, as the charge stated the law accurately; thus, the trial court did not err in giving this version of the charge. *Garrison v. State*, 276 Ga. App. 243, 622 S.E.2d 910 (2005).

**Charge that evidence of alibi need only create reasonable doubt of guilt suffices.** — Duty to instruct on alibi could be fulfilled by instructing that evidence presented to prove alibi, considered alone or with all other evidence, need only be sufficient to create reasonable doubt of

defendant's guilt. *Parham v. State*, 120 Ga. App. 723, 171 S.E.2d 911 (1969); *Hunter v. State*, 135 Ga. App. 172, 217 S.E.2d 172 (1975), commented on in 21 *Mercer L. Rev.* 511 (1970).

**Failure to charge on alibi as reversible error.** — In very close case where there is evidence tending to show alibi, it is reversible error for judge to fail to charge upon that subject. *Staton v. State*, 174 Ga. 719, 163 S.E. 901 (1932).

Failure to give charge on alibi is ground for new trial, when in close case it is set up and sustained by evidence. *Hornbuckle v. State*, 76 Ga. App. 111, 45 S.E.2d 98 (1947).

**Alibi, if proved, results in acquittal in and of itself.** *Hale v. State*, 110 Ga. App. 236, 138 S.E.2d 113 (1964).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 29A Am. Jur. 2d, Evidence, § 1417.

**Am. Jur. Proof of Facts.** — Alibi Defense, 27 POF2d 431.

**ALR.** — Instructions disparaging defense of alibi, 14 ALR 1426; 67 ALR 122; 146 ALR 1377.

Burden and degree of proof as to alibi, 29 ALR 1127; 67 ALR 138; 124 ALR 471.

Duty of court to instruct on the subject of alibi, 118 ALR 1303.

Validity and construction of statute re-

quiring defendant in criminal case to disclose matter as to alibi defense, 45 ALR3d 958.

Duty of court, in absence of specific request, to instruct on subject of alibi, 72 ALR3d 547.

Propriety and prejudicial effect of "on or about" instruction where alibi evidence in federal criminal case purports to cover specific date shown by prosecution evidence, 92 ALR Fed. 313.

## CHAPTER 4

### CRIMINAL ATTEMPT, CONSPIRACY, AND SOLICITATION

| Sec.    |  | Sec.      |   |
|---------|--|-----------|---|
| 16-4-1. | Criminal attempt.  | 16-4-6.   | Penalties for criminal attempt.                             |
| 16-4-2. | Conviction for criminal attempt where crime completed.             | 16-4-7.   | Criminal solicitation.                                      |
| 16-4-3. | Charge of commission of crime as including criminal attempt.       | 16-4-8.   | Conspiracy to commit a crime.                               |
| 16-4-4. | Impossibility as a defense.  | 16-4-8.1. | Conviction of conspiracy even if crime completed.           |
| 16-4-5. | Abandonment of effort to commit a crime as an affirmative defense. | 16-4-9.   | Withdrawal by coconspirator from agreement to commit crime. |
|         |  | 16-4-10.  | Domestic terrorism; penalty.                                |

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**Law reviews.** — For annual survey article discussing trial practice and procedure, see 52 Mercer L. Rev. 447 (2000).

#### JUDICIAL DECISIONS

**Cited** in Smith v. State, 228 Ga. 293, 185 S.E.2d 381 (1971).

#### **16-4-1. Criminal attempt.**

A person commits the offense of criminal attempt when, with intent to commit a specific crime, he performs any act which constitutes a substantial step toward the commission of that crime. (Code 1933, § 26-1001, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For annual survey on criminal law and procedure, see 42 Mercer L. Rev. 141 (1990). For article, "A Comprehensive Analysis of Georgia RICO," see 9 Georgia St. U.L. Rev. 537 (1993). For survey article on criminal law and procedure

for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 117 (2003).

For review of 1996 criminal attempt, conspiracy, and solicitation legislation, see 13 Georgia St. U.L. Rev. 105 (1996).

#### JUDICIAL DECISIONS

#### ANALYSIS

##### GENERAL CONSIDERATION APPLICATION

##### **General Consideration**

**Editor's notes.** — In light of the similarity of the statutory provisions, decisions rendered prior to codification of this

principle by Ga. L. 1968, p. 1249, § 1, are included in the annotations for this Code section.

**Essential elements of criminal at-**

**General Consideration (Cont'd)**

**tempt** are that the act (substantial step) be such as would be proximately connected with completed crime, and there must be apparent possibility to commit the crime in manner proposed. *Fears v. State*, 152 Ga. App. 817, 264 S.E.2d 284 (1979).

Attempt to commit crime consists of three elements: first, intent to commit crime; second, performance of some overt act towards commission of crime; and third, failure to consummate its commission. *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981).

To constitute attempt, there must be act done in pursuance of intent, and more or less directly tending to commission of crime. *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981).

Act must be one done in pursuance of intent to commit crime and must tend toward commission of the crime. *R.L.T. v. State*, 159 Ga. App. 828, 285 S.E.2d 259 (1981); *Adams v. State*, 178 Ga. App. 261, 342 S.E.2d 747 (1986).

**Attempt requires act done with intent to commit crime**, and tending to, but falling short of its commission. *Hammond v. State*, 47 Ga. App. 795, 171 S.E. 559 (1933).

**Acts going beyond preparation and towards final commission of crime.** — Acts which go towards final commission of crime and are carried beyond mere preparation, although falling short of ultimate design, do constitute attempt to commit crime. *Hammond v. State*, 47 Ga. App. 795, 171 S.E. 559 (1933).

**Intent necessary.** — In order to constitute an attempt to commit a crime, where no crime is actually committed, an intention to commit the particular crime is essential. *Jenkins v. State*, 53 Ga. 33, 21 Am. R. 255 (1874); *Nowell v. State*, 94 Ga. 588, 21 S.E. 591 (1894); *Chelsey v. State*, 121 Ga. 340, 49 S.E. 258 (1904).

**Commission means** act of committing, doing, or performing; the act of perpetrating. *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981).

**Criminal attempt defined only in conjunction with substantive crime** involved in attempt. *Orkin v. State*, 236

Ga. 176, 223 S.E.2d 61 (1976).

**Uniform Commercial Code definition of "negotiable instrument"** did not apply as an additional element in a prosecution for criminal attempt to commit the crime of theft by taking. *Thogerson v. State*, 224 Ga. App. 76, 479 S.E.2d 463 (1996).

**Issue is whether accused has gone past preparation** and has begun perpetration. *Riddle v. State*, 145 Ga. App. 328, 243 S.E.2d 607 (1978).

**Mere preparation is insufficient.** *J.E.T. v. State*, 151 Ga. App. 836, 261 S.E.2d 752 (1979).

Act must be more than mere preparation and must be inexplicable as a lawful act. *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981); *R.L.T. v. State*, 159 Ga. App. 828, 285 S.E.2d 259 (1981).

Mere acts of preparation, not proximately leading to consummation of intended crime, will not suffice to establish attempt to commit such crime. *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981).

It cannot be said that no preparations can amount to an attempt, rather, it is a question of degree, and depends upon circumstance of each case. *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981).

**Nature of act required to constitute attempt.** — In general, to constitute an attempt, there must be an act done in pursuance of the intent, and more or less directly tending to commission of crime. *Riddle v. State*, 145 Ga. App. 328, 243 S.E.2d 607 (1978), overruled on other grounds, *Adsitt v. State*, 248 Ga. 237, 282 S.E.2d 305 (1981); *J.E.T. v. State*, 151 Ga. App. 836, 261 S.E.2d 752 (1979).

**Substantial step toward commission of crime suffices.** — Substantial step made toward commission of crime, even though it might not be ultimate step or last possible act to consummation of offense attempted, is sufficient evidence to support verdict of guilty of criminal attempt. *Lett v. State*, 150 Ga. App. 132, 257 S.E.2d 37 (1979).

Defendant's acts, including telephoning a known drug dealer about purchasing cocaine, and driving to an agreed location to make the transaction, sufficiently constituted a substantial step under Jackson

v. Virginia to convict the defendant of attempting to possess cocaine *Massey v. State*, 267 Ga. App. 482, 600 S.E.2d 437 (2004).

In an attempt to traffic in cocaine case under O.C.G.A. §§ 16-4-1 and 16-13-31, the defendant was not entitled to a directed verdict of acquittal because the state did not prove the purity of the cocaine that the defendant intended to purchase; proof of purity was unnecessary given that all that was needed was a substantial step towards the crime of trafficking, not completion of the crime. *Davis v. State*, 281 Ga. App. 855, 637 S.E.2d 431 (2006), cert. denied, 2007 Ga. LEXIS 151 (Ga. 2007).

Because sufficient evidence was presented which showed that the defendant took substantial steps to arouse the defendant's own sexual desires in soliciting both the defendant's child and the child's cousin, showing the cousin indecent photos, discussing masturbation with both, and trying to kiss the defendant's child between the legs, the defendant's attempted child molestation convictions were upheld on appeal. *Carey v. State*, 281 Ga. App. 816, 637 S.E.2d 757 (2006).

Based on a victim's testimony, the jury could have concluded that had the victim consented to the defendant's request for oral sex, the defendant would have performed oral sex on the victim, thereby committing aggravated child molestation; consequently, the jury could have found that the defendant asking the victim about engaging in oral sex constituted a substantial step towards the commission of that crime. *Johnson v. State*, 284 Ga. App. 147, 643 S.E.2d 556 (2007).

**Mere preparatory acts not proximately leading to consummation of offense** do not constitute attempt. *Groves v. State*, 116 Ga. 516, 42 S.E. 755 (1902); *Hammond v. State*, 47 Ga. App. 795, 171 S.E. 559 (1933).

**What acts constitute attempt may be governed by specific statute.** — Indefinite nature of offense at common law of attempt to commit a crime, has induced enactment of many statutes in England and this country, setting forth, in express terms, what acts shall constitute an attempt to commit crimes referred to in

such statutes. In such cases, the statute, of course, will govern. *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935).

**Indictment for attempt to steal cattle was sufficient.** — Indictment for attempt to steal cattle which charged the accused with attempting to steal the cattle of a named person located in that person's pasture, without further specifying the cattle intended to be stolen, was sufficiently certain, for where there is only an attempt, it is not always possible to say what particular cattle the would-be thief meant to steal. *Davis v. State*, 66 Ga. App. 877, 19 S.E.2d 543 (1942).

**Inclusion of additional acts in indictment is mere surplusage.** — Because O.C.G.A. § 16-4-1 requires proof of only one act which is a substantial step toward the commission of the crime, inclusion in the indictment of more than one such act is mere surplusage, which is unnecessary to constitute the offense, need not be proved, and may be disregarded. *Ranson v. State*, 198 Ga. App. 659, 402 S.E.2d 740 (1991), cert. denied, 198 Ga. App. 898, 402 S.E.2d 740 (1991).

**Purpose of "substantial step" requirement.** — In addition to assuring firmness of criminal purpose, requirement of substantial step will remove very remote preparatory acts from ambit of attempt liability and relatively stringent sanctions imposed for attempts; on the other hand, by broadening liability to extent suggested, apprehension of dangerous person will be facilitated and law enforcement officials and others will be able to stop criminal effort at an earlier stage — thereby minimizing risk of substantive harm — without providing immunity to offender. *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981).

**Denial of motion to sever.** — In a prosecution on two counts of attempting to hijack a motor vehicle, four counts of aggravated assault, possession of a firearm during the commission of a crime, and criminal trespass, because the offenses committed by a defendant and a codefendant amounted to a series of continuous acts connected together both in time and the area in which committed, and there

**General Consideration (Cont'd)**

was no likelihood of confusion, the trial court did not abuse its discretion in denying the defendant's motion to sever the trial from that of the codefendant; furthermore, the mere fact that the codefendants' defenses were antagonistic was insufficient in itself to warrant separate trials. *Diaz v. State*, 280 Ga. App. 413, 634 S.E.2d 160 (2006).

**"Substantial step" language** shifts emphasis from what remains to be done to what has been done; the fact that further step must be taken before crime can be completed does not preclude finding that steps already undertaken are substantial and, it is expected, in normal case, that this approach will broaden scope of attempt liability. *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981); *Adams v. State*, 178 Ga. App. 261, 342 S.E.2d 747 (1986); *Smith v. State*, 189 Ga. App. 27, 375 S.E.2d 69, cert. denied, 189 Ga. App. 913, 375 S.E.2d 69 (1988); *Brown v. State*, 242 Ga. App. 858, 531 S.E.2d 409 (2000).

**Cited** in *Moore v. State*, 231 Ga. 218, 201 S.E.2d 146 (1973); *Wade v. State*, 132 Ga. App. 600, 208 S.E.2d 613 (1974); *Mealor v. State*, 135 Ga. App. 682, 218 S.E.2d 683 (1975); *J.A.T. v. State*, 136 Ga. App. 540, 221 S.E.2d 702 (1975); *Rolland v. State*, 235 Ga. 808, 221 S.E.2d 582 (1976); *Johnson v. Jackson*, 140 Ga. App. 252, 230 S.E.2d 756 (1976); *Jones v. State*, 238 Ga. 51, 230 S.E.2d 865 (1976); *Brooks v. State*, 141 Ga. App. 725, 234 S.E.2d 541 (1977); *Printup v. State*, 142 Ga. App. 42, 234 S.E.2d 840 (1977); *Brooks v. State*, 144 Ga. App. 97, 240 S.E.2d 593 (1977); *Dunbar v. State*, 146 Ga. App. 136, 245 S.E.2d 486 (1978); *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979); *Brooks v. State*, 151 Ga. App. 384, 259 S.E.2d 743 (1979); *Maddox v. State*, 152 Ga. App. 384, 262 S.E.2d 636 (1979); *Taylor v. Hopper*, 596 F.2d 1284 (5th Cir. 1979); *Bissell v. State*, 153 Ga. App. 564, 266 S.E.2d 238 (1980); *Rollins v. State*, 154 Ga. App. 585, 269 S.E.2d 81 (1980); *Gunter v. State*, 155 Ga. App. 176, 270 S.E.2d 224 (1980); *Conroy v. State*, 155 Ga. App. 576, 271 S.E.2d 726 (1980); *McKenzie v. State*, 248 Ga. 294, 282 S.E.2d 95 (1981); *Morris v. State*, 159 Ga. App. 600, 284 S.E.2d 103

(1981); *Davis v. State*, 165 Ga. App. 440, 301 S.E.2d 659 (1983); *Graham v. State*, 171 Ga. App. 242, 319 S.E.2d 484 (1984); *Lester v. State*, 173 Ga. App. 300, 325 S.E.2d 912 (1985); *Cook v. State*, 255 Ga. 565, 340 S.E.2d 843 (1986); *Battle v. State*, 178 Ga. App. 655, 344 S.E.2d 477 (1986); *Cox v. State*, 180 Ga. App. 820, 350 S.E.2d 828 (1986); *Mathis v. State*, 184 Ga. App. 455, 361 S.E.2d 856 (1987); *Dawson v. State*, 186 Ga. App. 718, 368 S.E.2d 367 (1988); *Wittschne v. State*, 259 Ga. 448, 383 S.E.2d 885 (1989); *United States v. Ward*, 808 F. Supp. 803 (S.D. Ga. 1992); *Keener v. State*, 215 Ga. App. 117, 449 S.E.2d 669 (1994); *Painter v. State*, 219 Ga. App. 290, 465 S.E.2d 290 (1995); *Busch v. State*, 234 Ga. App. 766, 507 S.E.2d 868 (1998); *Sewell v. State*, 244 Ga. App. 449, 536 S.E.2d 173 (2000); *Mann v. State*, 263 Ga. App. 131, 587 S.E.2d 288 (2003); *Fernandez v. State*, 263 Ga. App. 750, 589 S.E.2d 309 (2003); *Brewster v. State*, 261 Ga. App. 795, 584 S.E.2d 66 (2003); *Drammeh v. State*, 285 Ga. App. 545, 646 S.E.2d 742 (2007); *Smith v. State*, 289 Ga. App. 742, 658 S.E.2d 156 (2008); *DaimlerChrysler Motors Co. v. Clemente*, 294 Ga. App. 38, 668 S.E.2d 737 (2008).

**Application**

**Sufficiency of indictment.** — Indictment stating offense charged, attempted armed robbery, in terms and language of O.C.G.A. § 16-4-1 suffices. *Miller v. State*, 155 Ga. App. 54, 270 S.E.2d 466 (1980).

Indictment for attempted child molestation was sufficient without alleging the specific intent of child molestation under O.C.G.A. § 16-6-4. *Livery v. State*, 233 Ga. App. 332, 503 S.E.2d 914 (1998).

Indictment for attempted child molestation alleging that defendant took a substantial step toward commission of the crime of child molestation by (1) engaging in sexually-explicit conversations over the internet and (2) driving to an arranged meeting place was not fatally defective in that it failed to allege the commission of a crime. *Dennard v. State*, 243 Ga. App. 868, 534 S.E.2d 182 (2000).

Although an indictment for attempting to commit the offense of enticing a child for indecent purposes did not allege actual asportation, it did allege that defendant

arranged to meet the victim for the purpose of committing indecent acts and, accordingly, did not fail to allege the taking of a substantial step toward the commission of the crime. *Dennard v. State*, 243 Ga. App. 868, 534 S.E.2d 182 (2000).

Trial court properly denied the defendant's motion to dismiss the indictment accusing the defendant of criminal attempt to traffic in cocaine in violation of O.C.G.A. §§ 16-4-1 and 16-13-31(a)(1); purity did not have to be alleged in an attempt case, particularly since there was no cocaine involved in the instant case, the indictment satisfied O.C.G.A. § 17-7-54(a) by tracking the applicable statutes in a manner that was easily understood and by apprising the defendant of both the crime and the manner in which the crime was alleged to have been committed, and if the defendant admitted the allegations precisely as set forth in the indictment, the defendant would have been guilty of criminal attempt to traffic in cocaine. *Davis v. State*, 281 Ga. App. 855, 637 S.E.2d 431 (2006), cert. denied, 2007 Ga. LEXIS 151 (Ga. 2007).

Trial court erred in granting the defendant's specific demurrer to an indictment charging the defendant with criminal attempt to entice a child for indecent purposes in violation of O.C.G.A. §§ 16-4-1 and 16-6-5(a) because the indictment contained the elements of the crime, informed the defendant of the charges against the defendant, and was specific enough to protect the defendant from double jeopardy, and the language in the indictment tracked the legislative language used in and cited directly to § 16-6-5(a); the crime charged in and of itself alerted the defendant to the fact that the defendant was being accused of acting with the intent of engaging in illicit sexual conduct with a minor, and because the defendant was indicted with criminal attempt to commit the crime of enticing a child for indecent purposes, by definition, the defendant fell short of the crime's commission, and any evidence of defendant's criminal intent was necessarily implicit. *State v. Marshall*, 304 Ga. App. 865, 698 S.E.2d 337 (2010).

Defendant was properly convicted of criminal attempt to commit burglary,

O.C.G.A. §§ 16-4-1 and 16-7-1, because prosecution for that crime was not time-barred; the crime for criminal attempt to commit burglary was substituted in lieu of a count of burglary charged in the original indictment, and the same evidence could be used to prove both the crime and criminal attempt to commit that crime. *Martinez v. State*, 306 Ga. App. 512, 702 S.E.2d 747 (2010).

**Kidnapping not converted to mere criminal attempt** when victim did not obey all of the assailant's commands. *Padgett v. State*, 170 Ga. App. 98, 316 S.E.2d 523 (1984).

**Offense of enticing.** — Offense of enticing does not require that lewd act be accomplished or even attempted, merely that it was intended as motivation for enticement. Thus, standards for proving criminal attempt are not applicable. *Peavy v. State*, 159 Ga. App. 280, 283 S.E.2d 346 (1981).

Crime of enticing is complete when the defendant asports the victim with the intent to commit an indecent act, regardless of whether the act is actually committed; when, however, the defendant attempts to entice a child but is unsuccessful with respect to the asportation element, the defendant is properly charged with criminal attempt. *Dennard v. State*, 243 Ga. App. 868, 534 S.E.2d 182 (2000).

**In a prosecution for enticing a child for indecent purposes**, there was no error in the trial court's refusal to charge the jury on the offense of criminal attempt. *Morris v. State*, 179 Ga. App. 228, 345 S.E.2d 686 (1986).

**Asportation of child is not essential element of attempted child molestation.** *Wittschcn v. State*, 189 Ga. App. 828, 377 S.E.2d 681 (1988), aff'd, 259 Ga. 448, 383 S.E.2d 885 (1989).

**Delinquent attempted aggravated child molestation.** — In order to find juvenile defendant guilty of the delinquent act of attempted aggravated child molestation, the court must find defendant attempted aggravated child molestation with intent to satisfy defendant's own desires. Whether the juvenile defendant had the sexual intent or knowledge of an adult would be irrelevant. *In re W.S.S.*,

**Application (Cont'd)**

266 Ga. 685, 470 S.E.2d 429 (1996).

**Defendant's conviction of attempted child molestation was affirmed** on evidence showing that defendant drove a van up to two young girls who were roller-skating on a street, held up dollar bills and asked them if they would like to have the money, and when one girl responded affirmatively, made a lewd suggestion. Wittschen v. State, 189 Ga. App. 828, 377 S.E.2d 681 (1988), aff'd, 259 Ga. 448, 383 S.E.2d 885 (1989).

When there was undisputed evidence that the defendant entered the 12-year old victim's house with the intent to engage in sexual activity and that the defendant sat nude on the victim's bed while the victim was in the bed, a rational trier of fact could have concluded beyond a reasonable doubt that the defendant was guilty of criminal attempt to commit child molestation. Garmon v. State, 192 Ga. App. 250, 384 S.E.2d 278 (1989).

Evidence that defendant undressed himself and a 14-year-old girl and then climbed into bed with her was more than sufficient to sustain defendant's conviction of criminal attempt to commit child molestation in violation of O.C.G.A. §§ 16-4-1 and 16-6-4(a). Colbert v. State, 255 Ga. App. 182, 564 S.E.2d 787 (2002).

Defendant could be convicted of criminal attempt to commit child molestation since defendant had definitely gone beyond mere preparation as the undisputed evidence showed that defendant repeatedly visited the victim and offered the victim money, defendant stuck a hand in the front pocket of the victim's pants, carried a picture of the victim in defendant's wallet, and gave the victim a note that expressly stated that defendant wanted to make love to the victim. Lopez v. State, 258 Ga. App. 92, 572 S.E.2d 736 (2002).

Evidence was sufficient to support conviction for attempted child molestation under O.C.G.A. § 16-4-1 when defendant: (1) wrapped defendant's body around a child so as to restrain the child's arms; (2) rubbed and kissed the child's back, placing defendant's feet in the child's crotch; and (3) asked where the child had been all

defendant's life. Tanner v. State, 259 Ga. App. 94, 576 S.E.2d 71 (2003).

Evidence supported the defendant's attempted child molestation conviction as the defendant showered a 13-year-old victim with gifts and marijuana to induce the victim to have sexual intercourse with the defendant. Leaptrot v. State, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Evidence supported the defendant's conviction of child molestation and criminal attempt to commit child molestation because: (1) the nine-year-old victim testified that on multiple occasions the defendant fondled the victim's breasts and private parts; (2) the victim further testified that the defendant attempted to have the victim touch the defendant's genitals; and (3) the victim initially informed the victim's mother of the defendant's actions and shortly thereafter repeated the details of the incidents to a therapist and two child services agency case workers. Cook v. State, 276 Ga. App. 803, 625 S.E.2d 83 (2005).

Despite allegations that: (1) the victim's testimony was contradicted by the victim's mother; and (2) the victim had a motive to lie about the defendant, the appeals court refused to disturb the jury's determination as to the same, given the jury's province to resolve the conflicts in the evidence; hence, the defendant's cruelty to children and attempted aggravated and child molestation convictions were upheld on appeal. Chalker v. State, 281 Ga. App. 305, 635 S.E.2d 890 (2006).

Sufficient evidence supported the defendant's convictions of aggravated child molestation under O.C.G.A. § 16-6-4(c), attempted aggravated sodomy under O.C.G.A. §§ 16-4-1 and 16-6-2(a), and statutory rape under O.C.G.A. § 16-6-3(a); the victim testified that the defendant put the defendant's privates inside the victim's privates and attempted to put the defendant's privates in the victim's behind, and the nurse practitioner testified that the physical examination of the victim indicated injuries consistent with the victim's testimony. Anderson v. State, 282 Ga. App. 58, 637 S.E.2d 790 (2006), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007).

Rational trier of fact could have found the defendant guilty of attempted child molestation beyond a reasonable doubt because whether the defendant's actions were immoral or indecent and done with the requisite intent were questions for the jury. *Machado v. State*, 300 Ga. App. 459, 685 S.E.2d 428 (2009).

Evidence that the defendant, age 35, met a girl online whom the defendant believed was 15, that the defendant made numerous comments about how the defendant could get in trouble or go to jail, that the defendant engaged in sexually explicit conversations and directed the child to pornography sites showing black men having sex with white women, that the defendant drove to an arranged meeting place, and, that, when officers appeared, the defendant fled, was sufficient to convict defendant of violating O.C.G.A. §§ 16-4-1 (attempt), 16-6-4 (child molestation), 16-6-5 (enticement of a child), and 16-10-24 (obstruction). *Smith v. State*, 306 Ga. App. 301, 702 S.E.2d 211 (2010).

Evidence that the defendant raised the subject of masturbation with the child victim and asked her to perform that act upon him was sufficient to support the defendant's conviction of attempted child molestation. *Pendley v. State*, No. A10A2301, 2011 Ga. App. LEXIS 283 (Mar. 25, 2011).

**Sexual offenses with minors initiated over the Internet.** — Defendant was not entrapped by law enforcement because: (1) the defendant, via electronic communications, asked an undercover officer who was posing as a teenage girl to engage in sexual intercourse and oral sodomy with the defendant, even after the "teenage girl" told the defendant that the teenage girl was 14 years old; (2) the defendant initiated the conversation during which a meeting was arranged and the defendant described in detail the sex acts which the defendant wished to perform on the teenage girl at the park where the two discussed meeting for sex; (3) when the defendant arrived at the park, the defendant possessed a condom on the defendant's person; and (4) when the officers who stopped the defendant at the park explained that the officers were with a task force for Internet crimes against chil-

dren, the defendant immediately responded that the defendant was at the park to counsel a 14-year-old girl about the dangers of meeting men from the Internet. *Logan v. State*, No. A10A2100, 2011 Ga. App. LEXIS 230 (Mar. 17, 2011).

**Evidence of criminal attempt to enter automobile sufficient.** — Evidence that defendants discussed theft of a car stereo, possessed tools to aid in the commission of such a crime, and that they drove to a shopping center parking lot in search of a specific car to enter was sufficient to find them guilty of criminal attempt to enter an automobile. *Evans v. State*, 216 Ga. App. 21, 453 S.E.2d 100 (1995).

**Evidence sufficient for conviction of attempt to commit burglary.** — Breaking window of door and reaching inside in attempt to open the door does not constitute entry for purposes of O.C.G.A. § 16-7-1 and will only sustain conviction for criminal attempt to commit burglary. *Hampton v. State*, 145 Ga. App. 642, 244 S.E.2d 594 (1978).

Presence of valuables inside premises, evidence of defendant's flight, presence of a cement block under a broken window, and a positive identification of defendant were sufficient to support defendant's conviction of criminal attempt to commit burglary. *Methvin v. State*, 189 Ga. App. 906, 377 S.E.2d 735 (1989).

Circumstantial evidence was sufficient to sustain defendant's conviction of criminal attempt to commit burglary, where defendant was found walking about a quarter of a mile from the burglarized premises within about a half hour of the attempted burglary, lied about defendant's identity, and was wearing boots and was carrying a knife with a piece of wire on it, and there was evidence that a footprint was found at the premises and that the telephone line had been cut. *Ware v. State*, 198 Ga. App. 24, 400 S.E.2d 384 (1990).

Evidence was sufficient to support convictions for attempted burglary after police officers who responded to an alert by a security company of an irregular noise at a warehouse found defendants with tools covered with cinder block dust along with a four foot hole in the back cinder block

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wall of the warehouse. Climpson v. State, 253 Ga. App. 485, 559 S.E.2d 495 (2002).

Insertion of a crowbar into the locked door to a business with the intent of prying open the door, and exerting pressure on the crowbar in such a manner that the striker plate on the door was bent and damaged, constituted a substantial step toward the commission of the crime of burglary to support a conviction for attempted burglary. Flanagan v. State, 265 Ga. App. 122, 592 S.E.2d 894 (2004).

Evidence was sufficient to support the defendant's conviction for attempted burglary as the evidence showed that the defendant took the substantial step of prying open the carport door of the house of another person, the exterior of which was 100 percent complete, so that the defendant could steal the valuable construction tools inside, and that the defendant was caught in the act while doing so. Weeks v. State, 274 Ga. App. 122, 616 S.E.2d 852 (2005).

Evidence supported the defendant's conviction for attempted burglary after the defendant admitted trying to break into a gas station to steal beer and cigarettes. Smith v. State, 273 Ga. App. 107, 614 S.E.2d 219 (2005).

Sufficient evidence, including that the defendant took a substantial step of knocking off the victim's shed door handle, without authority, with the intent to steal valuable goods therein, supported an attempted burglary conviction; moreover, although the defendant denied any intention to commit a theft, the credibility of the witnesses and the questions as to the reasonableness of the defendant's actions were issues for the factfinder to decide. Minor v. State, 278 Ga. App. 327, 629 S.E.2d 44 (2006).

Sufficient evidence supported the defendant's conviction of criminal attempt to commit burglary since the defendant, who had a history of sexual assaults, went to a hotel alone, late at night, wearing a mask, since, after visiting the hotel parking lot once before in the evening, and following a female hotel employee until the employee ran, the defendant approached the office door where that same lone female hotel

employee had returned to work, and attempted to open the locked door, since, when the locked door would not open, the defendant continued to shake the door violently, still wearing the mask, and since, when the defendant saw the hotel employee pick up the phone and dial 9-1-1, the defendant fled; in light of this evidence, the jury was authorized to conclude that the defendant took a substantial step toward entering the hotel office without authority to commit a sexual felony therein. Swint v. State, 279 Ga. App. 777, 632 S.E.2d 712 (2006).

Defendant was properly sentenced under the Armed Career Criminal Act, 18 U.S.C. § 924(e), and U.S. Sentencing Guidelines Manual § 4B1.1(a) based upon a Georgia attempted burglary of a dwelling conviction under O.C.G.A. §§ 16-4-1 and 16-7-1 because the defendant failed to object to the factfindings at sentencing, which conclusively established that the defendant was in fact convicted of attempting to commit a generic burglary within the meaning of 18 U.S.C. § 924(e); thus, because that offense was an enumerated violent felony, the crime of attempting to commit that offense was also a violent felony, permitting the court to use the conviction as a predicate offense under the Armed Career Criminal Act after the defendant pled guilty to violating 18 U.S.C. § 922(g). United States v. Wade, 458 F.3d 1273 (11th Cir. 2006).

There was sufficient evidence to support defendant's convictions of malice murder, felony murder, armed robbery, aggravated assault, attempted burglary, and possession of a firearm by a convicted felon; in addition to testimony by a codefendant and eyewitness testimony by the victim's spouse, the victim's blood was on the defendant's clothes, the defendant had the victim's keys, and the knife used to kill the victim and a pistol were discovered near the site of the defendant's arrest in some woods near the scene of the crime. Walker v. State, 282 Ga. 774, 653 S.E.2d 439 (2007), cert. denied, 129 S. Ct. 481, 172 L.Ed.2d 344 (2008); overruled on other grounds, No. S10P1859, 2011 Ga. LEXIS 267 (Ga. 2011).

Despite a sufficiency challenge to an adjudication on a charge of criminal at-

tempt to commit burglary, the court of appeals upheld the finding because the juvenile's conduct including: (1) repeatedly ringing the victim's doorbell; (2) hiding in the backyard; (3) furtive observation of the victim's house; (4) telephone contact with the other juvenile who was at the victim's front door; and (5) climbing over a basketball goal to reach a window at the back of the house was suspicious and undoubtedly consistent with preparation for a daylight burglary. Moreover, the juvenile's actions, as well as evidence of a bent window screen, constituted evidence of a substantial step towards entering the victim's house without authority and inconsistent with a lawful purpose. In the Interest of R.C., 289 Ga. App. 293, 656 S.E.2d 914 (2008).

Evidence supported a conviction of criminal attempt to commit burglary. The victim heard knocking at the victim's sliding glass door and saw the defendant, a neighbor, crouched down holding a crowbar and beating the bottom track of the door; when the victim asked what the defendant was doing, the defendant said, "Oh, you're home," and asked to borrow the victim's shovel, then said that the defendant had just wanted to make sure the victim was okay and left without the shovel; when police asked the defendant what had gone on, the defendant said, "I didn't have a crowbar in my hand. I had a screwdriver in my hand"; and during an interview with police, the defendant gave differing explanations for the defendant's actions. Rudnitskas v. State, 291 Ga. App. 685, 662 S.E.2d 729 (2008).

Evidence was sufficient to show that the defendant, who was convicted of attempted burglary under O.C.G.A. §§ 16-4-1 and 16-7-1, had the intent to rob the sawmill in question. The defendant and others set out early on a Saturday and entered the property in an unusual way; and the defendant drove the getaway truck, lied to police, and failed to produce a flashlight when asked to empty the defendant's pockets. Armour v. State, 292 Ga. App. 111, 663 S.E.2d 367 (2008).

Trial court did not err in denying a defendant's motion for a directed verdict of acquittal on a charge of attempted burglary in violation of O.C.G.A. §§ 16-4-1

and 16-7-1(a) because the evidence was sufficient to authorize the jury to conclude that the defendant took a substantial step toward entering an owner's apartment to commit a felony; the defendant's inculpatory statement that the defendant intended to enter the owner's apartment to get money was direct evidence of the defendant's guilt, and this statement, combined with a witness's testimony that the witness heard the defendant and the defendant's brother discuss entering the owner's apartment through the window, saw them on the owner's porch, and then heard the window breaking, provided ample evidence to support the defendant's conviction of attempted burglary beyond a reasonable doubt. Durham v. State, 295 Ga. App. 734, 673 S.E.2d 80 (2009).

**Attempt to push open door sufficient for attempted burglary.** — Defendant's attempted burglary conviction, O.C.G.A. § 16-4-1, was supported by evidence that the victim heard someone "snatching" at and "pushing on" the victim's door. When the victim observed the defendant and another person outside the victim's house, the victim threatened to shoot them; they fled in a car that they had parked close enough to the house that they could have stood on the car and climbed through a window. Mock v. State, 306 Ga. App. 93, 701 S.E.2d 567 (2010).

**Severance from separate charge of armed robbery.** — Attempted armed robbery conviction was upheld on appeal, as severance from a separate charge of armed robbery was not required, given that the two crimes were part of a series of connected acts, committed within a short period of time, in the same area, with the same weapon, and involved a similar modus operandi. Fields v. State, 283 Ga. App. 208, 641 S.E.2d 218 (2007).

**Evidence sufficient for criminal attempt to commit armed robbery.** — Since the victim testified that, while threatening the victim with a loaded gun and after telling the victim that defendant wouldn't hesitate to kill the victim, defendant asked, "do you got any money in here?", the evidence provided a sufficient basis for the jury's determination that defendant was guilty of criminal attempt to commit armed robbery. Green v. State, 249 Ga. App. 546, 547 S.E.2d 569 (2001).

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Evidence was sufficient to support the defendant's conviction of criminal attempt to commit armed robbery because the defendant surreptitiously watched others at a fast food restaurant, wore a mask, and drew a BB handgun that resembled a semi-automatic weapon when the defendant was confronted by a police officer. *New v. State*, 270 Ga. App. 341, 606 S.E.2d 865 (2004).

Evidence supported the defendant's conviction for armed robbery, attempted armed robbery, burglary, and one firearms offense because: (1) the defendant confessed to the crimes; (2) a companion wore distinctive shoes that matched those of an armed robber; (3) two dust-free ski masks, similar to those worn by the armed robbers, were found in the defendant's very dusty utility closet; and (4) a small red car was parked near a restaurant that was robbed, officers stopped the defendant two hours later, and the defendant drove the same car to the police station when the defendant came for voluntary questioning. *Ray v. State*, 273 Ga. App. 656, 615 S.E.2d 812 (2005).

Evidence supported a conviction for criminal attempt to commit armed robbery because the defendant jumped over the counter at a restaurant, held a knife to a waitress' neck and, after fleeing the scene and being caught by police, admitted to the crime. *Lemming v. State*, 272 Ga. App. 122, 612 S.E.2d 495 (2005), overruled on other grounds, *Miller v. State*, 285 Ga. 285, 676 S.E.2d 173 (2009).

Armed robbery, attempted armed robbery, and possession of a firearm during the commission of a crime convictions were upheld on appeal, based on sufficient evidence supporting the defendant's guilt, specifically, a security surveillance videotape, eyewitness testimony, and the defendant's voluntary admission to police. *Smith v. State*, 281 Ga. App. 587, 636 S.E.2d 748 (2006).

Evidence was sufficient to convict the defendant of criminal attempt to commit armed robbery, even though the defendant never said the defendant was going to rob a store or demanded money, as the jury was authorized to find that, having spent

all of the defendant's money, the defendant took the substantial step of entering the store with a knife with the intent to commit robbery. *Boyd v. State*, 284 Ga. 46, 663 S.E.2d 218 (2008).

Evidence supported the defendant's convictions for malice murder, felony murder, criminal attempt to commit armed robbery, armed robbery, aggravated assault, and possession of a firearm during the commission of a crime because: (1) the defendant participated in the armed robbery of three people, including the shooting victim, who were sitting in a car on a neighborhood street; (2) during the encounter, the co-indictee fatally shot the victim in the head with a shot gun; (3) one of the two other people in the car testified that, after the shooting, the defendant, with the defendant's hand in the defendant's pocket simulating that the defendant had a gun, took money and drugs from the witness; (4) the co-indictee also took money from the other person; and (5) the defendant and the co-indictee then fled the scene. *Gilyard v. State*, 288 Ga. 800, 708 S.E.2d 329 (2011).

**Evidence insufficient to support conviction for attempt to influence public official.** — Defendant corrections officer's conviction of an attempt to influence the defendant's supervisor not to charge an inmate with possession of marijuana by an inmate could not stand for lack of evidence showing that the officer took any action, substantial or otherwise, to improperly influence the defendant's supervisor to such end. *Beard v. State*, 300 Ga. App. 146, 684 S.E.2d 306 (2009).

**Attempted drug trafficking.** — Evidence was sufficient to support a conviction of attempted trafficking in marijuana. A codefendant's testimony at the codefendant's trial and the codefendant's statement to the police were admissible as prior inconsistent statements and constituted substantive evidence of the defendant's participation in the attempted drug trafficking; furthermore, the codefendant's statements were sufficiently corroborated under O.C.G.A. § 24-4-8 by the testimony of a case agent that a loaded pistol was found at the defendant's feet and that a bag containing the currency used in the drug transaction was found

within arm's reach of the defendant. *Green v. State*, 298 Ga. App. 17, 679 S.E.2d 348 (2009).

**Evidence insufficient to support a conviction for criminal attempt to manufacture methamphetamine.** — Defendants were stopped for a traffic violation and had possession of an unopened bottle of Heet, one pack of cold pills containing pseudoephedrine, a large unopened bottle of iodine, and some plastic tubing which an officer testified that, based on training and experience, were ingredients used in the manufacture of methamphetamine. All of the items in defendants' possession had recognized legal uses and were only a small portion of the ingredients and materials necessary to manufacture methamphetamine, and the quantity of each item was also only a small portion of the amount needed. Defendants' possession of materials used in the manufacture of methamphetamine constituted mere preparation to commit the crime and was insufficient to support convictions for attempt to manufacture methamphetamine. *Thurman v. State*, 295 Ga. App. 616, 673 S.E.2d 1 (2008).

**Completed attempt to commit armed robbery.** — Attempt to commit armed robbery was completed when defendant entered bank armed with gun and wearing disguise, with manifest intent to commit theft. *Lambert v. State*, 157 Ga. App. 275, 277 S.E.2d 66 (1981).

Failing to charge the jury on the lesser included offense of criminal attempt to commit armed robbery was not error since, if the jury believed any combination of defendant's statements, the defendant either was a party to the completed crime of armed robbery or defendant lacked any intent to be a party to the crime. *Spivey v. State*, 243 Ga. App. 785, 534 S.E.2d 498 (2000).

**Criminal attempt not included in offense of shoplifting.** — Trial court did not err in refusing to instruct on criminal attempt as a lesser included offense of theft by shoplifting where the evidence showed that defendant concealed shirts in defendant's pants while in the store and the only issue for the jury was whether defendant had the requisite intent to shoplift; if the jury had not found such

intent, it would have been required to acquit defendant. *Parham v. State*, 218 Ga. App. 42, 460 S.E.2d 78 (1995).

**Crimes of attempted armed robbery and aggravated assault are separate and distinct, and separate sentences may be imposed.** *Lambert v. State*, 157 Ga. App. 275, 277 S.E.2d 66 (1981).

Aggravated assault is not included in attempted armed robbery as a matter of law, although these two offenses may as a matter of fact merge if the same facts are used to prove both offenses. However, where the underlying facts show that one crime was completed prior to the second crime, so that the crimes are separate as a matter of law, there is no merger. *Gaither v. Cannida*, 258 Ga. 557, 372 S.E.2d 429 (1988).

When a defendant pulled out a gun and demanded money from a cab driver, the offense of criminal attempt armed robbery was complete, and the defendant's subsequent acts, including striking the driver on the head, were not necessary to prove that offense; thus, the attempt offense did not merge with aggravated assault offenses for sentencing purposes. *Duncan v. State*, 290 Ga. App. 32, 658 S.E.2d 780 (2008).

Defendant was properly denied merger of a charge of criminal attempt to commit armed robbery and aggravated assault of a store victim as the offense of attempted armed robbery under, *inter alia*, O.C.G.A. § 16-4-1 was complete when the defendant pointed the gun at the victim and aggravated assault occurred when the victim was struck in the face with the gun. *Stubbs v. State*, 293 Ga. App. 692, 667 S.E.2d 905 (2008).

**Aggravated assault conviction merged with attempted armed robbery.** — Since the defendant was indicted for aggravated assault for pointing a handgun at a victim, which was also a substantial step toward commission of the armed robbery, the trial court properly merged the defendant's aggravated assault conviction with the attempted armed robbery conviction. *McKinney v. State*, 274 Ga. App. 32, 619 S.E.2d 299 (2005).

**Possession of firearm did not merge with attempted armed robbery con-**

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**viction.** — Possession of a firearm during the commission of a felony did not merge with an attempted armed robbery conviction because the crime of possession of a firearm is considered to be a separate offense under O.C.G.A. § 16-11-106(b) and (e). *McKinney v. State*, 274 Ga. App. 32, 619 S.E.2d 299 (2005).

**Attempted armed robbery is lesser included offense of felony murder.** *Farley v. State*, 238 Ga. 181, 231 S.E.2d 761 (1977).

**Later, additional crimes did not merge with attempted armed robbery.** — Convictions for burglary, kidnapping, terroristic threats, and possession of a firearm during the commission of a felony did not merge with attempted armed robbery conviction because the attempted armed robbery was complete before the crimes were committed inside the residence; the defendant discussed with the co-worker the idea to dress up as a heating and air technician to perform a robbery, traveled to the residence armed with handguns and a hollow clipboard used to conceal the handgun, and pointed the handgun at a victim before entering the house. *McKinney v. State*, 274 Ga. App. 32, 619 S.E.2d 299 (2005).

**Misdemeanor attempt, not felony, escape sentencing was proper when defendant was jailed for parole violation.** — Defendant should have been sentenced for misdemeanor attempted escape under O.C.G.A. § 16-10-52(b)(4) since the defendant was in jail for a parole violation, not for a charge on another crime, when the defendant attempted to escape; because the defendant was not charged with any crime at the time the defendant was incarcerated for the parole violation when the defendant attempted to escape from custody, the defendant was erroneously sentenced for a felony under O.C.G.A. § 16-10-52(b)(2) and was entitled to resentencing for misdemeanor attempted escape under O.C.G.A. § 16-10-52(b)(4). *Green v. State*, 283 Ga. App. 541, 642 S.E.2d 167 (2007).

**Criminal attempt to commit rape.** — When, instead of stopping as requested, defendant drove past the fire station,

grabbed the victim by the hair and told her she could not get out until she gave defendant a kiss, and that she would have to do some other stuff, too, defendant's statements to the victim and his actions in the car indicate that he was attempting to rape the victim, and the evidence was sufficient to support defendant's conviction. *Helton v. State*, 166 Ga. App. 662, 305 S.E.2d 592 (1983).

**Criminal attempt to commit murder.** — Aggravated assault conviction merged into a criminal attempt to commit murder conviction, where both counts were based on allegations that defendant had stabbed the victim with a knife. *Kelley v. State*, 201 Ga. App. 343, 411 S.E.2d 276 (1991).

Evidence that a defendant gave a detective checks for \$7,000 to kill the defendant's uncle and described defendant's uncle's location was sufficient to support defendant's convictions for criminal attempt to commit murder and solicitation of murder. Impossibility was not a defense, although the uncle was through airport security and there were no funds in the defendant's account, because the defendant believed that the hit could take place and that the checks would persuade the supposed hit man to commit the murder. *Rana v. State*, 304 Ga. App. 750, 697 S.E.2d 867, cert. denied, No. S10C1764, 2010 Ga. LEXIS 922 (Ga.); cert. denied, U.S. , 131 S. Ct. 156, 178 L. Ed. 2d 93 (2010).

**Criminal attempt to commit theft from vehicle.** — There was no merit to argument of juvenile defendant that circumstantial evidence was insufficient to prove the acts of entering an automobile and criminal attempt to commit theft from a vehicle since, during the early morning hours, defendant was in the area where a car stereo was stolen and the attempted theft of tire rims occurred, a driver's license bearing the false name defendant gave was found at the crime scene, defendant returned to the car that defendant was driving with a car stereo, and car stereo parts were found in the car defendant was driving. *In the Interest of C.M.*, 290 Ga. App. 788, 661 S.E.2d 598 (2008).

**Criminal attempt to sell drugs.** — It was not error to charge the jury on at-

tempt because there was evidence regarding defendant's attempt to sell cocaine in the county in which defendant was charged before completing a purchase and sale in another county. *Singleton v. State*, 229 Ga. App. 135, 493 S.E.2d 556 (1997).

**Criminal attempt to commit statutory rape.** — Nineteen-year-old's defendant's admission that the defendant and a 14-year-old child of the opposite sex took off their clothes and got onto the bed together, and that the defendant "got on" the child was sufficient to sustain the defendant's conviction for attempted statutory rape, even though the defendant testified, in contravention to the victim's testimony, that they did not have sexual intercourse. *Neal v. State*, 264 Ga. App. 311, 590 S.E.2d 168 (2003).

**Attempted rape required sex offender registration.** — In pleading guilty to criminal attempt to commit rape, a defendant admitted that the defendant intended to commit the specific crime of rape and took a substantial step toward that end. Because the crime attempted was related to a sexually violent offense, namely rape, the defendant was properly required to comply with the registration requirements of O.C.G.A. § 42-1-12, and the trial court did not err in convicting the defendant for violating the registry statute. *Jenkins v. State*, 284 Ga. 642, 670 S.E.2d 425 (2008).

**Attempted kidnapping.** — Convictions of criminal attempt to commit kidnapping, O.C.G.A. § 16-5-40(a), and aggravated assault with intent to rape, O.C.G.A. § 16-5-21(a)(1), were supported by sufficient evidence since the victim positively identified the defendant as the attacker when the defendant was captured and again at trial, and since a store owner also identified the defendant at trial and testified that the store owner maintained sight of the defendant from when the store owner saw the defendant attacking the victim until the defendant's capture; additionally, since the defendant made no attempt to take the victim's purse or keys, and the evidence showed that the defendant had pornographic photos of a person who looked similar to the victim, the jury was authorized to find that the defendant had the requisite in-

tent to detain, abduct, and rape the victim as charged. *Mobley v. State*, 279 Ga. App. 476, 631 S.E.2d 491 (2006).

**Attempted statutory rape merged into child molestation.** — Trial court did not err in merging an attempted statutory rape charge into a child molestation charge as the state was required to prove the commission of an immoral or indecent act, removing the victim's and the defendant's clothing, the victim's age was less than 16, and the defendant's intent to arouse or satisfy the defendant's own or the child's sexual desires; thus, the state used up the evidence that the defendant committed attempted statutory rape in establishing that the defendant committed child molestation. *Leaptrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Defendant's convictions for child molestation, attempted statutory rape, and burglary were supported because: (1) the defendant entered the 14-year-old victim's room through a window, uninvited; (2) told the victim to push the bed against the door; (3) removed the victim's panties and the defendant's own pants and laid on top of the victim, but the victim prevented the defendant from penetrating the victim; (4) defendant fondled the victim's breasts and touched the victim's nipples; and (5) on a prior occasion, the defendant made the victim touch the defendant's penis with the victim's hand. *Leaptrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

**Attempted obstruction.** — Because an investigative stop of the defendant matured into a de facto arrest when the officers transported the defendant, without consent, to a police investigative site, the officers needed probable cause to arrest the defendant for a criminal drug activity, and, based on what the officers knew at the time of the de facto arrest, probable cause did not exist to arrest the defendant for such an activity; however, the defendant lied to the officers, providing probable cause to arrest the defendant for attempted obstruction under O.C.G.A. §§ 16-4-1 and 16-10-24(a) and therefore, the seizure of the defendant's person was not illegal, and the evidence gathered as a result of the seizure was not suppressed. *United States v. Virden*, 417 F. Supp. 2d 1360 (M.D. Ga. 2006), aff'd, 488 F.3d 1317 (11th Cir. 2007).

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**Sex offender registration.** — Defendant was properly ordered to register as a sex offender because defendant's convictions constituted criminal offenses against a victim who was a minor, pursuant to O.C.G.A. § 42-1-12(a)(9)(B) and, as attempt convictions pursuant to O.C.G.A. § 16-4-1 were covered within the registration requirement; defendant was convicted of criminal attempt to commit child molestation and criminal attempt to entice a child for indecent purposes, in violation of O.C.G.A. §§ 16-6-4(a) and 16-6-5(a), respectively, after defendant communicated over the Internet with a police officer who was disguised as a 14-year-old child, and arranged to meet the alleged child, and the fact that an actual child was not involved did not negate the offense or the need for the registration, as there was no impossibility defense. Spivey v. State, 274 Ga. App. 834, 619 S.E.2d 346 (2005).

**Attempted aggravated sodomy.** — There was sufficient evidence presented for the jury to find the defendant guilty of criminal attempt to commit aggravated sodomy because the state presented sufficient evidence via the victim's testimony that the defendant attempted to force the victim to perform oral sodomy; the victim testified that the defendant moved her to the bedroom of her home while holding a knife and told her to perform oral sex on him and that when she explained that she could not engage in the act the defendant, while still standing over her, moistened and fondled himself and then forced her to fondle him. Williams v. State, 300 Ga. App. 839, 686 S.E.2d 446 (2009).

Trial court did not err in convicting the defendant of criminal attempt to commit aggravated sodomy in violation of O.C.G.A. §§ 16-4-1 and 16-6-2 because a reasonable trier of fact could have found that the defendant had the necessary criminal intent to commit aggravated sodomy when the evidence presented at trial showed that the defendant forced the victim's mouth into close proximity with the defendant's sex organs while the victim screamed for help, kicked, and fought the defendant; a reasonable trier of fact could

have found that had the victim not been able to escape, the defendant would have forced the victim to engage in sodomy, thereby demonstrating that the defendant had taken a substantial step toward committing aggravated sodomy even though the defendant had not spoken, touched either the defendant's or the victim's sex organs, or exposed the defendant's genitals when the violent acts occurred. English v. State, 301 Ga. App. 842, 689 S.E.2d 130 (2010).

**Likelihood of success.** — Evidence that defendant tried to slide a bag of marijuana into a pool table pocket in order to conceal it was sufficient to sustain conviction for attempting to tamper with evidence, and defendant's reasonable ability to conceal the marijuana was irrelevant; the test was whether defendant performed an act which constituted a substantial step toward concealing the evidence, not whether defendant was likely to succeed. Taylor v. State, 260 Ga. App. 890, 581 S.E.2d 386 (2003).

**Jury instruction upheld.** — Trial court did not err in giving the jury an instruction on conspiracy when the offense charged was not conspiracy but attempted bribery. Since the instruction was free of confusion or other error, it follows that there was no "possibility" or "real probability" that the instruction would induce the jury to convict the defendant of conspiracy (maximum sentence: five years) rather than of attempted bribery (a ten-year maximum). Carpenter v. State, 167 Ga. App. 634, 307 S.E.2d 19 (1983), aff'd, 252 Ga. 79, 310 S.E.2d 912 (1984).

To the extent the defendant sought review under O.C.G.A. § 17-8-58(b), of the trial court's charge to the jury on the jury's consideration of child molestation, attempted child molestation, and indecent exposure, there was no error because the trial court explained that the jury needed to consider all three offenses at the same time and properly explained how the jury would record the jury's verdict. Machado v. State, 300 Ga. App. 459, 685 S.E.2d 428 (2009).

Trial court did not err in charging the jury on attempted statutory rape, O.C.G.A. §§ 16-4-1 and 16-6-3(a), because the court's instruction to the jury was

properly tailored to fit the allegations in the indictment and the evidence admitted at trial; the victim testified that the defendant positioned himself between her legs with his pants unbuttoned and that the two of them were about to engage in sexual intercourse before the victim's grandfather came into her bedroom, and based on that evidence, a rational trier of fact could conclude that the defendant attempted to have sexual intercourse with a person under the age of 16. *Judice v. State*, 308 Ga. App. 229, 707 S.E.2d 114 (2011).

**When the evidence showed a completed crime.** — there was no error in refusing to charge on attempt or abandonment of attempt. *Sanders v. State*, 251 Ga. 70, 303 S.E.2d 13 (1983).

**Abandonment not found.** — Trial court properly denied the defendant's motion for a directed verdict, on a charge of criminal attempt to commit armed robbery, as the mere fact of the fortuitous arrival of the police while the defendant and another were about to commit the actual robbery did not constitute an abandonment of the act. *Level v. State*, 273 Ga. App. 601, 615 S.E.2d 640 (2005).

**Failure to give adequate charge.** — Since an adequate charge on criminal attempt to commit armed robbery was not given to the jury, that crime cannot serve as a basis for defendant's felony murder convictions. *Prater v. State*, 273 Ga. 477, 541 S.E.2d 351 (2001).

**Charge on attempted first-degree arson was authorized.** — since the jury would have been authorized from the evidence to conclude that the defendant intended to set fire to a house and that defendant set fire to clothing as a substantial step toward the commission of that crime. *Plemons v. State*, 194 Ga. App. 554, 390 S.E.2d 916 (1990).

Evidence was sufficient to support the defendant's conviction of criminal attempt to commit arson, even though the defendant testified that the defendant poured the gasoline on the floor as an experiment to get rid of insects, when a victim testified that the defendant poured gasoline on the floor after getting angry with the defendant's spouse, a neighbor testified that the victim and the victim's parent smelled

like gasoline, the police chief testified that the odor of gasoline was so strong that the defendant called the fire department, and the defendant testified that the defendant overreacted when the defendant heard the defendant's spouse and child laughing and that the defendant told them that they thought that the defendant was wrong about burning the house down. *Waller v. State*, 267 Ga. App. 608, 600 S.E.2d 706 (2004).

When the facts demonstrated that the defendant threatened to burn down a restaurant and then proceeded to pour gasoline onto the restaurant's tables and carpet in front of numerous eyewitnesses, such was sufficient evidence to allow a rational jury to convict defendant of attempt to commit arson and terroristic threats; moreover, the defendant's act of damaging the tables and carpet by pouring gasoline on them was sufficient to support a conviction of first-degree criminal damage to property. *Robinson v. State*, 288 Ga. App. 219, 653 S.E.2d 810 (2007).

**Evidence held sufficient.** — See *Laidler v. State*, 180 Ga. App. 213, 348 S.E.2d 739 (1986) (attempted rape); *Walker v. State*, 193 Ga. App. 446, 388 S.E.2d 44 (1989) (attempted armed robbery); *Harrison v. State*, 201 Ga. App. 577, 411 S.E.2d 738 (1991) (attempted felony bail jumping); *Criswell v. State*, 186 Ga. App. 823, 368 S.E.2d 579 (1988) (attempted criminal escape); *Perkins v. State*, 224 Ga. App. 63, 479 S.E.2d 471 (1996); *Alford v. State*, 224 Ga. App. 451, 480 S.E.2d 893 (1997) (attempted child molestation). (attempted burglary); *Hollis v. State*, 225 Ga. App. 370, 484 S.E.2d 54 (1997) (attempted rape); *Sweeney v. State*, 233 Ga. App. 862, 506 S.E.2d 150 (1998) (attempt to possess cocaine); *Heath v. State*, 240 Ga. App. 492, 522 S.E.2d 761 (1999) (attempt to escape); *Salters v. State*, 244 Ga. App. 219, 535 S.E.2d 278 (2000); *Jackson v. State*, 247 Ga. App. 273, 543 S.E.2d 770 (2000) (attempted armed robbery). *Davis v. State*, 249 Ga. App. 579, 548 S.E.2d 678 (2001) (attempted armed robbery).

Malice murder and attempted arson convictions were upheld as: (1) the evidence presented showed that an attempted arson was inextricably linked to

**Application (Cont'd)**

the victim's murder, and the jury was authorized to find beyond a reasonable doubt that the defendant was guilty; (2) the admission of two handwritten documents that defendant had penned, was proper as their prejudicial impact did not outweigh their probative value; and (3) the trial court did not abuse the court's discretion in determining that any prejudicial impact of a religious prayer asking for strength, and an expression of uncertainty as to what "makes me tick," did not outweigh the probative value of the evidence. *Fortson v. State*, 280 Ga. 376, 628 S.E.2d 104 (2006).

Because sufficient evidence showed that the defendant, by posing as a police officer and driving the victims to remote locations, used fear and intimidation to ensure that said victims would cooperate and agree to have sex, the defendant was not entitled to an acquittal as to the charges of impersonating an officer, aggravated sodomy, attempted aggravated sodomy, aggravated assault and rape; furthermore, though both victims willingly got into the defendant's car, after the victims pleaded to be let go and the defendant refused to grant those pleas, said act amounted to a kidnapping. *Dasher v. State*, 281 Ga. App. 326, 636 S.E.2d 83 (2006).

Based on the defendant's concession that the state's evidence tended to show an inference of the defendant's guilt in making a false claim against the county as to money the county allegedly owed to the defendant, and despite a claim that the facts supported the conclusion that the county's aquatic center director was the culpable party, when the defendant pointed to no evidence proving such, convictions for criminal attempt to commit theft by taking and first-degree forgery were supported by the evidence. *Brown v. State*, 285 Ga. App. 453, 646 S.E.2d 289 (2007), cert. denied, No. S07C1503, 2007 Ga. LEXIS 672 (Ga. 2007).

There was sufficient evidence to support an adjudication for delinquency based on criminal attempt to commit robbery under O.C.G.A. §§ 16-4-1 and 16-8-40; a rational trier of fact was authorized to find that

the defendant, in "reaching at" the victim and grabbing the victim's jacket prior to shooting the victim, attempted to take the victim's cigarettes by force, intimidation, or sudden snatching. *In the Interest of B.S.*, 284 Ga. App. 680, 644 S.E.2d 527 (2007).

Despite a juvenile's challenge to the sufficiency of the evidence, an adjudication entered by the juvenile court on a charge of attempted rape was proper because the charge was supported not only by the testimony of the victim, but also by the corroborating testimony offered by both the victim's neighbor, who witnessed the attack, and the victim's sister, who chased the juvenile away from the scene. *In the Interest of J.L.H.*, 289 Ga. App. 30, 656 S.E.2d 160 (2007).

Sufficient evidence existed to support defendant's conviction for criminal attempt to manufacture methamphetamine, and defendant's challenge to the sufficiency of the evidence based upon the uncorroborated testimony of defendant's accomplice alone failed, as the incriminating testimony by the accomplice was adequately corroborated by independent evidence, including defendant's possession of essential items for manufacturing methamphetamine; defendant's statement to a passenger in the back of the patrol car that a store likely had ratted about the matchbook purchases; and the large quantity of matchbooks found discarded along the route defendant had just traveled. *Kohlmeier v. State*, 289 Ga. App. 709, 658 S.E.2d 261 (2008).

Evidence was sufficient for the jury to find beyond a reasonable doubt that defendant was guilty of criminal attempt to manufacture methamphetamine based on evidence that defendant was processing and in possession of methamphetamine oil and that defendant performed an act (processing and possession of methamphetamine oil) which constituted a substantial step toward commission of that crime. *Womble v. State*, 290 Ga. App. 768, 660 S.E.2d 848 (2008).

There was sufficient evidence to support a defendant's conviction for attempting to possess marijuana based on the evidence that the defendant solicited undercover officers and asked for marijuana and at-

tempted to pay for the marijuana. The defendant's rejection of the first bag the undercover officers gave did not establish abandonment of the crime since the defendant asked for a second bag. *Collins v. State*, 297 Ga. App. 364, 677 S.E.2d 407 (2009).

Sufficient evidence was presented to the jury to support the defendant's convictions for armed robbery, aggravated assault, burglary, criminal attempt to commit aggravated sodomy, and possession of a knife during the commission of a crime because the victim's testimony alone was sufficient to support the convictions; regardless of any inconsistencies in the victim's testimony, it was for the jury to assess witness credibility, and the jury chose to believe the victim's identification of the defendant as the individual who committed the crimes. *Williams v. State*, 300 Ga. App. 839, 686 S.E.2d 446 (2009).

There was sufficient evidence to infer that a defendant had taken a substantial step, in violation of O.C.G.A. § 16-4-1, toward the manufacturing of methamphetamine by transporting most of the chemicals, tools, and supplies necessary to commit that crime. *Davenport v. State*, 308 Ga. App. 140, 706 S.E.2d 757 (2011).

**Inconsistent verdict claim rejected.** — Defendant's claim that the defendant's attempted armed robbery verdict and three armed robbery verdicts should have been vacated as the defendant was acquitted of the firearms offenses related to those crimes was rejected; although the defendant claimed to have argued that the verdicts were mutually exclusive, the defendant in fact argued that the verdicts were inconsistent and Georgia has abol-

ished the inconsistent verdict rule. *Ray v. State*, 273 Ga. App. 656, 615 S.E.2d 812 (2005).

**Sentencing.** — Convictions for possession of methamphetamine and criminal attempt to manufacture methamphetamine merged as a matter of fact since the state used the same conduct to establish commission of both crimes, namely the same methamphetamine oil found in a toilet; therefore, though it was permissible to prosecute defendant for each crime, defendant could not be convicted for both offenses and a possession conviction and sentence were vacated by operation of law on appeal. *Womble v. State*, 290 Ga. App. 768, 660 S.E.2d 848 (2008).

**Prior out-of-state convictions.** — Defendant's case was remanded for resentencing after a conviction for criminal attempt to manufacture methamphetamine because the trial court considered an uncertified Arkansas docket sheet in aggravation of sentence and a Tennessee conviction that might not qualify as a prior felony in Georgia under the recidivist statute. *Elliot v. State*, 274 Ga. App. 73, 616 S.E.2d 844 (2005).

Defendant's conviction for criminal attempt to manufacture methamphetamine was supported by the evidence because: (1) the defendant's spouse informed law enforcement authorities that the defendant was manufacturing methamphetamine; (2) the defendant was discovered at a motel and was arrested; and (3) a forensic chemist testified that the items found in the defendant's motel room were those used in the manufacture of methamphetamine. *Elliot v. State*, 274 Ga. App. 73, 616 S.E.2d 844 (2005).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 154 et seq.

**C.J.S.** — 22 C.J.S., Criminal Law, § 148 et seq.

**ALR.** — What constitutes attempt to commit robbery, 55 ALR 714.

Offense of larceny, embezzlement, robbery, or assault to commit robbery, as affected by defendant's intention to take or retain money or property in payment of,

or as security for, a claim, or to collect a debt, or to recoup gambling losses, 116 ALR 997.

Criminal responsibility of one cooperating in offense which he is incapable of committing personally, 131 ALR 1322.

Homicide: causing one, by threats or fright, to leap or fall to his death, 25 ALR2d 1186.

Conviction or acquittal of attempt to

commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa, 53 ALR2d 622.

Attempt to commit assault as criminal offense, 79 ALR2d 597.

Attempts to receive stolen property, 85 ALR2d 259.

Attempts to commit offenses of larceny by trick, confidence game, false pretenses, and the like, 6 ALR3d 241.

What constitutes attempted murder, 54 ALR3d 612.

What conduct amounts to an overt act or acts done toward commission of larceny so as to sustain charge of attempt to commit larceny, 76 ALR3d 842.

Attempt to commit assault as criminal offense, 93 ALR5th 683.

## 16-4-2. Conviction for criminal attempt where crime completed.

A person may be convicted of the offense of criminal attempt if the crime attempted was actually committed in pursuance of the attempt but may not be convicted of both the criminal attempt and the completed crime. (Code 1933, § 26-1004, enacted by Ga. L. 1968, p. 1249, § 1.)

### JUDICIAL DECISIONS

**Lesser included offenses.** — Aggravated assault with intent to commit murder and with a deadly weapon may be charged as lesser included offenses of murder. Hall v. State, 163 Ga. App. 515, 295 S.E.2d 194 (1982).

When an attempt to commit one crime can only be proved by proof of another, greater, consummated crime, the attempt of the former cannot possibly be "included" in or "lesser" than the latter. Cannon v. State, 167 Ga. App. 225, 305 S.E.2d 910 (1983).

**One may be convicted of assault, though criminal act intended was completed.** — It is intent of legislature that although assault may be a criminal attempt, and even though criminal act intended be completed, a conviction for assault is authorized. Williams v. State, 141 Ga. App. 201, 233 S.E.2d 48 (1977).

**One may be convicted of simple assault though battery was committed.** — Recognizing fact that assault is nothing more than an attempted battery, (and thus that every battery necessarily includes an assault) by virtue of O.C.G.A. §§ 16-4-2 and 16-5-22, it is presently lawful to convict for simple assault even though proof shows that a battery was committed. C.L.T. v. State, 157 Ga. App. 180, 276 S.E.2d 862 (1981).

**Not entitled to jury charge on lesser included offense of attempted armed robbery.** — Trial court did not err by refusing to charge the jury that the jury could find the defendant guilty of attempted armed robbery as an included offense of aggravated assault with intent to rob since the defendant was not entitled to a charge or verdict of attempted armed robbery when that offense could only be proved by showing that the defendant brandished a weapon in the faces of the victims with the intent to rob the victims, that is, that the defendant actually committed the greater offense, a completed aggravated assault with the intent to rob. Since the evidence that proved that the defendant committed an attempted armed robbery necessarily proved that the defendant committed the greater, completed crime of aggravated assault with intent to rob, there was no evidence that the defendant committed only the offense of attempted armed robbery and, therefore, the defendant was not entitled to a charge on that lesser included offense. Pilkington v. State, 298 Ga. App. 317, 680 S.E.2d 164 (2009), cert. denied, No. S09C1717, 2010 Ga. LEXIS 54 (Ga. 2010).

**Recovery for personal injuries.** — Legislative purpose of the Georgia Racketeer Influenced and Corrupt Organiza-

tions Act, O.C.G.A. § 16-14-1 et seq. does not preclude recovery for personal injuries. *Reaugh v. Inner Harbour Hosp.*, 214 Ga. App. 259, 447 S.E.2d 617 (1994).

**Evidence sufficient for giving charge on criminal attempt.** — See *Plummer v. State*, 168 Ga. App. 108, 308 S.E.2d 210 (1983).

**Cited** in *Bearden v. State*, 122 Ga. App. 25, 176 S.E.2d 243 (1970); *Adams v. State*, 129 Ga. App. 839, 201 S.E.2d 649 (1973); *Jones v. State*, 238 Ga. 51, 230 S.E.2d 865

(1976); *Scott v. State*, 141 Ga. App. 848, 234 S.E.2d 685 (1977); *Printup v. State*, 142 Ga. App. 42, 234 S.E.2d 840 (1977); *Harper v. State*, 157 Ga. App. 480, 278 S.E.2d 28 (1981); *Schwerdtfeger v. State*, 167 Ga. App. 19, 305 S.E.2d 834 (1983); *Parham v. State*, 218 Ga. App. 42, 460 S.E.2d 78 (1995); *Spivey v. State*, 243 Ga. App. 785, 534 S.E.2d 498 (2000); *Sewell v. State*, 244 Ga. App. 449, 536 S.E.2d 173 (2000); *Colbert v. State*, 255 Ga. App. 182, 564 S.E.2d 787 (2002).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 21, 154.

**C.J.S.** — 42 C.J.S., Indictments and Informations, § 303.

**ALR.** — Conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa, 53 ALR2d 622.

Attempt to commit assault as criminal offense, 79 ALR2d 597.

Application of felony-murder doctrine where the felony relied upon is an includable offense with the homicide, 40 ALR3d 1341.

## 16-4-3. Charge of commission of crime as including criminal attempt.

A person charged with commission of a crime may be convicted of the offense of criminal attempt as to that crime without being specifically charged with the criminal attempt in the accusation, indictment, or presentment. (Code 1933, § 26-1005, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For article, "A Comprehensive Analysis of Georgia RICO," see 9 Georgia St. U.L. Rev. 537 (1993).

## JUDICIAL DECISIONS

**Controlled substance violations.** — O.C.G.A. § 16-13-33 concerning attempt in no way affects operation of O.C.G.A. § 16-4-3; rather it renders the penalty in O.C.G.A. § 16-4-6 inapplicable in prosecutions under the Georgia Controlled Substances Act, O.C.G.A. Ch. 13, T. 16. *Davis v. State*, 164 Ga. App. 633, 298 S.E.2d 615 (1982).

It was not error to charge the jury on attempt because there was evidence regarding defendant's attempt to sell cocaine in the county in which defendant was charged before completing a purchase

and sale in another county. *Singleton v. State*, 229 Ga. App. 135, 493 S.E.2d 556 (1997).

**Predicate acts for purposes of RICO prosecution.** — Jurisdiction under 28 U.S.C. § 1331 did not exist in a borrower's suit asserting various claims against a lender and an appraiser in connection with a loan that encumbered the borrower's property with a debt that exceeded the property's value. Although the borrower alleged that the lender violated 18 U.S.C. §§ 1341 and 1343 as predicate acts under O.C.G.A. § 16-14-3(9)(A) of

Georgia's Racketeer Influenced and Corrupt Organizations (RICO) Act, O.C.G.A. § 16-14-1 et seq., that did not require the court to interpret the federal statutes; further, the borrower also asserted that the lender violated state statutes that could serve as predicate acts under Georgia's RICO law. *Austin v. Ameriquest Mortg. Co.*, 510 F. Supp. 2d 1218 (N.D. Ga. Feb. 27, 2007).

**One may be charged with a crime and convicted only of attempt** if evidence warrants. *Finley v. State*, 139 Ga. App. 495, 229 S.E.2d 6 (1976).

**Evidence was sufficient to convict defendants who were indicted for burglary** of attempted burglary; it was not necessary that the offense of attempted burglary be charged in the indictment in order for defendants to be found guilty of attempted burglary. *Climpson v. State*, 253 Ga. App. 485, 559 S.E.2d 495 (2002).

**Evidence sufficient for giving charge on criminal attempt.** — See *Plummer v. State*, 168 Ga. App. 108, 308 S.E.2d 210 (1983).

Although the codefendants argued that since the codefendants were not indicted for attempting to obtain a motor vehicle by force, the trial court should not have given the jury the opportunity to convict the codefendants of attempting to obtain a motor vehicle by charging the entire statute; nevertheless, a person indicted for a specific crime could be convicted of attempt of the specific crime without an attempt charge being listed in the indictment, O.C.G.A. § 16-4-3. The specific statutory inclusion of attempt as a method of committing the crime of hijacking a motor vehicle did not alter the general rule that an attempt could be proven and charged without being indicted; accordingly, the trial court did not err in the court's charge to the jury on the offense of hijacking a motor vehicle. *Daniels v.*

*State*, 306 Ga. App. 577, 703 S.E.2d 41 (2010).

**Evidence sufficient for attempted aggravated child molestation conviction.** — Trial court did not err in denying the defendant's motion for a directed verdict on the count of an indictment charging the defendant with attempted aggravated child molestation because the defendant was convicted only of the offense of criminal attempt, which was supported by the evidence, and the defendant could be convicted of the lesser-included offense of criminal attempt pursuant to a proper jury instruction. *Arnold v. State*, 305 Ga. App. 45, 699 S.E.2d 77 (2010).

**Instruction on attempted statutory rape proper.** — Trial court did not err in charging the jury on attempted statutory rape, O.C.G.A. §§ 16-4-1 and 16-6-3(a), because the court's instruction to the jury was properly tailored to fit the allegations in the indictment and the evidence admitted at trial; the victim testified that the defendant positioned himself between her legs with his pants unbuttoned and that the two of them were about to engage in sexual intercourse before the victim's grandfather came into her bedroom, and based on that evidence, a rational trier of fact could conclude that the defendant attempted to have sexual intercourse with a person under the age of 16. *Judice v. State*, 308 Ga. App. 229, 707 S.E.2d 114 (2011).

**Cited in** *Lingo v. State*, 226 Ga. 496, 175 S.E.2d 657 (1970); *Rozier v. State*, 124 Ga. App. 481, 184 S.E.2d 203 (1971); *Bryant v. State*, 146 Ga. App. 43, 245 S.E.2d 333 (1978); *Maddox v. State*, 152 Ga. App. 384, 262 S.E.2d 636 (1979); *Collins v. State*, 164 Ga. App. 482, 297 S.E.2d 503 (1982); *Schwerdtfeger v. State*, 167 Ga. App. 19, 305 S.E.2d 834 (1983); *Gatlin v. State*, 199 Ga. App. 500, 405 S.E.2d 118 (1991); *Jenkins v. State*, 284 Ga. 642, 670 S.E.2d 425 (2008).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 154. 41 Am. Jur. 2d, Indictments and Informations, §§ 108, 296.

**C.J.S.** — 42 C.J.S., Indictments and Information, § 303.

**ALR.** — Attempt to commit assault as criminal offense, 79 ALR2d 597.

#### 16-4-4. Impossibility as a defense.

It is no defense to a charge of criminal attempt that the crime the accused is charged with attempting was, under the attendant circumstances, factually or legally impossible of commission if such crime could have been committed had the attendant circumstances been as the accused believed them to be. (Code 1933, § 26-1002, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For article, "A Comprehensive Analysis of Georgia RICO," see 9 Georgia St. U.L. Rev. 537 (1993).

#### JUDICIAL DECISIONS

**Trafficking imitation cocaine.** — The fact that the defendant attempted to traffic imitation cocaine does not relieve defendant of culpability absent evidence that defendant knew the substance was not cocaine. Durfee v. State, 221 Ga. App. 211, 471 S.E.2d 32 (1996).

**Aggravated assault with intent to rape.** — Defendant's belief that the victim was a female and defendant's actions taken towards the victim were sufficient to establish defendant's intent to rape; fact that the victim turned out to be a male rendering an actual rape impossible did not affect defendant's culpability. Gordon v. State, 252 Ga. App. 133, 555 S.E.2d 793 (2001).

**Evidence sufficient to satisfy defense.** — Defendant's actual inability to complete drug purchase because defendant had no money with the defendant falls within the definition of impossibility set forth in O.C.G.A. § 16-4-4. Guzman v. State, 206 Ga. App. 170, 424 S.E.2d 849 (1992).

**Defense not supported by the evidence.** — Evidence that a defendant gave a detective checks for \$7,000 to kill the defendant's uncle and described the defendant's uncle's location was sufficient to support the defendant's convictions for criminal attempt to commit murder and solicitation of murder. Impossibility was not a defense, although the uncle was through airport security and there were no funds in the defendant's account, because the defendant believed that the hit could take place and that the checks would persuade the supposed hit man to commit the murder. Rana v. State, 304 Ga. App. 750, 697 S.E.2d 867, cert. denied, No. S10C1764, 2010 Ga. LEXIS 922 (Ga.); cert. denied, U.S. , 131 S. Ct. 156, 178 L. Ed. 2d 93 (2010).

**Cited** in Williams v. State, 123 Ga. App. 9, 179 S.E.2d 351 (1970); Riddle v. State, 145 Ga. App. 328, 243 S.E.2d 607 (1978); Hibbert v. State, 146 Ga. App. 887, 247 S.E.2d 554 (1978); Logan v. State, No. A10A2100, 2011 Ga. App. LEXIS 230 (Mar. 17, 2011).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 156.

**ALR.** — Criminal responsibility of one co-operating in offense which he is incapable of committing personally, 74 ALR 1110; 131 ALR 1322.

Attempts to receive stolen property, 85 ALR2d 259.

What constitutes attempted murder, 54 ALR3d 612.

Construction and application of state statute governing impossibility of consummation as defense to prosecution for attempt to commit crime, 41 ALR4th 588.

### 16-4-5. Abandonment of effort to commit a crime as an affirmative defense.

(a) When a person's conduct would otherwise constitute an attempt to commit a crime under Code Section 16-4-1, it is an affirmative defense that he abandoned his effort to commit the crime or in any other manner prevented its commission under circumstances manifesting a voluntary and complete renunciation of his criminal purpose.

(b) A renunciation of criminal purpose is not voluntary and complete if it results from:

(1) A belief that circumstances exist which increase the probability of detection or apprehension of the person or which render more difficult the accomplishment of the criminal purpose; or

(2) A decision to postpone the criminal conduct until another time. (Code 1933, § 26-1003, enacted by Ga. L. 1968, p. 1249, § 1.)

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**Burden of proof.** — Renunciation of criminal purpose is an affirmative defense of which defendant bears burden of proof. Cowart v. State, 136 Ga. App. 528, 221 S.E.2d 649 (1975), aff'd, 237 Ga. 282, 227 S.E.2d 248 (1976).

**Burden of persuasion as to renunciation of criminal purpose.** — Affirmative defenses authorized by former Code 1933, § 26-901 et seq. (see O.C.G.A. § 16-3-20 et seq.) and by former Code 1933, § 26-1003 (see O.C.G.A. § 16-4-5) imply that if defendant presents one it is to defendant's advantage and to defendant's interest to affirmatively show it as best defendant can but defendant has no burden to show it nor does defendant have burden of persuasion. Moore v. State, 137 Ga. App. 735, 224 S.E.2d 856, rev'd on other grounds, 237 Ga. 269, 227 S.E.2d 241 (1976).

**Charge that defendant bears burden of persuasion under former Code 1933, § 26-1003** was constitutionally impermissible. Moore v. State, 137 Ga. App. 735, 224 S.E.2d 856, rev'd on other grounds, 237 Ga. 269, 227 S.E.2d 241 (1976) (see O.C.G.A. § 16-4-5).

**Defendant's mere disinterest in subsequent proceedings** inside the room where defendant and codefendant were engaged in a criminal enterprise did

not establish abandonment. Cunningham v. State, 240 Ga. App. 92, 522 S.E.2d 684 (1999).

**When a crime is already completed,** the court need not charge on abandonment of criminal attempt. Maddox v. State, 152 Ga. App. 384, 262 S.E.2d 636 (1979); Baker v. State, 157 Ga. App. 746, 278 S.E.2d 462 (1981); Sanders v. State, 251 Ga. 70, 303 S.E.2d 13 (1983); Freese v. State, 196 Ga. App. 761, 396 S.E.2d 922 (1990); Perkins v. State, 224 Ga. App. 63, 479 S.E.2d 471 (1996).

Showing that crime was already completed when defendant abandoned efforts is insufficient to require charge on abandonment of criminal attempt. Joiner v. State, 147 Ga. App. 526, 249 S.E.2d 335 (1978).

**Crime already committed.** — Defendant could be found guilty of hindering the apprehension of a criminal where, knowing that a codefendant had used the gun to shoot someone, the defendant concealed it with the intent of protecting self and defendant's friend from punishment; defendant's later informing the police where defendant had hidden the gun was not abandonment of a crime because the crimes had already been committed. Hubbard v. State, 210 Ga. App. 141, 435 S.E.2d 709 (1993).

**Victim's testimony that after attempting rape and murder, defendant "up and left" does not authorize abandonment charge.** Guthrie v. State, 147 Ga. App. 351, 248 S.E.2d 714 (1978).

**Charge on entire section where request included only portion of section.** — Trial court did not err in charge on renunciation of criminal purpose where appellant requested and court had approved a charge on only a portion of O.C.G.A. § 16-4-5, and court's charge included entire Code section. Smith v. State, 157 Ga. App. 238, 276 S.E.2d 905 (1981).

**Flight when discovered.** — Trial court did not err by failing to give burglary defendant's requested charge on abandonment of an attempt, where there was no evidence that the attempt was abandoned for any reason other than that defendant fled when discovered. Hayes v. State, 193 Ga. App. 33, 387 S.E.2d 139, cert. denied, 193 Ga. App. 909, 387 S.E.2d 139 (1989).

**Evidence supported finding of involuntary renunciation of criminal purpose.** — Attempted robbery conviction was supported by sufficient evidence which showed, *inter alia*, that the defendant only abandoned a plan to rob a bank after repeatedly making eye contact with an officer who had fortuitously arrived, and that the defendant believed this increased the probability of apprehension, rendering renunciation of the criminal purposes involuntary under O.C.G.A. § 16-4-5(b)(1); although the officer arrived in an unmarked car and did not wear a police uniform, there was evidence that the officer wore clothing normally worn by law enforcement individuals and that the officer's badge was possibly visible. Moreover, regardless of whether the defendant knew the individual the defendant continued to look at was an officer, the fact remained that the defendant was acutely aware of the individual's presence. Heard v. State, 299 Ga. App. 44, 681 S.E.2d 701 (2009).

**No evidence presented to indicate defendant abandoned effort to sell cocaine.** — See Quinn v. State, 171 Ga. App. 590, 320 S.E.2d 827 (1984).

**Forcing victim to perform fellatio after failed rape attempt was not ev-**

**idence of renunciation of criminal purpose of rape.** — Since the evidence showed that, upon discovering the victim was menstruating, the defendant apparently found the accomplishment of the crime of rape to be more difficult, the defendant was not found to have abandoned the criminal enterprise, choosing instead to force the victim to perform fellatio; therefore, sufficient evidence existed to support the defendant's conviction for attempted rape since the defendant did not make a complete renunciation of the criminal purpose. Allen v. State, 286 Ga. App. 82, 648 S.E.2d 677 (2007).

**No evidence of abandonment.** — When the evidence showed that the defendant directed the getaway car to enable an accomplice to join the group and effect an escape, and the defendant disposed of weapons that had been used in the crimes, there was sufficient evidence from which the jury could have rejected the defendant's defense of abandonment. Johnson v. State, 276 Ga. 368, 578 S.E.2d 885 (2003).

In a criminal trial on a charge of criminal attempt to commit armed robbery, a trial court properly denied the defendant's motion for a directed verdict because a criminal attempt under O.C.G.A. § 16-4-1 was committed when the defendant and the defendant's two coworkers obtained equipment, including guns and ammunition, in preparation for robbing a store, drove to the store, and were thereafter spotted by the police. Level v. State, 273 Ga. App. 601, 615 S.E.2d 640 (2005).

Evidence that a defendant was participating in a home invasion robbery but backed out of the house when confronted by the victim, then shot the victim in the chest as the victim reached for the victim's pistol, did not show the defense of abandonment under O.C.G.A. § 16-4-5(b) because it was a response to circumstances presenting an increased probability of apprehension or making accomplishment of the criminal purpose more difficult. Younger v. State, 288 Ga. 195, 702 S.E.2d 183 (2010).

**Cited in** Gibbons v. State, 136 Ga. App. 609, 222 S.E.2d 55 (1975); Cowart v. State, 237 Ga. 282, 227 S.E.2d 248 (1976); Hibbert v. State, 146 Ga. App. 887, 247

S.E.2d 554 (1978); Stewart v. State, 147 Ga. App. 547, 249 S.E.2d 351 (1978); Jackson v. State, 148 Ga. App. 623, 252 S.E.2d 26 (1979); J.E.T. v. State, 151 Ga. App. 836, 261 S.E.2d 752 (1979); Beckum v. State, 156 Ga. App. 484, 274 S.E.2d 829 (1980); Cook v. State, 249 Ga. 709, 292 S.E.2d 844 (1982); Padgett v. State, 170 Ga. App. 98, 316 S.E.2d 523 (1984); Battle v. State, 178 Ga. App. 655, 344 S.E.2d 477

(1986); Merritt v. State, 183 Ga. App. 135, 358 S.E.2d 293 (1987); Willis v. State, 191 Ga. App. 251, 381 S.E.2d 416 (1989); Williams v. State, 191 Ga. App. 913, 383 S.E.2d 344 (1989); Spivey v. State, 243 Ga. App. 785, 534 S.E.2d 498 (2000); Barnett v. State, 244 Ga. App. 585, 536 S.E.2d 263 (2000); Kelly v. State, 272 Ga. 800, 537 S.E.2d 338 (2000).

## RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Withdrawal From or Abandonment of Criminal Enterprise, 8 POF2d 231.

**C.J.S.** — 22 C.J.S., Criminal Law, § 150.

**ALR.** — Attempt to conceal or dispose of body as evidence connecting accused with homicide, 2 ALR 1227.

What constitutes attempted murder, 54 ALR3d 612.

## 16-4-6. Penalties for criminal attempt.

(a) A person convicted of the offense of criminal attempt to commit a crime punishable by death or by life imprisonment shall be punished by imprisonment for not less than one year nor more than 30 years.

(b) A person convicted of the offense of criminal attempt to commit a felony, other than a felony punishable by death or life imprisonment, shall be punished by imprisonment for not less than one year nor more than one-half the maximum period of time for which he or she could have been sentenced if he or she had been convicted of the crime attempted, by one-half the maximum fine to which he or she could have been subjected if he or she had been convicted of the crime attempted, or both.

(c) A person convicted of the offense of criminal attempt to commit a misdemeanor shall be punished as for a misdemeanor. (Code 1933, § 26-1006, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2007, p. 501, § 1/SB 79.)

**Editor's notes.** — Ga. L. 2007, p. 501, § 2, not codified by the General Assembly, provides that this Code section shall apply to all crimes committed on and after July 1, 2007.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 4712 are included in the annotations for this Code section.

**Statute not confined to indictments for attempts.** — Penalties prescribed for

attempts to commit offenses apply equally whether indictment is under statute for attempt, or under some other statute for offense itself and only attempt is found by jury. Miller v. State, 58 Ga. 200 (1877) (decided under former Code 1873, § 4712).

**O.C.G.A. §§ 16-4-6 and 16-13-33 are mutually exclusive** and there is no uncertainty as to which applies because § 16-13-33 renders § 16-4-6 inapplicable in prosecutions under the Georgia Controlled Substances Act as when a crime is penalized by a special law, the general provisions of the penal code are not applicable; accordingly, there is no merit to the assertion that § 16-13-33 contravenes the rule of lenity, and the trial court did not err in imposing a sentence for marijuana convictions under that provision rather than § 16-4-6. Woods v. State, 279 Ga. 28, 608 S.E.2d 631 (2005).

**Attempted rape conviction required sex offender registration.** — In pleading guilty to criminal attempt to commit rape, a defendant admitted that the defendant intended to commit the specific crime of rape and took a substantial step toward that end. Because the crime attempted was related to a sexually violent offense, namely rape, the defendant was properly required to comply with the registration requirements of O.C.G.A. § 42-1-12, and the trial court did not err in convicting the defendant for violating the registry statute. Jenkins v. State, 284 Ga. 642, 670 S.E.2d 425 (2008).

**Recovery for personal injuries.** — Legislative purpose of the Georgia Racketeer Influenced and Corrupt Organizations Act does not preclude recovery for personal injuries. Reaugh v. Inner Harbour Hosp., 214 Ga. App. 259, 447 S.E.2d 617 (1994).

**Felony punished as misdemeanor.** — That felony may be punished as misdemeanor when prisoner is recommended to mercy, does not take attempt to commit such felony out of operation of former Code 1873, § 4712 if there were no recommendation of mercy. Miller v. State, 58 Ga. 200 (1877) (decided under former Code 1873, § 4712).

**Controlled substance violations.** — O.C.G.A. § 16-13-33, concerning attempt, in no way affects operation of O.C.G.A. § 16-4-3, but rather it renders the penalty in O.C.G.A. § 16-4-6 inapplicable in prosecutions under the Georgia Controlled Substances Act, O.C.G.A. § 16-13-1 et seq. Davis v. State, 164 Ga. App. 633, 298 S.E.2d 615 (1982).

**Contribution rights.** — Contribution rights by which liability is apportioned among joint tortfeasors will be recognized under Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., when those rights are expressly created by the parties in a contractual agreement preceding the litigation. Sikes v. AT & T Co., 841 F. Supp. 1572 (S.D. Ga. 1993).

**Jury instruction upheld.** — Trial court did not err in giving the jury an instruction on conspiracy when the offense charged was attempted bribery. Since the instruction is free of confusion or other error, it follows that there is no “possibility” or “real probability” that the instruction would induce the jury to convict the defendant of conspiracy (maximum sentence: five years) rather than of attempted bribery (a ten-year maximum). Carpenter v. State, 167 Ga. App. 634, 307 S.E.2d 19 (1983), aff’d, 252 Ga. 79, 310 S.E.2d 912 (1984).

**Defendant was properly sentenced as recidivist under O.C.G.A. § 17-10-7** as O.C.G.A. § 16-7-1(b) was inapplicable since defendant was convicted of attempted burglary, which was subject to sentencing under O.C.G.A. § 16-4-6; further, defendant had been convicted of two other burglaries and two other felonies, so defendant was a four-time felony offender subject to the general recidivist sentencing scheme in O.C.G.A. § 17-10-7. Smith v. State, 273 Ga. App. 107, 614 S.E.2d 219 (2005).

Trial court properly vacated a consent order modifying the defendant’s original sentence, as such was based upon a mistake of law induced by the defendant personally, and hence, void; moreover, because the defendant was sentenced as a recidivist, the trial court was required to impose a sentence pursuant to O.C.G.A. § 17-10-7(a). Sosebee v. State, 282 Ga. App. 905, 640 S.E.2d 379 (2006).

**Sentence within statutory limits for attempted burglary upheld.** — When the defendant was sentenced to 10 years, the maximum allowed under O.C.G.A. § 16-4-6(b) for a first offense of attempted burglary, the court would not disturb the sentence as the sentence was within the statutory limits. Armour v.

State, 292 Ga. App. 111, 663 S.E.2d 367 (2008).

**Court erred in sentencing defendant to 30 years for attempted sodomy.** — In 2007, the maximum penalty for criminal attempt to commit aggravated sodomy was increased from ten years to thirty years pursuant to O.C.G.A. § 16-4-6. The increased sentence, however, applied only to crimes committed on or after July 1, 2007; therefore, the trial court erred in sentencing a defendant to 30 years for an attempted sodomy that occurred on March 2, 2006. *Bryant v. State*, 304 Ga. App. 755, 697 S.E.2d 860 (2010).

**Cited in** *Bearden v. State*, 122 Ga. App. 25, 176 S.E.2d 243 (1970); *Williams v. State*, 123 Ga. App. 9, 179 S.E.2d 351 (1970); *Witt v. State*, 124 Ga. App. 535, 184 S.E.2d 517 (1971); *Fullewellen v. State*, 127 Ga. App. 568, 194 S.E.2d 275

(1972); *Cowart v. State*, 136 Ga. App. 528, 221 S.E.2d 649 (1975); *Johnson v. Jackson*, 140 Ga. App. 252, 230 S.E.2d 756 (1976); *Farley v. State*, 238 Ga. 181, 231 S.E.2d 761 (1977); *Johnson v. State*, 144 Ga. App. 568, 241 S.E.2d 458 (1978); *Head v. Hopper*, 241 Ga. 164, 243 S.E.2d 877 (1978); *Dunbar v. State*, 146 Ga. App. 136, 245 S.E.2d 486 (1978); *Taylor v. Hopper*, 596 F.2d 1284 (5th Cir. 1979); *Gunter v. State*, 155 Ga. App. 176, 270 S.E.2d 224 (1980); *McKenzie v. State*, 248 Ga. 294, 282 S.E.2d 95 (1981); *Stillwell v. State*, 161 Ga. App. 230, 288 S.E.2d 295 (1982); *Morast v. Lance*, 631 F. Supp. 474 (N.D. Ga. 1986); *Ranson v. State*, 198 Ga. App. 659, 402 S.E.2d 740 (1991); *Daniel v. State*, 200 Ga. App. 79, 406 S.E.2d 806 (1991); *English v. State*, 282 Ga. App. 552, 639 S.E.2d 551 (2006); *Upton v. Johnson*, 282 Ga. 600, 652 S.E.2d 516 (2007).

#### 16-4-7. Criminal solicitation.

(a) A person commits the offense of criminal solicitation when, with intent that another person engage in conduct constituting a felony, he solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct.

(b) A person convicted of the offense of criminal solicitation to commit a felony shall be punished by imprisonment for not less than one nor more than three years. A person convicted of the offense of criminal solicitation to commit a crime punishable by death or by life imprisonment shall be punished by imprisonment for not less than one nor more than five years.

(c) It is no defense to a prosecution for criminal solicitation that the person solicited could not be guilty of the crime solicited.

(d) The provisions of subsections (a) through (c) of this Code section are cumulative and shall not supersede any other penal law of this state. (Code 1933, §§ 26-1007, 26-1008, 26-1009, enacted by Ga. L. 1978, p. 903, § 1.)

**Law reviews.** — For article surveying developments in Georgia constitutional law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 51 (1981).

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**Section is not overbroad as encompassing protected speech.** — Former Code 1933, § 26-1007 prohibits only such

language as creates a clear and present danger of a felony being committed and is therefore not overbroad as encompassing

protected speech. *State v. Davis*, 246 Ga. 761, 272 S.E.2d 721 (1980) (see O.C.G.A. § 16-4-7).

**Clear and present danger of perpetration of felony by person solicited.**

— Phrase “or otherwise attempts to cause such other person to engage in such conduct” is construed as meaning or otherwise creates a clear and present danger of such other person perpetrating a felony. *State v. Davis*, 246 Ga. 761, 272 S.E.2d 721 (1980).

**Nature of statement constituting solicitation.** — Only a relatively overt statement or request intended to bring about action on part of another person will bring defendant within statute. *State v. Davis*, 246 Ga. 761, 272 S.E.2d 721 (1980).

**Words alone, regardless of degree of their insulting nature,** will not in any case justify excitement of passion so as to reduce crime for murder to manslaughter where killing is done solely on account of the indignation aroused by use of opprobrious words. *Brooks v. State*, 249 Ga. 583, 292 S.E.2d 694 (1982).

**Drug trafficking.** — Defendant’s exercise of control over an attempted sale of drugs to police sufficiently supported defendant’s conviction for criminal solicitation to commit trafficking. *Forrester v. State*, 255 Ga. App. 456, 565 S.E.2d 825 (2002).

**Solicitation to commit murder.** — Evidence that a defendant gave a detective checks for \$7,000 to kill the defendant’s uncle and described the defendant’s uncle’s location was sufficient to support the defendant’s convictions for criminal attempt to commit murder and solicitation of murder. Impossibility was not a defense, although the uncle was through airport security and there were no funds in the defendant’s account, because the defendant believed that the hit could take place and that the checks would persuade the supposed hit man to commit the murder. *Rana v. State*, 304 Ga. App. 750, 697 S.E.2d 867, cert. denied, No. S10C1764, 2010 Ga. LEXIS 922 (Ga.); cert. denied, U.S. , 131 S. Ct. 156, 178 L. Ed. 2d 93 (2010).

**Solicitation is not a lesser included offense** of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e), as

the facts necessary to prove each offense are different. *Dimas v. State*, 276 Ga. App. 245, 622 S.E.2d 914 (2005).

Trial court properly denied defendant’s motion for a directed verdict of acquittal on all of the charges relating to solicitation to commit two murders and solicitation to conceal the death of one of the purported murder victims as the testimony of a witness established that defendant sought that witness’s aide in murdering two game wardens who had charged defendant with various hunting violations, that the witness was equipped with a tape device to record defendant’s plans and those tapes were presented at trial, which detailed defendant going over the gun to be used and the manner in which the death of one victim was to be concealed. *English v. State*, 290 Ga. App. 378, 659 S.E.2d 783 (2008).

**Jury instructions.** — Evidence did not warrant a charge on criminal solicitation as a lesser included offense within charge of criminal attempt to commit murder where the evidence established without dispute that to the extent the defendant may have attempted to induce another person to commit a crime, defendant went well beyond the mere use of language and paid defendant for that purpose. *Norris v. State*, 176 Ga. App. 164, 335 S.E.2d 611 (1985).

Trial court did not err in denying defendant’s requested charge on criminal solicitation because it was not a lesser included offense in the crime of trafficking in cocaine as a matter of law or fact. *Adams v. State*, 229 Ga. App. 381, 494 S.E.2d 92 (1997).

Trial court did not err in refusing to charge on criminal attempt to solicit murder since that charge was not supported in law or fact. *McTaggart v. State*, 225 Ga. App. 359, 483 S.E.2d 898 (1997).

Defendant’s convictions on two counts of criminal solicitation to commit a felony (murder) were reversed for a new trial as the trial court erred in failing to instruct the jury on the definitions of the words “felony” and “murder” as essential elements of the crime charged. *Essuon v. State*, 286 Ga. App. 869, 650 S.E.2d 409 (2007).

Trial court properly charged the jury with the entire solicitation statute, pursuant to O.C.G.A. § 16-4-7, despite the state only alleging that defendant violated the statute in one manner in the indictment as there was no reasonable probability existing that the jury convicted defendant for committing the offense in a manner not charged in the indictment. The trial court did not submit the case to the jury upon a theory entirely different from that claimed in the indictment; the indictment used the words "solicit" and "request," as did the trial court in the court's charge to the jury; the trial court's charge to the jury, which also included "commands, urges or otherwise attempts," did not permit the prosecution to prove that a crime was committed in a wholly different manner than that specifically alleged in the indictment; and the trial court instructed the jury that the state must prove the acts were completed as alleged in the indictment, and that the state bore the burden

of proving every material allegation of the indictment beyond a reasonable doubt. English v. State, 290 Ga. App. 378, 659 S.E.2d 783 (2008).

**After the defendant delivered a package containing drugs** to an informant's love interest who was working with police, and there was no evidence that the defendant asked the love interest to engage in anything or that the defendant used language indicating a clear and present danger that a felony would be committed, the defendant was not entitled to a jury charge on criminal solicitation in violation of O.C.G.A. § 16-4-7(a). Dimas v. State, 276 Ga. App. 245, 622 S.E.2d 914 (2005).

**Cited** in Williams v. State, 123 Ga. App. 9, 179 S.E.2d 351 (1970); Howell v. State, 157 Ga. App. 451, 278 S.E.2d 43 (1981); Washington v. State, 268 Ga. 598, 492 S.E.2d 197 (1997); Lindsey v. State, 282 Ga. 447, 651 S.E.2d 66 (2007).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 158 et seq.

**C.J.S.** — 22 C.J.S., Criminal Law, §§ 149, 159 et seq.

**ALR.** — Solicitation to crime as substantive common-law offense, 35 ALR 961.

Criminal responsibility of one cooperating in offense which he is incapable of committing personally, 131 ALR 1322.

Construction and effect of statutes mak-

ing solicitation to commit crime a substantive offense, 51 ALR2d 953.

Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignation — modern cases, 77 ALR3d 519.

Solicitation to commit crime against more than one person or property, made in single conversation, as single or multiple crimes, 24 ALR4th 1324.

#### 16-4-8. Conspiracy to commit a crime.

A person commits the offense of conspiracy to commit a crime when he together with one or more persons conspires to commit any crime and any one or more of such persons does any overt act to effect the object of the conspiracy. A person convicted of the offense of criminal conspiracy to commit a felony shall be punished by imprisonment for not less than one year nor more than one-half the maximum period of time for which he could have been sentenced if he had been convicted of the crime conspired to have been committed, by one-half the maximum fine to which he could have been subjected if he had been convicted of such crime, or both. A person convicted of the offense of criminal conspiracy to commit a misdemeanor shall be punished as for a misdemeanor. A person convicted of the offense of criminal conspiracy to commit a crime punishable by death or by life imprisonment shall be

punished by imprisonment for not less than one year nor more than ten years. (Laws 1833, Cobb's 1851 Digest, p. 808; Code 1863, § 4387; Code 1868, § 4425; Code 1873, § 4497; Code 1882, § 4497; Penal Code 1895, § 118; Penal Code 1910, § 120; Code 1933, § 26-1901; Code 1933, § 26-3201, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 14; Ga. L. 1977, p. 601, § 2.)

**Law reviews.** — For article, "A comprehensive analysis of Georgia RICO," see 9 Georgia St. U.L. Rev 537 (1993). For

annual survey of real property law, see 57 Mercer L. Rev. 331 (2005).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION  
WHAT CONSTITUTES CONSPIRACY  
INDICTMENT  
VENUE  
JURY CHARGE

#### General Consideration

**Editor's notes.** — In light of the similarity of the statutory provisions, decisions rendered prior to codification of this principle by Ga. L. 1968, p. 1249, § 1 are included in the annotations for this Code section.

**Constitutionality.** — Conspiracy statute, O.C.G.A. § 16-4-8, is not unconstitutionally vague because the statute's term "overt act" unambiguously refers to a specific type of open or manifest act made in furtherance of a conspiracy to commit a crime. Bradford v. State, 285 Ga. 1, 673 S.E.2d 201 (2009).

**Conspiracy to defraud the state,** O.C.G.A. § 16-10-21(a), is distinct from O.C.G.A. § 16-4-8, which is the general conspiracy statute. Gordon v. State, 181 Ga. App. 391, 352 S.E.2d 582 (1986), aff'd in part, rev'd in part on other grounds, 257 Ga. 335, 359 S.E.2d 634 (1987).

Offense of conspiracy to defraud a state or political subdivision does not merge with the underlying offense of theft by taking. English v. State, 202 Ga. App. 751, 415 S.E.2d 659 (1992).

**Crime of conspiracy, or of criminal attempt, can only be defined in conjunction with a second criminal section.** Orkin v. State, 236 Ga. 176, 223 S.E.2d 61 (1976).

Crime of conspiracy can be defined only

in conjunction with substantive crime involved in it. Orkin v. State, 236 Ga. 176, 223 S.E.2d 61 (1976); Gonzalez v. Abbott, 262 Ga. 671, 425 S.E.2d 272 (1993).

**When conspiracy itself is a separate crime.** — It was intent of the legislature to make conspiracy itself a separate crime only in cases where crime conspired to be committed had not in fact been committed. Scott v. State, 229 Ga. 541, 192 S.E.2d 367 (1972); Rowe v. State, 166 Ga. App. 836, 305 S.E.2d 624 (1983).

It was intent of legislature to make conspiracy itself a separate crime only in cases where crime conspired to be committed had not in fact been committed, that is, where conspiracy had been "nipped in the bud." Crosby v. State, 232 Ga. 599, 207 S.E.2d 515 (1974); Roberts v. State, 242 Ga. 634, 250 S.E.2d 482 (1978).

One cannot be tried for conspiracy when the object of the conspiracy is completed. Kilgore v. State, 251 Ga. 291, 305 S.E.2d 82 (1983).

**Law of conspiracy can apply only to subjects capable of entertaining a criminal intent.** Sweat v. State, 119 Ga. App. 646, 168 S.E.2d 654 (1969).

**Each participant in a conspiracy is responsible for acts of the others.** Causey v. State, 154 Ga. App. 76, 267 S.E.2d 475 (1980).

When a conspiracy is shown, the act of one becomes the act of all, insofar as

**General Consideration (Cont'd)**

furtherance of conspiracy is concerned; and each is as fully responsible for acts of the others in carrying out common purpose as if that one personally had committed the acts. *Thrift-Mart, Inc. v. Commercial Union Assurance Cos.*, 154 Ga. App. 344, 268 S.E.2d 397 (1980).

Once common design is shown by evidence tending to indicate that individuals have associated themselves together to do an unlawful act, any act done in pursuance of that association by any one of the associates, would, in legal contemplation, be the act of each of them. *Greene v. State*, 155 Ga. App. 222, 270 S.E.2d 386 (1980).

**Act of one conspirator is considered to be act of all conspirators.** *Whitfield v. State*, 159 Ga. App. 398, 283 S.E.2d 627 (1981).

**One may become part of conspiracy after its formation.** — After conspiracy is formed, if a party joins therein, knowing of its existence and purpose, that party becomes as much a party thereto as if the person had been an original member. *Willson v. Appalachian Oak Flooring & Hdwe. Co.*, 220 Ga. 599, 140 S.E.2d 830 (1965) (decided under prior law).

**Conspiring with another to commit crime as element of accessory liability.** — Conspiring with another to commit an offense may be an element in the guilt of one charged as an accessory, or in misdemeanors, even of a principal. *Crow v. State*, 52 Ga. App. 192, 182 S.E. 685 (1935) (decided under prior law).

**One who conspires to commit murder does so with malice aforethought.** *Orkin v. State*, 236 Ga. 176, 223 S.E.2d 61 (1976).

**Murder may be imputable to coconspirators where it is incidental, probable consequence of conspiracy.** — If during commission of crime a coconspirator commits murder, it is not necessary that the murder be part of original design, but it is enough if it is an incidental, probable consequence of the execution of conspirators' design and should appear at the moment to one of the participants to be expedient for the common purpose, and intent of actual slayer is imputable to the

coconspirators. *Lumpkin v. State*, 176 Ga. 446, 168 S.E. 241 (1933) (decided under prior law).

**Evidence of a subsequent successful conspiracy by defendant to murder her husband** had a logical connection to the crime for which she was being tried, a separate conspiracy to murder him. Such evidence tends to show intent and state of mind, and certainly tends to establish conspiracy to murder the same victim. *Buffington v. State*, 171 Ga. App. 919, 321 S.E.2d 418 (1984).

**Merger of offenses.** — Even though the crimes of conspiracy and possession of tools for the commission of a crime do not merge as a matter of law, because the form of the indictment required proof of the possession of tools in order to prove the conspiracy, the offenses merged as a matter of fact. *Green v. State*, 240 Ga. App. 377, 523 S.E.2d 581 (1999).

**Merger of conspiracy into greater crime.** — Conspiracy is merged into greater crime where evidence shows without dispute that crime charged was actually committed, or that all essential acts constituting crime were committed. *Dutton v. State*, 228 Ga. 850, 188 S.E.2d 794 (1972); *Crosby v. State*, 232 Ga. 599, 207 S.E.2d 515 (1974).

**Multiple convictions under separate conspiracy statutes.** — When conspiracy contemplates commission of more than one substantive offense, and there are separate conspiracy statutes separately punishing a conspiracy to commit each offense, a separate conviction under each conspiracy statute may be authorized. *Price v. State*, 247 Ga. 58, 273 S.E.2d 854 (1981).

**Acts pursuant to single conspiracy constituting separate substantive offenses.** — When multiple overt acts are committed pursuant to what is albeit a single conspiracy, and each overt act constitutes a separate substantive offense, there may be multiple convictions for multiple substantive offenses. *Price v. State*, 247 Ga. 58, 273 S.E.2d 854 (1981).

Charges of conspiracy to import marijuana and trafficking in marijuana could be joined for trial, over objection, where the charges arose from the same conduct. *Bridges v. State*, 195 Ga. App. 851, 395 S.E.2d 30 (1990).

**Improper conviction for multiple counts of conspiracy as harmless error.** — Improper conviction of multiple counts of conspiracy indictment is harmless error where defendant's sentence is within legal limits for conviction of a single conspiracy. *Price v. State*, 247 Ga. 58, 273 S.E.2d 854 (1981).

**When defendants are indicted under former Code 1933, § 26-3201, the maximum punishment provisions apply.** *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975) (see O.C.G.A. § 16-4-8).

**Sentence appropriate.** — Juvenile defendant was sentenced as an adult to 10 years' imprisonment after being convicted of conspiracy to commit armed robbery in a criminal episode in which a person was killed. As the 10-year sentence was within the limits set by O.C.G.A. §§ 16-4-8 and 16-8-41(b), and there was no showing that the sentence was overly severe or excessive in proportion to the offense, the sentence did not violate the Eighth Amendment. *Pascarella v. State*, 294 Ga. App. 414, 669 S.E.2d 216 (2008), cert. denied, No. S09C0426, 2009 Ga. LEXIS 188 (Ga. 2009).

**Sentence for conspiracy to traffic in marijuana.** — Sentencing provisions in O.C.G.A. § 16-13-33, not the general provisions in O.C.G.A. § 16-4-8, are applicable to the offense of conspiracy to traffic in marijuana. *Raftis v. State*, 175 Ga. App. 893, 334 S.E.2d 857 (1985).

**Maximum punishment provisions of Controlled Substances Act apply to conspiracy.** — When the indictment charged "Conspiracy to Possess and Sell Marijuana" a violation of provisions of the Georgia Controlled Substances Act (see O.C.G.A. Ch. 13, T. 16) is properly charged and maximum punishment provisions of it apply. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

Because conspiracy to manufacture methamphetamine was a crime penalized by a special law, the general provisions of the penal code did not apply; thus, under both O.C.G.A. §§ 16-13-30 and 16-13-33, which were mutually exclusive, the defendant was properly sentenced to 30 years, which was the maximum sentence allowed. *McWhorter v. State*, 275 Ga. App. 624, 621 S.E.2d 571 (2005).

**Imposition of a fine.** — When the clear language of O.C.G.A. § 16-13-33 precludes the imposition of a fine in conjunction with a prison sentence for conspiracy to violate the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., the preclusion applies equally to attempt and conspiracy; therefore, § 16-13-33 supplanted the general punishment provision of O.C.G.A. § 16-4-8 for attempt or conspiracy to possess controlled substances. *Watson v. State*, 276 Ga. 212, 576 S.E.2d 897 (2003).

Since under O.C.G.A. § 16-13-33, a conviction for criminal attempt to violate the Georgia Controlled Substance Act, O.C.G.A. § 16-13-20 et seq., does not authorize the imposition of a fine; therefore, *Watson v. State*, 256 Ga. App. 789 (2002) is reversed to the extent that it holds to the contrary. *Watson v. State*, 276 Ga. 212, 576 S.E.2d 897 (2003).

**Civil liability arising from acts pursuant to conspiracy.** — If in carrying out design of conspirators, overt acts are done, causing legal damage, the person so damaged has a right of action. *Patterson-Pope Motor Co. v. Ford Motor Co.*, 66 Ga. App. 41, 16 S.E.2d 877 (1941).

**Conspiracy alone, without overt act, will not support a civil cause of action.** *Patterson-Pope Motor Co. v. Ford Motor Co.*, 66 Ga. App. 41, 16 S.E.2d 877 (1941).

**Arson conspiracy and murder.** — Conspiracy to commit arson, without more does not naturally, necessarily, and probably result in the murder of one coconspirator by another; thus, defendant was improperly convicted of murder because although defendant was guilty of conspiracy to commit arson, the subsequent murder of one coconspirator by another to keep the murdered coconspirator quiet was not reasonably foreseen as a necessary, probable consequence of the arson conspiracy. *Everritt v. State*, 277 Ga. 457, 588 S.E.2d 691 (2003).

**Theft by shoplifting.** — Sufficient evidence supported the defendant's convictions of false statements under O.C.G.A. § 16-10-20 and conspiracy to commit theft by shoplifting under O.C.G.A. § 16-4-8 as the coconspirator testified as to the defendant's request for specific items to be

**General Consideration (Cont'd)**

stolen, the special agent testified about the defendant's false statements, and the defendant gave a statement admitting to the conduct; the testimony of the coconspirator and of the special agent established the elements of the offenses, and the jury, under O.C.G.A. § 24-9-80, had the right to disbelieve the defendant's testimony to the contrary. *Acey v. State*, 281 Ga. App. 197, 635 S.E.2d 814 (2006).

**Cited** in *Cross v. State*, 124 Ga. App. 152, 183 S.E.2d 93 (1971); *Patterson v. State*, 126 Ga. App. 753, 191 S.E.2d 584 (1972); *Sak v. State*, 129 Ga. App. 301, 199 S.E.2d 628 (1973); *Porterfield v. State*, 137 Ga. App. 449, 224 S.E.2d 94 (1976); *Barner v. State*, 139 Ga. App. 50, 227 S.E.2d 874 (1976); *Brooks v. State*, 144 Ga. App. 97, 240 S.E.2d 593 (1977); *Mace v. State*, 144 Ga. App. 496, 241 S.E.2d 615 (1978); *Hammock v. State*, 146 Ga. App. 339, 246 S.E.2d 392 (1978); *Booker v. State*, 242 Ga. 773, 251 S.E.2d 518 (1979); *Dasher v. State*, 149 Ga. App. 740, 256 S.E.2d 106 (1979); *Evans v. State*, 161 Ga. App. 468, 288 S.E.2d 726 (1982); *Hamilton v. State*, 162 Ga. App. 620, 292 S.E.2d 473 (1982); *State v. Lewis*, 249 Ga. 565, 292 S.E.2d 667 (1982); *Robinson v. State*, 164 Ga. App. 652, 297 S.E.2d 751 (1982); *Staton v. State*, 165 Ga. App. 572, 302 S.E.2d 126 (1983); *Minton v. State*, 167 Ga. App. 114, 305 S.E.2d 812 (1983); *Solomon v. Kemp*, 735 F.2d 395 (11th Cir. 1984); *Simmons v. State*, 174 Ga. App. 171, 329 S.E.2d 312 (1985); *Robinson v. State*, 175 Ga. App. 769, 334 S.E.2d 358 (1985); *Duren v. State*, 177 Ga. App. 421, 339 S.E.2d 394 (1986); *Chase v. State*, 179 Ga. App. 71, 345 S.E.2d 149 (1986); *Hamilton v. State*, 179 Ga. App. 434, 346 S.E.2d 881 (1986); *Rowe v. State*, 181 Ga. App. 492, 352 S.E.2d 813 (1987); *Skinner v. State*, 182 Ga. App. 370, 355 S.E.2d 726 (1987); *Kelleher v. State*, 185 Ga. App. 774, 365 S.E.2d 889 (1988); *Hargrove v. State*, 188 Ga. App. 336, 373 S.E.2d 44 (1988); *State v. McBride*, 261 Ga. 60, 401 S.E.2d 484 (1991); *Lyons v. State*, 214 Ga. App. 709, 448 S.E.2d 777 (1994); *Burnette v. State*, 241 Ga. App. 682, 527 S.E.2d 276 (1999); *Pinkins v. State*, 243 Ga. App. 737, 534 S.E.2d 192 (2000); *Granados v. State*,

244 Ga. App. 153, 34 S.E.2d 886 (2000); *Anderson v. State*, 261 Ga. App. 456, 582 S.E.2d 575 (2003); *Kelley v. State*, 279 Ga. App. 187, 630 S.E.2d 783 (2006); *Walker v. State*, 289 Ga. App. 879, 658 S.E.2d 375 (2008).

**What Constitutes Conspiracy**

**Evidence supported conviction for conspiracy to possess cocaine with intent to distribute** where: (1) the defendant was found in a shed with 70 pieces of crack cocaine, scales, razors, and baggies; (2) the defendant's pockets contained a large amount of cash; (3) the codefendant, the shed's occupant, fled from the police and was found with additional crack cocaine; and (4) the defendant's car contained a case for holding scales and additional baggies. *King v. State*, 275 Ga. App. 450, 620 S.E.2d 570 (2005).

**Essence of conspiracy** under O.C.G.A. § 16-4-8 is an agreement, and that agreement (unlike its meaning in contract law) may be a mere tacit understanding. *Drane v. State*, 265 Ga. 255, 455 S.E.2d 27 (1995).

**Some evidence necessary to support its finding of conspiracy.** — While ordinarily the question of whether or not a conspiracy was entered into is a question of fact exclusively for consideration of jury, this question, like other questions of fact, is subject to the scintilla rule and unless there is some evidence to show a conspiracy, a conviction or a finding of fact which has as its basis a conspiracy ought not to be allowed to stand. *Brewer v. State*, 129 Ga. App. 118, 199 S.E.2d 109 (1973), overruled on other grounds, *State v. Folk*, 238 Ga. App. 206, 521 S.E.2d 194 (1999).

**Existence of conspiracy may appear from direct proof or by inference** as a deduction from conduct which discloses a common design on part of persons charged to act together for accomplishment of unlawful purpose. *McGinty v. State*, 134 Ga. App. 399, 214 S.E.2d 678 (1975); *Jerdine v. State*, 137 Ga. App. 811, 224 S.E.2d 803 (1976); *Tookes v. State*, 159 Ga. App. 423, 283 S.E.2d 642 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1443, 71 L. Ed. 2d 658 (1982).

Conspiracy may be shown by circum-

stantial evidence, such as conduct evidencing common design of participants. Simpkins v. State, 149 Ga. App. 763, 256 S.E.2d 63 (1979).

Conspiracy may be established by circumstantial as well as direct evidence, and on occasion without actually placing one of the parties as present at scene of crime. Byrd v. State, 156 Ga. App. 522, 275 S.E.2d 108 (1980).

**Conspiracy consists in corrupt agreement** between two or more persons to do an unlawful act. Tookes v. State, 159 Ga. App. 423, 283 S.E.2d 642 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1443, 71 L. Ed. 2d 658 (1982).

To have a conspiracy, there must be an agreement between two or more persons to commit a crime. Kilgore v. State, 251 Ga. 291, 305 S.E.2d 82 (1983).

**It is not necessary to show a preliminary antecedent agreement.** Simpkins v. State, 149 Ga. App. 763, 256 S.E.2d 63 (1979).

**It is not necessary to prove an express compact or agreement among parties.** It need not appear that parties have ever met together, either formally or informally, and entered into any explicit formal agreement; it is not necessary that it appear either by words or writing that defendants formulated their unlawful objects. It is sufficient that two or more persons in any manner, either positively or tacitly, come to a mutual understanding that they will accomplish the unlawful design. Hewitt v. State, 127 Ga. App. 180, 193 S.E.2d 47 (1972).

While essential element of charge is the common design or purpose between two or more persons to commit an unlawful act, it need not appear that parties met together either formally or informally or that they entered into a formal agreement. Neither is it essential that conspirators formulated their unlawful objective either by words or writings. It is sufficient that two or more persons in any manner either expressly or tacitly came to a mutual understanding that they would accomplish the unlawful design. Causey v. State, 154 Ga. App. 76, 267 S.E.2d 475 (1980).

**“Meeting of the minds” is not necessary.** — Type of agreement necessary to

form a conspiracy is not the “meeting of the minds” necessary to form a contract and may be a mere tacit understanding between two or more people that the people will pursue a particular criminal objective. Kilgore v. State, 251 Ga. 291, 305 S.E.2d 82 (1983).

**Acting “together with” one another.**

— Agreement relating to the sale or delivery of amounts of less than 28 grams cannot support a conviction of conspiracy to traffic in methamphetamine, even if the amounts sold over time amount to 28 grams or more, as the plain language of O.C.G.A. § 16-13-31(e) requires a transaction involving 28 grams or more; additionally, the coconspirators must act “together with” one another to commit the crime of trafficking. Pruitt v. State, 264 Ga. App. 44, 589 S.E.2d 864 (2003).

**Acts pursuant to common intent and purpose as establishing conspiracy.** — If evidence shows that defendants acted with a common intent and purpose, and that things which were proved to have happened were within scope of this common intent and purpose, this amounts to a conspiracy. Garmon v. State, 122 Ga. App. 61, 176 S.E.2d 218 (1970).

**Consideration relevant to jury’s determination as to existence of conspiracy.** — Jury is authorized to conclude that a conspiracy existed by proof of acts and conduct of parties, and from nature of acts done, relation of parties and interests of alleged conspirator. Hewitt v. State, 127 Ga. App. 180, 193 S.E.2d 47 (1972).

**Presence, companionship and conduct before and after commission of alleged offense may be considered by jury** and are circumstances which may give rise to inference of existence of conspiracy. Stroud v. State, 154 Ga. App. 852, 270 S.E.2d 69 (1980); Price v. State, 155 Ga. App. 206, 270 S.E.2d 203 (1980), rev'd on other grounds, 247 Ga. 58, 273 S.E.2d 854 (1981).

**Proof that crime has been committed does not necessarily prove end of conspiracy** so as to render acts and declarations of coconspirators after that time inadmissible against other coconspirators, as a conspiracy may be kept open for various purposes. Hawkins v. State, 80 Ga. App. 496, 56 S.E.2d 315 (1949) (de-

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cided under prior law).

**Conspiracy may extend beyond actual commission of criminal offense charged.** It may expressly or impliedly include such matters as concealing the crime, concealing or suppressing evidence, taking means to prevent or defeat prosecution, possession and disposition of the spoils — depending on nature and extent of agreement as expressly or impliedly entered into by alleged conspirators. Burns v. State, 191 Ga. 60, 11 S.E.2d 350 (1940); Kent v. State, 105 Ga. App. 565, 125 S.E.2d 96 (1962) (decided under prior law).

**Knowledge of existence or acquiescence in conspiracy does not render one part of it;** there must exist some element of affirmative cooperation or at least an agreement to cooperate. Stinson v. State, 151 Ga. App. 533, 260 S.E.2d 407 (1979).

**Only one conspiracy can result from single agreement.** — Whether object of a single agreement is to commit one or many crimes, it is in either case the agreement that constitutes the conspiracy, and if there is only one agreement there can be only one conspiracy. Price v. State, 247 Ga. 58, 273 S.E.2d 854 (1981).

**"Wheel" conspiracies.** — In a "wheel" conspiracy, there is usually a "hub," or common source of the conspiracy, who deals individually with different persons, "spokes," who do not know each other. It is more difficult to infer an agreement among these spokes than among the links of a "chain" conspiracy because they are less likely to have a community of interest or reason to know of each others' existence, since one spoke's success is usually not dependent on the other spokes' success but instead on the spokes' dealings with the hub. Kilgore v. State, 251 Ga. 291, 305 S.E.2d 82 (1983).

**Conspiracy is deemed to progress until its ultimate purpose is accomplished** and may include acts performed and declarations made after commission of crime, and conspiratorial efforts to conceal facts of crime and identity of perpetrators are a continuance of a conspiracy.

Timberlake v. State, 158 Ga. App. 125, 279 S.E.2d 283 (1981).

**Possession of burglary tools.** — Possessing tools for the commission of a crime, itself a violation of O.C.G.A. § 16-7-20(a), is an overt act upon which an armed robbery conspiracy conviction may be based. Fuller v. State, 165 Ga. App. 55, 299 S.E.2d 397 (1983).

**Writing and signing a contract are overt acts** to effect the object of a conspiracy to commit murder. McCright v. State, 176 Ga. App. 486, 336 S.E.2d 361 (1985).

**Coconspirator's letters, written during existence of conspiracy, tending to show acts pursuant to conspiracy, are admissible.** Nelson v. State, 51 Ga. App. 207, 180 S.E. 16 (1935).

**Acts, conduct and sayings of coconspirator during concealment of offense are admissible.** — Acts, conduct, and sayings of one conspirator during pendency of wrongful act, not alone in its actual perpetration but also in its subsequent concealment, were admissible against another conspirator. Bragg v. State, 52 Ga. App. 69, 182 S.E. 403 (1935).

**Other acts of same character at about same time.** — When intent is material, other acts of same character, at about same time, tending to show common purpose and design to defraud, although such acts were committed by coconspirator, are admissible. Nelson v. State, 51 Ga. App. 207, 180 S.E. 16 (1935).

**Conspiracy to commit murder.** — Former Code 1933, § 26-3201 (see O.C.G.A. § 16-4-8) and substantive offense of murder, former Code 1933, § 26-1101 (see O.C.G.A. § 16-5-1), create crime of conspiracy to commit murder. Orkin v. State, 236 Ga. 176, 223 S.E.2d 61 (1976).

**Drug trafficking.** — Evidence supported defendant's conviction on a charge of conspiracy to traffic in cocaine by showing that defendant conspired with defendant's nephew and another man to knowingly possess 28 grams or more of cocaine; defendant performed an overt act by picking up the cocaine from the nephew; by instructing the other man to drive slower to avoid arrest because they had cocaine in the car; and by trying to conceal the cocaine in the car after the driver was

stopped for speeding. *Smith v. State*, 253 Ga. App. 131, 558 S.E.2d 455 (2001).

State did not have to prove that the defendant was guilty of trafficking in cocaine to obtain a conviction for conspiracy to commit trafficking in cocaine, and the state supreme court rejected defendant's argument that the defendant's conviction for conspiracy to commit trafficking in cocaine had to be reversed because the state did not offer evidence to prove the quantity or purity of the cocaine allegedly involved. *Hendricks v. State*, 277 Ga. 61, 586 S.E.2d 317 (2003).

Evidence was sufficient to convict defendant of a conspiracy to traffic in methamphetamine, based on the defendant's understanding with the defendant's spouse regarding the spouse's drug sales, and testimony of drug enforcement agents and co-indictees as well as drugs, money, and drug paraphernalia obtained during a search of the residence defendant shared with the spouse, who had engaged in three sales of this contraband. *Williamson v. State*, 300 Ga. App. 538, 685 S.E.2d 784 (2009), cert. denied, No. S10C0387, 2010 Ga. LEXIS 191 (Ga. 2010).

**Drug possession.** — Evidence supported a defendant's conviction of bringing stolen property to Georgia, eluding an officer, and possessing marijuana as a party, if not as a conspirator since: (1) the defendant discussed with the defendant's love interest what would happen if they were apprehended by the police; (2) the love interest gave the defendant a handgun after the love interest stole a new gun and the defendant packed two guns with the defendant's personal items and the ski masks; (3) the defendant suspected that the truck was stolen, refused to ask about its origin, saw the stolen gun on the seat of the truck, observed two gas drive-offs, ate stolen food, smoked shared marijuana repeatedly, and sat next to the glove compartment where the marijuana lay; and (4) the defendant was silent during the police pursuits, saw the defendant's love interest retrieve a stolen handgun just prior to an assault of a police officer, did not hinder the love interest or warn the police, lied to the police to cover up the matter, and referred to the entire affair as

having "fun for a minute." *Michael v. State*, 281 Ga. App. 289, 635 S.E.2d 790 (2006).

**Conspiracy to manufacture methamphetamine.** — Conviction for conspiring to manufacture methamphetamine was not supported by the evidence. The testimony of the defendant's friend showed only that as an admitted methamphetamine user, the friend was familiar with methamphetamine labs, not that the friend and the defendant reached any agreement to manufacture the drug at the place and time in question; furthermore, the fact that the friend was convicted for manufacturing the drug in a related proceeding arising from the same facts could not be taken as evidence of that fact for purposes of the present case. *Honeycutt v. State*, 293 Ga. App. 614, 668 S.E.2d 19 (2008).

**Evidence sufficient to show conspiracy to distribute methamphetamine.** — Evidence was sufficient to convict the defendant of conspiracy to distribute methamphetamine because methamphetamine was found in a trailer on the defendant's property, which the defendant occupied and controlled, a known drug dealer was found on the defendant's premises, who had been "fronting" the defendant and the defendant's spouse methamphetamine on a weekly basis, and the defendant's spouse kept a book regarding their sales from the drugs supplied by the dealer. *Peacock v. State*, 301 Ga. App. 873, 689 S.E.2d 853 (2010).

**Aggravated assault.** — Defendant's motion for a new trial on the defendant's aggravated assault and possession of a firearm during the aggravated assault charges was properly denied as the defendant's actions before, during, and after a friend's aggravated assault and firearm possession crimes at a home showed not only that the defendant was a party to those crimes, but that the defendant was a fellow conspirator in the assault against the woman as the defendant: (1) forced the woman at gunpoint to drive to the home; (2) stayed in the nearby living room while the friend shot a gun and threatened the woman (and defendant looked into the bedroom after the gun was fired); (3) accompanied the friend and the handcuffed

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woman in the vehicle following the incident while the friend searched for the boyfriend's residence; (4) encouraged the friend to kill the woman; and (5) did not protest any of the friend's actions throughout the evening. *Sapp v. State*, 280 Ga. App. 592, 634 S.E.2d 523 (2006).

**Overt act is required for conviction of conspiracy under former Code 1933, § 79A-812.**

For one to be guilty of conspiracy under former Code 1933, § 79A-812, one or more of the conspirators must commit an overt act, as required by O.C.G.A. § 16-4-8. *Price v. State*, 247 Ga. 58, 273 S.E.2d 854 (1981) (see O.C.G.A. § 16-13-33).

Phrase, "any person who conspires," in former Code 1933, § 79A-812 (see O.C.G.A. § 16-13-33), means anyone committing conspiracy as defined by former Code 1933, § 26-3201 (see O.C.G.A. § 16-4-8). *Hammock v. Zant*, 244 Ga. 863, 262 S.E.2d 82 (1979).

**Separate indictment of parties does not affect admissibility of acts of coconspirator against defendant.** *Nelson v. State*, 51 Ga. App. 207, 180 S.E. 16 (1935) (decided under prior law).

**Acts and declarations of one coconspirator, by themselves.** — While rule is well established that conspiracy itself cannot be shown from acts and declarations of one coconspirator in absence of the others, such acts and declarations made in carrying out the conspiracy are relevant. *Bragg v. State*, 52 Ga. App. 69, 182 S.E. 403 (1935) (decided under prior law).

**Admissibility of acts and declarations of alleged conspirator against others.** — Unless a conspiracy is shown *prima facie*, evidence of acts and declarations of one alleged conspirator can only operate against person whose acts and declarations are proved, if one is on trial; or, if one is not on trial, they are not admissible against defendants being on trial, and should be rejected. *Jones v. State*, 62 Ga. App. 734, 9 S.E.2d 707 (1940) (decided under prior law).

**When jury finds no company.** — If sufficient *prima facie* evidence of conspiracy is introduced to authorize admitting of

evidence of acts and declarations of one of the alleged conspirators, ultimately it is for jury to determine whether from all evidence, a conspiracy has been shown; and, if they find that none has been established, it is then their duty not to consider acts and declarations of supposed coconspirator which have been admitted, except so far as they may affect the coconspirator, if the coconspirator is on trial. *Nelson v. State*, 51 Ga. App. 207, 180 S.E. 16 (1935) (decided under prior law).

**Indictment**

**Object of conspiracy need not be charged.** — State is not precluded from electing to indict and proceed on a conspiracy charge where the object of the conspiracy is completed but not charged. *Moser v. State*, 178 Ga. App. 526, 343 S.E.2d 703 (1986).

**It is unnecessary that another person be indicted with defendant for conspiracy** to justify a charge on the subject. *Simpkins v. State*, 149 Ga. App. 763, 256 S.E.2d 63 (1979).

**Indictment need not specify which appellants committed each overt act.** *Causey v. State*, 154 Ga. App. 76, 267 S.E.2d 475 (1980).

**Offense of conspiracy was not included in an indictment** when no reference was made therein to one or more persons conspiring or agreeing to commit an offense, and when the indictment did not refer to any overt act to effect the object of a conspiracy, but, on the contrary, alleged only that a substantive crime had been committed, namely, possession with intent to distribute marijuana. *Rowe v. State*, 166 Ga. App. 836, 305 S.E.2d 624 (1983).

**Conspiracy instruction when conspiracy not charged in indictment.** — In a trial for armed robbery and kidnapping, the trial court does not err in instructing the jury on the law of conspiracy although conspiracy is not charged in the indictment, where the conspiracy instruction is properly adjusted to the evidence. *Spencer v. State*, 180 Ga. App. 498, 349 S.E.2d 513 (1986).

Conspiracy may be proven and a jury charge given on conspiracy, even though defendant is not indicted under that the-

ory. Williams v. State, 267 Ga. 308, 477 S.E.2d 570 (1996); Wiley v. State, 238 Ga. App. 334, 519 S.E.2d 10 (1999).

Victim was raped and robbed at gunpoint by two accomplices, and then murdered. The jury was properly charged on conspiracy, although it was not alleged in the indictment, since the evidence tended to show a conspiracy. Davis v. State, 292 Ga. App. 782, 666 S.E.2d 56 (2008).

**Error to convict for conspiracy where not charged.** — When the evidence established clearly that the offense of possession with intent to distribute more than one ounce of marijuana had been committed, considering the fact that conspiracy was not included in the indictment and a person cannot be convicted of a crime not charged, together with the fact that conspiracy is a separate crime only when the crime conspired to be committed has not been committed, it was error to find appellant guilty of conspiracy to possess with intent to distribute marijuana, and defendant's conviction must be set aside. Rowe v. State, 166 Ga. App. 836, 305 S.E.2d 624 (1983).

**Habeas relief warranted for invalid indictment.** — Denial of habeas relief was reversed where conviction for conspiracy to traffic in cocaine was based on indictment alleging "a conspiracy to commit the crime of possessing a sufficient amount of a substance containing cocaine"; this indictment was invalid as a matter of law. Gonzalez v. Abbott, 986 F.2d 461 (11th Cir. 1993), cert. denied, 510 U.S. 894, 114 S. Ct. 257, 126 L. Ed. 2d 210 (1993).

**Indictment held sufficient.** — Because an indictment clearly charged that, in furtherance of the conspiracy, the defendant arranged for the distribution of both amphetamine and methamphetamine, and no authority required the indictment to set forth the particulars of the overt act, but required a reference to the overt act alleged by the State, the indictment at issue sufficiently apprised the defendant of the crimes charged. Bradford v. State, 283 Ga. App. 75, 640 S.E.2d 630 (2006).

**Sentence for offense not included in indictment not void.** — An indictment

that accused a defendant and a codefendant of acting together as parties to the crime to commit the offense of possession of cocaine with intent to distribute accused the defendant in a manner that included a conspiracy offense. As the evidence was sufficient to allow the jury to conclude that the defendant conspired with the codefendant to possess the cocaine without actually reaching the point of possession, the defendant's sentence for a conviction of the lesser-included offense of conspiracy to possess cocaine with intent to distribute was not void, even though that offense was not charged in the indictment. King v. State, 295 Ga. App. 865, 673 S.E.2d 329 (2009).

### Venue

**Some act pursuant to conspiracy must occur in county where indictment returned.** — If conspiracy is formed in one county and act done in another, or if some acts are in county of venue and others not, proof must affirmatively show one or more of these events as occurring in county of venue and jury must be instructed, if more than one is alleged and evidence of venue is in conflict, that the jury must acquit unless the evidence shows one of the forbidden acts to have occurred in the county where indictment was returned. Caldwell v. State, 142 Ga. App. 831, 237 S.E.2d 452 (1977).

**Venue may be laid in county of corrupt agreement or overt act.** — When overt acts are alleged to have been committed in more than one jurisdiction, it is essential in a conspiracy prosecution that jury be properly instructed as to venue. In Georgia, both corrupt agreement and overt act must be proved; venue may be laid in county of either, or, if there are several overt acts, in a county where any of them was committed. Caldwell v. State, 142 Ga. App. 831, 237 S.E.2d 452 (1977).

### Jury Charge

**Conspiracy is question for jury.** Simpkins v. State, 149 Ga. App. 763, 256 S.E.2d 63 (1979).

**Conspiracy may be charged, though not alleged.** — Conspiracy may

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be proved, though not alleged in indictment or accusation. *Sweat v. State*, 119 Ga. App. 646, 168 S.E.2d 654 (1969).

When evidence shows a conspiracy, a charge on the subject is proper even though not alleged in indictment. *Alexander v. State*, 150 Ga. App. 41, 256 S.E.2d 649 (1979); *Keen v. State*, 164 Ga. App. 81, 296 S.E.2d 91 (1982); *Simpkins v. State*, 149 Ga. App. 763, 256 S.E.2d 63 (1979); *Anderson v. State*, 153 Ga. App. 401, 265 S.E.2d 299 (1980); *Greene v. State*, 155 Ga. App. 222, 270 S.E.2d 386 (1980); *Evans v. State*, 161 Ga. App. 468, 288 S.E.2d 726 (1982); *Keen v. State*, 164 Ga. App. 81, 296 S.E.2d 91 (1982). But see *Rowe v. State*, 166 Ga. App. 836, 305 S.E.2d 624 (1983).

When the evidence tends to show jointly indicted defendants had acted in concert, conspiracy may be proved though not alleged in the indictment, and there is no error in charging the jury upon the issue of conspiracy. *Alexander v. State*, 186 Ga. App. 787, 368 S.E.2d 550 (1988).

When evidence tends to show a conspiracy, a charge upon the subject is not error even if not alleged in indictment. *Simpkins v. State*, 149 Ga. App. 763, 256 S.E.2d 63 (1979); *Anderson v. State*, 153 Ga. App. 401, 265 S.E.2d 299 (1980); *Greene v. State*, 155 Ga. App. 222, 270 S.E.2d 386 (1980).

Conspiracy may be proven and a jury charge may be given on conspiracy and parties to a crime even though a defendant is not indicted under those theories. *Parnell v. State*, 260 Ga. App. 213, 581 S.E.2d 263 (2003).

Because the evidence established more than the defendant's mere presence at the scene of the crimes, the evidence was sufficient to find the defendant guilty beyond a reasonable doubt of felony murder and simple assault; although the defendant was not indicted for conspiracy, the evidence also supported a conspiracy charge. *Belsar v. State*, 276 Ga. 261, 577 S.E.2d 569 (2003).

Jury was properly instructed on conspiracy and parties, even though the defendant's indictment alleged that the defendant directly committed the offenses

and did not specify that the defendant was only a party to or coconspirator in the criminal acts. *Michael v. State*, 281 Ga. App. 289, 635 S.E.2d 790 (2006).

**Jury was not instructed on conspiracy.** — When a defendant was charged with malice murder, the fact that a jury did not convict the defendant of conspiracy did not indicate that the jury did not believe the defendant to have been involved in the killings at issue; the jury had not been instructed that the jury could find the offense of conspiracy, and even if the jury had rejected a conspiracy offense, Georgia has rejected the inconsistent verdict rule. *Conway v. State*, 281 Ga. 685, 642 S.E.2d 673 (2007).

**Charge where two or more persons were involved in crime.** — When evidence in a criminal case shows that two or more persons were concerned in the commission of an alleged crime, it is not harmful error for the trial court to charge the jury on law of conspiracy. *Anderson v. State*, 153 Ga. App. 401, 265 S.E.2d 299 (1980).

When the state proceeded against the defendant as a party to the crime of murder with a co-indictee, any possible error by the trial court in charging conspiracy was harmless since there was sufficient evidence to support a charge on parties to a crime, and the state did not attempt to use statements of the co-indictee against defendant under the conspiracy hearsay exception. *Drane v. State*, 265 Ga. 255, 455 S.E.2d 27 (1995).

**Instruction when the offense charged is not conspiracy but attempted bribery.** — When an instruction is free of confusion or other error, it follows that there is no "possibility" or "real probability" that the instruction would induce the jury to convict the defendant of conspiracy (maximum sentence: five years) rather than attempted bribery (a ten-year maximum). *Carpenter v. State*, 167 Ga. App. 634, 307 S.E.2d 19 (1983), aff'd, 252 Ga. 79, 310 S.E.2d 912 (1984).

**When crime was completed.** — When evidence showed crime to have been complete, refusal to charge on conspiracy as a lesser offense is not error. *Terrell v. State*, 138 Ga. App. 74, 225 S.E.2d 470 (1976).

When the evidence shows without dispute that the crime charged was actually committed, omission to charge on conspiracy is not error. Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979); Byram v. State, 189 Ga. App. 627, 376 S.E.2d 909 (1988).

Even if the trial judge committed legal error in failing to instruct that an overt act is a necessary element of a conspiracy, the error was harmless where the jury necessarily found that the crimes themselves had been committed in furtherance of the conspiracy. High v. Turpin, 14 F. Supp. 2d 1358 (S.D. Ga. 1998), aff'd sub nom. High v. Head, 209 F.3d 1257 (11th Cir. 2000).

**Failure to charge jury on withdrawal proper.** — Trial court did not err in refusing to give the defendant's requested charge on withdrawal from conspiracy because the charge was not authorized by the evidence in the case when the conspiracy to rob the victims could not have been effected without the defendant's performance of overt acts; prior to the defendant's alleged withdrawal from the conspiracy, the defendant acted to lead

the defendant's co-indictees to the home where the victims were present, told the co-indictees, who were seeking victims to rob, about dice game money the defendant observed on the floor of the home, accompanied an armed co-indictee to the home and knocked on the door, and gave the defendant's name so as to enable the defendant's armed co-indictee to gain entry when the door was opened in response to the defendant's words. Mikell v. State, 286 Ga. 434, 689 S.E.2d 286, overruled on other grounds, 287 Ga. 338, 698 S.E.2d 301 (2010).

**Evidence sufficient to support jury instruction on conspiracy.** — With regard to a defendant's conviction for trafficking in marijuana, the trial court properly denied the defendant's motion for a new trial since no error occurred by the trial court giving the jury an instruction on conspiracy as evidence that the defendant and the codefendant were paid, jointly picked up a package containing drugs from a shipping company, and both refused to tell who hired the pair was sufficient to support that a conspiracy existed. Aguilera v. State, 293 Ga. App. 523, 667 S.E.2d 378 (2008).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 16 Am. Jur. 2d, Conspiracy, § 1 et seq.

**Am. Jur. Trials.** — Handling the Defense in a Conspiracy Prosecution, 20 Am. Jur. Trials 351.

**ALR.** — Substitution or attempted substitution of another for one under sentence as a criminal offense, 28 ALR 1381.

Merger of conspiracy in completed offense, 37 ALR 778; 75 ALR 1411.

When does statute of limitations begin to run against civil action or criminal prosecution for conspiracy, 97 ALR 137; 62 ALR2d 1369.

Conspiracy to commit adultery or other offense which can only be committed by the concerted action of the parties to it, 104 ALR 1430.

Criminal responsibility of one who furnishes instrumentality of a kind ordinarily used for legitimate purposes, with knowledge that it is to be used by another for criminal purposes, 108 ALR 331.

Identity, as regards former jeopardy, of

offenses charged in different indictments or information for conspiracy, 112 ALR 983.

Conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa, 53 ALR2d 622.

Criminal conspiracies as to gambling, 91 ALR2d 1148.

Jurisdiction to prosecute conspirator who was not in state at time of substantive criminal act, for offense committed pursuant to conspiracy, 5 ALR3d 887.

Insured's co-operation with claimant in establishing valid claim against insurer as breach of co-operation clause, 8 ALR3d 1345.

Actionability of conspiracy to give or to procure false testimony or other evidence, 31 ALR3d 1423.

Criminal liability of corporation for bribery or conspiracy to bribe public official, 52 ALR3d 1274.

Criminal conspiracy between spouses, 74 ALR3d 838.

When statute of limitation begins to run on charge of obstructing justice or of conspiracy to do so, 77 ALR3d 725.

Right of defendants in prosecution for criminal conspiracy to separate trials, 82 ALR3d 366.

Right of creditor to recover damages for conspiracy to defraud him of claim, 11 ALR4th 345.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators, 19 ALR4th 192.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant — Marijuana cases, 1 ALR6th 549.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant — Cocaine cases, 2 ALR6th 551.

When is conspiracy continuing offense for purposes of statute of limitations under 18 USCS § 3282, 109 ALR Fed. 616.

### **16-4-8.1. Conviction of conspiracy even if crime completed.**

A person may be convicted of the offense of conspiracy to commit a crime, as defined in Code Section 16-4-8, even if the crime which was the objective of the conspiracy was actually committed or completed in pursuance of the conspiracy, but such person may not be convicted of both conspiracy to commit a crime and the completed crime. (Code 1981, § 16-4-8.1, enacted by Ga. L. 1996, p. 679, § 1.)

#### **JUDICIAL DECISIONS**

**Jury instructions.** — O.C.G.A. § 16-4-8.1 does not address a trial court's obligation to give requested jury charges; since the evidence was undisputed that the conspirators to a scheme to rob for drugs came into possession of drugs, if the jury found that the defendant was a member of that conspiracy, then the defendant

was also guilty of the completed crime pursuant to O.C.G.A. § 16-2-20, and the trial court's omission to charge on conspiracy was proper. Garcia v. State, 279 Ga. App. 75, 630 S.E.2d 596 (2006).

Cited in Willard v. State, 244 Ga. App. 469, 535 S.E.2d 820 (2000); Tesler v. State, 295 Ga. App. 569, 672 S.E.2d 522 (2009).

### **16-4-9. Withdrawal by coconspirator from agreement to commit crime.**

A coconspirator may be relieved from the effects of Code Section 16-4-8 if he can show that before the overt act occurred he withdrew his agreement to commit a crime. (Code 1933, § 26-3202, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 14.)

#### **JUDICIAL DECISIONS**

**Failure to charge jury on withdrawal proper.** — Trial court did not err in refusing to give the defendant's requested charge on withdrawal from conspiracy because the charge was not authorized by the evidence in the case when the

conspiracy to rob the victims could not have been effected without the defendant's performance of overt acts; prior to the defendant's alleged withdrawal from the conspiracy, the defendant acted to lead the defendant's co-indictees to the home

where the victims were present, told the co-indictees, who were seeking victims to rob, about dice game money the defendant observed on the floor of the home, accompanied an armed co-indictee to the home and knocked on the door, and gave the defendant's name so as to enable the defendant's armed co-indictee to gain entry when the door was opened in response to the defendant's words. *Mikell v. State*, 286 Ga. 434, 689 S.E.2d 286, overruled on

other grounds, 287 Ga. 338, 698 S.E.2d 301 (2010).

**Cited** in *Patterson v. State*, 126 Ga. App. 753, 191 S.E.2d 584 (1972); *Sak v. State*, 129 Ga. App. 301, 199 S.E.2d 628 (1973); *Freedman v. United States*, 437 F. Supp. 1252 (N.D. Ga. 1977); *Booker v. State*, 242 Ga. 773, 251 S.E.2d 518 (1979); *Jenkins v. State*, 159 Ga. App. 183, 283 S.E.2d 49 (1981); *Wireman v. State*, 163 Ga. App. 439, 295 S.E.2d 530 (1982).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 16 Am. Jur. 2d, Conspiracy, § 27.

**Am. Jur. Proof of Facts.** — Withdrawal from or Abandonment of Criminal Enterprise, 8 POF2d 231.

**C.J.S.** — 15A C.J.S., Conspiracy, § 129 et seq.

**ALR.** — What is "infamous" offense within constitutional or statutory provision in relation to presentment or indictment by grand jury, 24 ALR 1002.

Substitution or attempted substitution of another for one under sentence as a criminal offense, 28 ALR 1381.

### 16-4-10. Domestic terrorism; penalty.

(a) As used in this Code section, "domestic terrorism" means any violation of, or attempt to violate, the laws of this state or of the United States which:

(1) Is intended or reasonably likely to injure or kill not less than ten individuals as part of a single unlawful act or a series of unlawful acts which are interrelated by distinguishing characteristics; and

(2)(A) Is intended to intimidate the civilian population of this state, any of its political subdivisions, or of the United States;

(B) Is intended to alter, change, or coerce the policy of the government of this state or any of its political subdivisions by intimidation or coercion; or

(C) Is intended to affect the conduct of the government of this state or any of its political subdivisions by use of destructive devices, assassination, or kidnapping.

(b) Notwithstanding any other provision of law, any person who commits, attempts to commit, conspires to commit, or solicits, coerces, or intimidates another to commit a violation of the laws of this state or of the United States for the purpose of domestic terrorism shall, except in cases for which the death penalty may be imposed and the state has served notice of its intention to seek the death penalty, be sentenced to the maximum term of imprisonment and a fine not to exceed the amount prescribed by Code Section 17-10-8, which penalty shall not be suspended, stayed, probated, or withheld.

(c) In addition to any other provision of law, evidence that a person committed an offense for which the death penalty may be imposed under the laws of this state for the purpose of domestic terrorism shall be admissible during the sentencing phase as a statutory aggravating circumstance. It shall be the duty of the judge to consider, or to instruct the jury to consider, in addition to the statutory aggravating circumstances provided in Code Section 17-10-30, that the offense was committed for the purpose of domestic terrorism. (Code 1981, § 16-4-10, enacted by Ga. L. 2002, p. 1284, § 2.)

**Cross references.** — Sedition and subversive activities, T. 16, C. 11, A. 1, P. 2. Bioterrorism and public health emergencies, T. 16, C. 11, A. 1, P. 2, § 31-12-1.1 War on Terrorism Local Assistance, T. 36, C. 75.

**Editor's notes.** — Ga. L. 2002, p. 1284, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'Georgia's Homeland Defense Act.'"

Ga. L. 2002, p. 1284, § 4, not codified by

the General Assembly, provides, in part, that the provisions of this Act defining, redefining, or changing the punishment for crimes shall apply with respect to acts committed on or after May 16, 2002; and in these respects prior law shall continue to apply with respect to acts committed prior to May 16, 2002.

**Law reviews.** — For note on the 2002 enactment of this Code section, see 19 Georgia St. U.L. Rev. 95 (2002).

#### RESEARCH REFERENCES

**C.J.S.** — 93 C.J.S. War and National Defense, § 65 et seq.

## CHAPTER 5

### CRIMES AGAINST THE PERSON

| <b>Article 1</b>   | <b>Sec.</b> |   |
|--|-------------|---|
| <b>Homicide</b>  |             |   |
| Sec.   |             |   |
| 16-5-1. Murder; felony murder.   | 16-5-43.    | Malicious confinement of sane person in an asylum.  |
| 16-5-2. Voluntary manslaughter.  | 16-5-44.    | Hijacking an aircraft.  |
| 16-5-3. Involuntary manslaughter.  | 16-5-45.    | Hijacking a motor vehicle.  |
| 16-5-4. Time elapsed between injury and death.   | 16-5-46.    | Interference with custody.  |
| 16-5-5. Offering to assist in commission of suicide; criminal penalties.   | 16-5-60.    | Trafficking of persons for labor or sexual servitude.   |
| <b>Article 2</b>   |             |   |
| <b>Assault and Battery</b>   |             |   |
| 16-5-20. Simple assault.   | 16-5-70.    | Reckless conduct causing harm to or endangering the bodily safety of another; conduct by HIV infected persons; assault by HIV infected persons or hepatitis infected persons. |
| 16-5-21. Aggravated assault.   | 16-5-71.    | Hazing.   |
| 16-5-22. Conviction of assault with intent to commit a crime if intended crime actually committed.   | 16-5-71.1.  | Cruelty to children.  |
| 16-5-23. Simple battery.   | 16-5-72.    | Tattooing.  |
| 16-5-23.1. Battery.  | 16-5-73.    | Piercing of the body.   |
| 16-5-24. Aggravated battery.   |             | Reckless abandonment.   |
| 16-5-25. Opprobrious or abusive language as justification for simple assault or simple battery.  |             | Prohibition against presence of children during manufacture of methamphetamine; punishment.   |
| 16-5-26. Publication of second or subsequent conviction of simple assault, simple battery, or battery; cost of publication; good faith publications immune from liability. | 16-5-80.    | Feticide; voluntary manslaughter of an unborn child; penalties.   |
| 16-5-27. (Effective until January 1, 2013. See note.) Female genital mutilation.   |             |   |
| 16-5-27. (Effective January 1, 2013. See note.) Female genital mutilation.   |             |   |
| 16-5-28. Assault on an unborn child.   | 16-5-90.    | Stalking; psychological evaluation.   |
| 16-5-29. Battery of an unborn child.   | 16-5-91.    | Aggravated stalking.  |
|  | 16-5-92.    | Applicability.  |
|  | 16-5-93.    | Right of victim to notification of release or escape of stalker.  |
|  | 16-5-94.    | Restraining orders; protective orders.  |
|  | 16-5-95.    | Offense of violating family violence order; penalty.  |
| <b>Article 3</b>   |             |   |
| <b>Kidnapping, False Imprisonment, and Related Offenses</b>  |             |   |
| 16-5-40. Kidnapping.   |             |   |
| 16-5-41. False imprisonment.   |             |   |
| 16-5-42. False imprisonment under color of legal process.  |             |   |

Sec.

- 16-5-96. Publication of second or subsequent conviction of stalking or aggravated stalking; cost of publication; good faith publications immune from liability.

**Article 8****Protection of Elder Persons**

- 16-5-100. Cruelty to a person 65 years of age or older.

**Article 9****Notice of Conviction and Release from Confinement of Sex Offenders**

Sec.

- 16-5-110. Publication of notice; information required; assessment for cost; immunity.

**Cross references.** — Suspension policy for students committing acts of physi-

cal violence resulting in injury to teachers, § 20-2-751.6.

## **ARTICLE 1**

### **HOMICIDE**

**Cross references.** — Jurisdiction of state over homicides where act causing death or death itself occurs within state, § 17-2-1. Administrative penalties for killing or injuring another person while hunting, § 27-2-25.1. Denial of right of person who commits murder or voluntary

manslaughter to receive benefits from insurance policy on life of victim, § 33-25-13. Homicide by vehicle, § 40-6-393. Actions for wrongful death, T. 51, C. 4. Denial of right of murderer to inherit from victim, § 53-4-6.

**JUDICIAL DECISIONS**

**Lack of causal relationship between wound and death.** — It is a defense in prosecution for unjustifiable homicide that there was no causal relationship between wound inflicted and death, and that death resulted from completely independent cause. *Styles v. State*, 118 Ga. App. 445, 164 S.E.2d 156 (1968).

**Charge as to both murder and manslaughter where warranted by evidence.** — If there is any doubt as to whether offense is murder or manslaughter, however slight, the court should instruct as to both when requested in writing. *Spradlin v. State*, 151 Ga. App. 585, 260 S.E.2d 517 (1979), overruled on other grounds, *Bangs v. State*, 198 Ga. App. 404, 401 S.E.2d 599 (1991), overruled on other

grounds, *Stewart v. State*, 262 Ga. App. 426, 585 S.E.2d 622 (2003).

Where the defendants were accused of firing into a house, killing one occupant and injuring another; one defendant admitted firing into the home, thinking the defendant had killed a man; ballistics reports identified shell casings found at the scene as having been fired from at least two different guns; and DNA testing identified a cap recovered from the scene as having been worn by another defendant, their convictions for felony murder and aggravated assault were supported by sufficient evidence. *Culler v. State*, 277 Ga. 717, 594 S.E.2d 631 (2004).

**Cited** in *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980).

## RESEARCH REFERENCES

**Am. Jur. Trials.** — Homicide, 7 Am. Jur. Trials 477.

Vehicular Homicide, 13 Am. Jur. Trials 295.

Forensic Pathology in Homicide Cases, 40 Am. Jur. Trials 501.

Self-Defense in Homicide Cases, 42 Am. Jur. Trials 151.

Transcript of "The Trial of the Century: America vs. Lee Harvey Oswald," 56 Am. Jur. Trials 1.

**ALR.** — What amounts to participation in homicide on part of one not the actual perpetrator, who was present without preconcert or conspiracy, 12 ALR 275.

Homicide as affected by time elapsing between wound and death, 20 ALR 1006; 93 ALR 1470.

Criminal responsibility of peace officers for killing or wounding one whom they wished to investigate or identify, 61 ALR 321.

Homicide or assault in connection with negligent operation of automobile or its use for unlawful purpose or in violation of law, 99 ALR 756.

Admissibility on issue of self-defense (or defense of another), on prosecution for homicide or assault, of evidence of specific acts of violence by deceased, or person assaulted, against others than defendant, 121 ALR 380.

Inference of malice or intent to kill where killing is by blow without weapon, 22 ALR2d 854.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased naming accused as beneficiary, 28 ALR2d 857.

Homicide by fright or shock, 47 ALR2d 1072.

Homicide by juvenile as within jurisdiction of a juvenile court, 48 ALR2d 663.

Admissibility and propriety, in homicide prosecution, of evidence as to deceased's spouse and children, 67 ALR2d 731.

Necessity that trial court charge upon motive in homicide case, 71 ALR2d 1025.

Applicability of criminal "hit-and-run" statute to accidents occurring on private property, 77 ALR2d 1171.

Motor vehicle operator's criminal re-

sponsibility for homicide where he and deceased were racing, though accused's car was not otherwise involved in the collision or incident, 82 ALR2d 463.

Homicide: presumption of deliberation or premeditation from the fact of killing, 86 ALR2d 656.

Homicide: failure to provide medical or surgical attention, 100 ALR2d 483.

Insulting words as provocation of homicide or as reducing the degree thereof, 2 ALR3d 1292.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide, 11 ALR3d 834.

Unintentional killing of or injury to third person during attempted self-defense, 55 ALR3d 620.

Homicide as affected by lapse of time between injury and death, 60 ALR3d 1323.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death, 65 ALR3d 283.

Proof of live birth in prosecution for killing newborn child, 65 ALR3d 413.

What constitutes "imminently dangerous" act within homicide statute, 67 ALR3d 900.

Degree of homicide as affected by accused's religious or occult belief in harmlessness of ceremonial or ritualistic acts directly causing fatal injury, 78 ALR3d 1132.

Criminal liability for death of another as result of accused's attempt to kill self or assist another's suicide, 40 ALR4th 702.

Homicide: sufficiency of evidence of mother's neglect of infant born alive, in minutes or hours immediately following unattended birth, to establish culpable homicide, 40 ALR4th 724.

Homicide by causing victim's brain-dead condition, 42 ALR4th 742.

Corporation's criminal liability for homicide, 45 ALR4th 1021.

Homicide: physician's withdrawal of life supports from comatose patient, 47 ALR4th 18.

Homicide: cremation of victim's body as violation of accused's rights, 70 ALR4th 1091.

Admissibility of evidence in homicide

case that victim was threatened by other than defendant, 11 ALR5th 831.

Homicide: liability where death imme-

diate results from treatment or mistreatment of injury inflicted by defendant, 50 ALR5th 467.

### 16-5-1. Murder; felony murder.

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

(c) A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.

(d) A person convicted of the offense of murder shall be punished by death, by imprisonment for life without parole, or by imprisonment for life. (Laws 1833, Cobb's 1851 Digest, p. 783; Code 1863, § 4217; Code 1868, § 4254; Code 1873, § 4320; Code 1882, § 4320; Penal Code 1895, § 60; Penal Code 1910, § 60; Code 1933, § 26-1002; Code 1933, § 26-1101, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2009, p. 223, § 1/SB 13.)

**The 2009 amendment**, effective April 29, 2009, inserted “, by imprisonment for life without parole,” in the middle of subsection (d). See editor’s note for applicability.

**Cross references.** — Time limitation on prosecution for murder, § 17-3-1. Denial of right of murderer to inherit from victim, § 53-4-6.

**Editor’s notes.** — Ga. L. 2009, p. 223, § 8, not codified by the General Assembly, provides that: “Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, an accused whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act, provided that: (1) jeopardy for the offense charged has not attached or (2) the accused has been sentenced to death but the conviction or sentence has been reversed on appeal and the

state is not barred from seeking prosecution after the remand.”

Ga. L. 2009, p. 223, § 9, not codified by the General Assembly, provides that: “Except as provided in Section 8 of this Act, the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act.”

Ga. L. 2009, p. 223, § 10, not codified by the General Assembly, provides that: “A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state.” Ga. L. 2011, p. 752, § 17(3) codified these provisions at Code Section 17-10-16.1.

Ga. L. 2009, p. 223, § 11(a), not codified by the General Assembly, provides that the amendment by that Act shall apply to all crimes committed on and after April 29, 2009.

Ga. L. 2009, p. 223, § 11(b), not codified by the General Assembly, provides that:

"The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

**Law reviews.** — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For annual survey of criminal law and procedure, see 35 Mercer L. Rev. 103 (1983). For annual survey article discussing developments in criminal law, see 51 Mercer L. Rev. 209 (1999). For annual survey article, "Georgia Death Penalty Law," see 52 Mercer L. Rev. 29 (2000).

For note discussing the felony murder rule, and proposing legislation to place

limitations on Georgia's felony murder statute, see 9 Ga. St. B.J. 462 (1973). For note, "An Unconstitutional Fiction: The Felony Murder Rule as Applied to the Supply of Drugs," see 20 Ga. L. Rev. 671 (1986). For note, "Edge v. State: The Modified Merger Rule Comes Up Short," see 44 Mercer L. Rev. 697 (1993).

For comment on Battle v. State, 37 Ga. App. 154, 139 S.E. 159 (1927), see 1 Ga. B.J. 51 (1927). For comment on Springer v. State, 37 Ga. App. 154, 139 S.E. 159 (1927), see 1 Ga. B.J. 51 (1927). For comment on Head v. State, 68 Ga. App. 759, 24 S.E.2d 145 (1943), holding year and a day rule applicable in Georgia as a matter of procedure and evidence, see 9 Ga. B.J. 320 (1947). For comment on Gaines v. Wolcott, 119 Ga. App. 313, 167 S.E.2d 366 (1969), see 21 Mercer L. Rev. 325 (1969). For comment on Baker v. State, 236 Ga. 754, 225 S.E.2d 269 (1976), see 28 Mercer L. Rev. 371 (1976).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

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##### 4. SPOUSES OR LOVERS AS VICTIMS

### General Consideration

**Editor's notes.** — In light of the similarity of the statutory provisions, deci-

sions under former Code 1863, §§ 4218, 4219, former Code 1868, §§ 4255, 4256, former Code 1873, §§ 4321, 4322, former Code 1882, §§ 4321, 4322, former Penal

**General Consideration (Cont'd)**

Code 1895, §§ 61, 62, former Penal Code 1910, §§ 61, 62, and former Code 1933, §§ 26-1003, 26-1004 are included in the annotations for this Code section.

**Constitutionality.** — O.C.G.A. § 16-5-1, the murder statute, and O.C.G.A. § 17-10-30, which authorizes a death sentence for murder, are not unconstitutional. *Speed v. State*, 270 Ga. 688, 512 S.E.2d 896 (1999).

Defendant's malice murder conviction was affirmed as O.C.G.A. § 16-5-1 was constitutional. *Thomason v. State*, 281 Ga. 429, 637 S.E.2d 639 (2006).

Felony murder defendant's constitutional challenge to Georgia's homicide statutes, O.C.G.A. §§ 16-5-1 and 16-5-2, could not be reviewed because the challenge was raised for the first time in the defendant's amended motion for new trial. Such challenges could not be raised after a guilty verdict. *Brown v. State*, 285 Ga. 772, 683 S.E.2d 581 (2009).

**Definition of "crime."** — Although "criminal negligence" was not an issue in a murder trial, the trial court did not err by employing the entirety of the language of O.C.G.A. § 16-2-21 in its charge to the jury on the general definition of "crime." *Harper v. State*, 182 Ga. App. 760, 357 S.E.2d 117 (1987).

**Elements of crime of murder** in Georgia are (1) unlawfully (2) causing death of another human being (3) with malice aforethought. *Holloway v. McElroy*, 474 F. Supp. 1363 (M.D. Ga. 1979), aff'd, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981), overruled on other grounds, *Baker v. Montgomery*, 811 F.2d 55 (11th Cir. 1987); *Mason v. Balkcom*, 487 F. Supp. 554 (M.D. Ga. 1980), rev'd on other grounds, 669 F.2d 222 (5th Cir. 1982), cert. denied, 460 U.S. 1016, 103 S. Ct. 1260, 75 L. Ed. 2d 487 (1983); *Wilcox v. Ford*, 626 F. Supp. 760 (M.D. Ga. 1985), aff'd in part, vacated in part on other grounds, 813 F.2d 1140 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 246 (1987).

**There can be no murder without malice express or implied.** *Shafer v. State*, 193 Ga. 748, 20 S.E.2d 34 (1942)

(decided under former Code 1933, §§ 26-1003, 26-1004).

**Mere negligent killing, without more, may not amount to murder.** *Patterson v. State*, 181 Ga. 698, 184 S.E. 309 (1936) (decided under former Code 1933, §§ 26-1003, 26-1004).

Both intent and malice are essential elements of the crime of murder in Georgia. *Stephens v. Kemp*, 846 F.2d 642 (11th Cir.), cert. denied, 488 U.S. 872, 109 S. Ct. 189, 102 L. Ed. 2d 158 (1988).

**Premeditation is not a specific element of malice murder;** in fact, malice need not be formed until immediately prior to the slaying. *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981), rev'd on other grounds sub nom. *Burger v. Zant*, 718 F.2d 979 (11th Cir. 1983), vacated, 467 U.S. 1212, 104 S. Ct. 2652, 81 L. Ed. 2d 360 (1984), cert. denied, 474 U.S. 998, 106 S. Ct. 374, 88 L. Ed. 2d 367 (1985).

**Difference between malice murder and felony murder** is absence of intent and malice in latter. *Burke v. State*, 234 Ga. 512, 216 S.E.2d 812 (1975).

**It is absence of malice which differentiates manslaughter from murder.** — If at time of killing the circumstances are such as to exclude malice, then homicide cannot be murder. *Parker v. State*, 218 Ga. 654, 129 S.E.2d 850 (1963) (decided under former Code 1933, §§ 26-1003, 26-1004).

**"Year-and-a-day rule" no longer viable.** — Because the "year-and-a-day rule," which allowed the quashing of an indictment on the ground that death did not occur within a year and a day of the injury caused by the defendant, was not included as part of what was intended to be a comprehensive criminal code, the adoption of the criminal code in 1968 ended the viability of the rule in Georgia. *State v. Cross*, 260 Ga. 845, 401 S.E.2d 510 (1991).

**Burglary and murder as included offenses for double jeopardy purposes.** — For substantive double-jeopardy purposes, neither a burglary conviction nor a murder conviction is a lesser included offense within the other, since proof of additional elements must necessarily be shown to establish each crime. *Cash v. State*, 258 Ga. 460,

368 S.E.2d 756 (1988).

**Proof of any particular motive is not essential to establish crime of murder.** Phillips v. State, 207 Ga. 336, 61 S.E.2d 473 (1950) (decided under former Code 1933, §§ 26-1003, 26-1004).

**While motive is strong evidence of murder, it is not an essential element** of it, and need not be proved where other elements exist. Carson v. State, 80 Ga. 170, 5 S.E. 295 (1887) (decided under former Code 1882, §§ 4321, 4322); Barnett v. State, 136 Ga. 65, 70 S.E. 868 (1911) (decided under former Penal Code 1910, §§ 61, 62).

**Failure of evidence to show motive for homicide** does not render conviction unlawful. Hancock v. State, 196 Ga. 351, 26 S.E.2d 760 (1943) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Evidence of motive admissible.** — As the defendant, a sheriff, was not empowered to use the sheriff's department as a personal domain, evidence of corruption in the sheriff's office was relevant and admissible, and the prosecution was well within bounds when it theorized that the defendant killed the victim, a political opponent, to prevent the victim from uncovering evidence of the defendant's corruption. Dorsey v. State, 279 Ga. 534, 615 S.E.2d 512 (2005).

**Alleged evidence of a same or similar nature committed by a codefendant was properly excluded** as the defendant's proffered evidence, via the testimony of the two victims of the other crime, failed to identify the codefendant as the perpetrator of said crime, and the defendant offered no evidence independent of these witnesses in an attempt to establish that the codefendant actually committed the other crime in question; moreover, the motive for the other crime and the murder and armed robbery the defendant was charged with were different. Carr v. State, 279 Ga. 271, 612 S.E.2d 292 (2005).

**Abuse of discretion to reject defendant's offer to stipulate status as convicted felon.** — When a defendant's prior conviction is of the nature likely to inflame the passions of the jury and raise the risk of a conviction based on improper considerations, and the purpose of the

evidence is solely to prove the defendant's status as a convicted felon, then it is an abuse of discretion for the trial court to spurn the defendant's offer to stipulate to the defendant's prior conviction and admit the evidence to the jury. In this case, the nature of the defendant's prior conviction could raise the risk of a verdict tainted by improper considerations and the evidence was unnecessary to prove anything other than the defendant's status as a convicted felon; however, due to the overwhelming evidence of the defendant's guilt, the error was deemed harmless. Ross v. State, 279 Ga. 365, 614 S.E.2d 31 (2005).

**Personal ill will unnecessary.** — To constitute murder, it is unnecessary that defendant should entertain personal ill will toward deceased. Revel v. State, 26 Ga. 275 (1858) (decided under former law).

**Motive is not an element of the offense of murder.** Cook v. State, 255 Ga. 565, 340 S.E.2d 843, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

**Appropriate test of mental capacity in trial for murder** and aggravated assault is whether the accused is capable of distinguishing between right and wrong at the time of the commission of the offense. Duck v. State, 250 Ga. 592, 300 S.E.2d 121 (1983).

**Soundness of mind in perpetration of act is prerequisite to murder.** — It is, in all crimes, one of the ingredients of the offense that there shall be a joint operation of act and intent, and an insane person cannot, in a legal sense, have any intent; indeed, in murder, soundness of mind, in perpetration of act, is part of the definition of the crime. Handspike v. State, 203 Ga. 115, 45 S.E.2d 662 (1947), overruled on other grounds, Brooks v. State, 247 Ga. 744, 279 S.E.2d 649 (1981) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Child cannot be subject of homicide until it has existence independent of its mother.** Shedd v. State, 178 Ga. 653, 173 S.E. 847 (1934) (decided under former Code 1933, §§ 26-1003, 26-1004).

To convict for murder of newly born baby, it is incumbent upon state to prove that child was born alive and had an

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independent and separate existence from its mother, and that it was slain by accused. *Montgomery v. State*, 202 Ga. 678, 44 S.E.2d 242 (1947) (decided under former Code 1933, §§ 26-1003, 26-1004).

There was no evidence presented that the defendant committed the crime of malice murder of a victim's unborn child in violation of O.C.G.A. § 16-5-1(a) because the only evidence was that the unborn child was alive solely in the mother's uterus, died due to the death of the mother, and never had an independent circulation or other evidence of independent existence. *Pineda v. State*, 288 Ga. 612, 706 S.E.2d 407 (2011).

**What constitutes existence of child independent of mother.** — For a child to exist independent of its mother generally requires that the umbilical cord be severed and independent circulation established. Ordinarily, if the child has breathed, this would show independent life, but this test is not infallible. Sometimes infants breathe before they are fully delivered, and sometimes they do not breathe for quite a perceptible period after delivery. Generally, however, if respiration is established, that also establishes an independent circulation and independent existence. *Shedd v. State*, 178 Ga. 653, 173 S.E. 847 (1934) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Corpus delicti and perpetration of offense by accused may be shown** by circumstantial or direct evidence. *Wright v. State*, 199 Ga. 576, 34 S.E.2d 879 (1945) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Wound sufficient to cause death.** — Absent signs of accident or suicide, wound sufficient to cause death proves corpus delicti. *Thomas v. State*, 67 Ga. 460 (1881) (decided under former Code 1873, §§ 4321, 4322).

**Prima facie case of murder.** — In prosecution for murder the state establishes a prima facie case when it produces evidence sufficient to show that defendant killed deceased in manner alleged in indictment, and thereby shifts to defendant burden of going forward with evidence to show justification or such mitigating facts

as would reduce grade of homicide from murder to a lesser offense where state's evidence does not within itself show such justification or mitigation. *Delegal v. State*, 92 Ga. App. 744, 90 S.E.2d 32 (1955) (decided under former Code 1933, §§ 26-1003, 26-1004).

When state proves that accused killed person named in indictment, in county and in manner therein described, a prima facie case of murder is made out. *Rickerson v. State*, 10 Ga. App. 464, 73 S.E. 681 (1912) (decided under former Penal Code 1910, §§ 61, 62).

**Valid confession, corroborated by proof of corpus delicti.** — Confession of guilt, freely, and voluntarily made by accused, is direct evidence of highest character and sufficient to authorize verdict of guilty on a charge of murder, when corroborated by proof of corpus delicti. *Seymour v. State*, 210 Ga. 571, 81 S.E.2d 808 (1954) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Proof of killing without evidence of justification or mitigation shifts burden** to defendant to establish defense and mere fact that there was a previous quarrel and fight does not, without more, establish mutual intent to fight. *Cone v. State*, 193 Ga. 420, 18 S.E.2d 850 (1942) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Defendant's admissions at trial negate need for further proof by state.** — In a homicide case, proof of corpus delicti must not only show that a person was killed, but must also identify the person. These elements must appear from proof other than extrajudicial confessions or admissions alone; but if defendant in defendant's statement made on trial admits them, state is not required to make further proof of them. *Wall v. State*, 5 Ga. App. 305, 63 S.E. 27 (1908) (decided under former Penal Code 1895, §§ 61, 62).

**Requirements for accepting guilty plea.** — State trial courts need not specifically address each individual element required under O.C.G.A. § 16-5-1 in order to accept a guilty plea. The judge need only explain the statute sufficiently to give the defendant real and adequate notice of the nature of the charge against defendant or find proof that the defendant

in fact understood the charge. *Moore v. Balkcom*, 716 F.2d 1511 (11th Cir. 1983), supplemented by 722 F.2d 629 (11th Cir. 1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1456, 79 L. Ed. 2d 773 (1984).

**Malice murder conviction, entered upon guilty plea, was not void.** — Trial court properly denied the defendant's motion to vacate a malice murder conviction, entered upon a guilty plea, as: (1) the defendant's claim that the conviction preceded the indictment, and hence that the trial court lacked jurisdiction to hear the plea, was belied by the record; and (2) only a request for a competency evaluation was made, with which the trial court complied, and not a special plea of mental incompetency, which would have triggered a right to a competency hearing prior to the court's acceptance of the defendant's guilty plea. *Jones v. State*, 282 Ga. 568, 651 S.E.2d 728 (2007).

**Incorporation in one count of different ways of committing offense.** — When one offense could be committed in several ways, that is, felony murder and murder with malice, it is permissible to incorporate the different ways in one count. *Leutner v. State*, 235 Ga. 77, 218 S.E.2d 820 (1975).

**Malice murder by vehicle**, just as malice murder by other means, may be prosecuted under former Code 1933, § 26-1101. *State v. Foster*, 141 Ga. App. 258, 233 S.E.2d 215, aff'd, 239 Ga. 302, 236 S.E.2d 644 (1977) (see O.C.G.A. § 16-5-1).

Vehicular homicide statute, O.C.G.A. § 40-6-393, does not preclude a malice murder charge in vehicular deaths. *Chester v. State*, 262 Ga. 85, 414 S.E.2d 477 (1992).

**Malice murder and felony murder not mutually exclusive.** — Presence or absence of malice is irrelevant to the commission of felony murder; therefore, the offenses are not mutually exclusive as a matter of law. *Knight v. State*, 271 Ga. 557, 521 S.E.2d 819 (1999).

**Vehicular homicide** must now be prosecuted under the vehicular homicide statute, former Code 1933, § 68A-903 (see O.C.G.A. § 40-6-393) or the murder statute, former Code 1933, § 26-1101 (see O.C.G.A. § 16-5-1). *State v. Foster*, 141

Ga. App. 258, 233 S.E.2d 215, aff'd, 239 Ga. 302, 236 S.E.2d 644 (1977).

**Murder and manslaughter, both voluntary and involuntary, are grades of unlawful homicide.** Perry v. State, 78 Ga. App. 273, 50 S.E.2d 709 (1948) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Distinguishing voluntary manslaughter.** — Intent to kill is an essential element of both murder and voluntary manslaughter; provocation, or the lack thereof, is what distinguishes the two offenses. *Parks v. State*, 254 Ga. 403, 330 S.E.2d 686 (1985).

**Involuntary manslaughter as lesser included offense.** — Trial court did not err in not giving a charge to the jury on involuntary manslaughter as a lesser included offense of murder where defendant did not request the charge nor object at trial to its absence. *Kilpatrick v. State*, 255 Ga. 344, 338 S.E.2d 274 (1986).

**Words, threats, menaces or contemptuous gestures.** — Unlawful killing of one who has given slayer no provocation other than use of words, threats, menaces, or contemptuous gestures cannot be graded as voluntary manslaughter under doctrine of mutual combat. *Cone v. State*, 193 Ga. 420, 18 S.E.2d 850 (1942) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Killing officer to prevent illegal arrest** may constitute manslaughter, but not murder. *Thomas v. State*, 91 Ga. 204, 18 S.E. 305 (1892) (decided under former Penal Code 1910, §§ 61, 62).

**Admission of evidence of drug use was proper.** — Defendant was properly convicted for felony murder, malice murder, and aggravated assault because the defendant was seen twice beating a person with a pipe and yelling at the person regarding drugs, and because the person died as a result of injuries from that beating two days later. Admission at the defendant's trial of use of drugs was proper because it was not admitted purely to impugn the defendant's character, but was relevant as to motive. *Dyers v. State*, 277 Ga. 859, 596 S.E.2d 595 (2004).

**Admissions of adultery coupled with conduct** as reducing homicide to manslaughter. While it has been held that

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a mere admission by one spouse to the other spouse of an adulterous relationship with another person will not reduce homicide to manslaughter, admissions, coupled with conduct, or conduct alone, may do so. *Campbell v. State*, 204 Ga. 399, 49 S.E.2d 867 (1948) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Simply being drunk and killing another in passion** cannot reduce crime from murder to manslaughter. *Bradberry v. State*, 170 Ga. 859, 154 S.E. 344 (1930) (decided under former Penal Code 1910, §§ 61, 62).

**Prospective juror properly excluded on basis of bias.** — When the defendant was convicted of malice murder, the trial court did not err in excusing for cause a prospective juror who was acquainted with defense counsel as the juror's statement that the juror worked with a criminal defense firm, and could not give the state a fair hearing clearly established a leaning or bias on the part of the juror, which made the juror subject to being excused for cause. *Bell v. State*, 276 Ga. 206, 576 S.E.2d 876 (2003).

**Photographs showing victim's injuries properly admitted.** — In a trial for murder of a child by malnutrition and child abuse, it was not error to admit into evidence 14 pre-autopsy photographs and one post-autopsy photograph of the child's body. Such exhibits were not unnecessarily repetitious, gruesome, and inflammatory, but were clearly relevant and admissible to show both the extent of the injuries and the extent of the neglect and malnutrition from which the child had suffered. While it was true that two of the photographs appeared to be identical and certain others somewhat repetitious, such duplication in and of itself did not result in undue prejudice to the defendant. *Lewis v. State*, 180 Ga. App. 369, 349 S.E.2d 257 (1986).

Defendant's motion for a mistrial based on the admission of a photograph of the victim's head was not an abuse of discretion as: (1) if pre-autopsy photographs were relevant and material to any issue in the case, they were admissible even if they were duplicative and might inflame the

jury; (2) photographs showing the extent and nature of the victim's wounds were material and relevant, even if the cause of death was not in dispute; (3) the state had the burden to prove beyond a reasonable doubt that the defendant caused the death of the victim with malice aforethought; and (4) the photograph was relevant to the state's claim that the defendant had done so by shooting a single shot into the victim's head with a .38 revolver. *Bradley v. State*, 281 Ga. 173, 637 S.E.2d 19 (2006).

**Verdict of manslaughter constitutes acquittal of murder.** — Finding accused guilty of manslaughter on indictment for murder is an acquittal of the charge of murder, and if the court is of the opinion that finding was wrong, and ought to have been for murder, it cannot grant a new trial. *Jordan v. State*, 22 Ga. 545 (1857) (decided under former law).

Error in charging on law relating to malice, either express or implied, or murder is not ground for new trial to one convicted of manslaughter. *Loftin v. State*, 30 Ga. App. 105, 117 S.E. 471 (1923) (decided under former Penal Code 1910, §§ 61, 62).

When one is charged with murder, in which malice must exist either express or implied, but is convicted of a lower grade of that offense, to wit, voluntary manslaughter, in which malice is not an element, an erroneous charge on the question of malice is *prima facie* harmless to accused and a new trial will not be granted therefor unless it is plainly shown that the erroneous charge wrongfully led to or influenced the verdict rendered. *Jones v. State*, 52 Ga. App. 83, 182 S.E. 527 (1935) (decided under former Code 1933, §§ 26-1003, 26-1004).

Refusal to charge upon principle of law which is solely applicable to crime of murder cannot be a ground for reversing judgment where conviction is of voluntary manslaughter, which is tantamount to acquittal of charge of murder. *Goldsmith v. State*, 54 Ga. App. 268, 187 S.E. 694 (1936) (decided under former Code 1933, §§ 26-1003, 26-1004).

Having been indicted for murder and convicted of voluntary manslaughter, the verdict was an acquittal of the charge of murder and the defendant cannot com-

plain of alleged errors in the court's instructions upon the law of murder. *Cook v. State*, 56 Ga. App. 375, 192 S.E. 631 (1937) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Scientific evidence properly admitted.** — In a murder prosecution, because the undisputed evidence showed that the mitochondrial DNA (mtDNA) analysis was based on sound scientific theory and produced reliable results when proper procedures were followed, and the "direct sequencing" method employed in the prosecution of the defendant for murder was the only technique accepted and used by those who conducted forensic mtDNA testing, as that technique produced reliable results upon which any practitioner could draw conclusions, the trial court did not err in allowing the evidence. *Vaughn v. State*, 282 Ga. 99, 646 S.E.2d 212 (2007).

**Admission of prejudicial unrelated evidence was abuse of discretion.** — Although the evidence presented at trial was sufficient to convict the defendant of malice murder, the defendant was entitled to a new trial because the trial court abused the court's discretion in admitting evidence regarding guns and ammunition found in the defendant's home when the defendant was arrested nine days after a shooting; the guns and ammunition were totally unrelated to the shooting, the items were not probative of the defendant's guilt, and the state's attempt to use the evidence to establish that the defendant had a propensity to violence was improper. *Nichols v. State*, 282 Ga. 401, 651 S.E.2d 15 (2007).

**When conviction is for voluntary manslaughter, exclusion of evidence rebutting presumption of malice is harmless.** *Carter v. State*, 2 Ga. App. 254, 58 S.E. 532 (1907) (decided under former Penal Code 1895, §§ 61, 62).

**Cruelty to child not lesser included offense.** — Offense of cruelty to children requires proof that the victim was younger than eighteen, whereas the offense of malice murder only requires proof that the victim was a human being. Accordingly, to prove cruelty to children, at least one fact — the age of the victim — had to be established in addition to the facts used to establish malice murder, and

the offense of cruelty to children therefore was not included as a matter of fact in the offense of malice murder. *McCartney v. State*, 262 Ga. 156, 414 S.E.2d 227 (1992), overruled on other grounds, 287 Ga. 881, 700 S.E.2d 394 (2010).

**Claim of error waived on appeal when exclusion of evidence not raised at trial.** — On appeal from convictions for murder and aggravated assault, the defendant waived any error regarding the exclusion of a videotaped statement on appeal, which the defendant claimed would have supported a voluntary manslaughter theory, by failing to raise the claim specifically at trial. *Johnson v. State*, 282 Ga. 96, 646 S.E.2d 216 (2007).

**Cited in** *Gaines v. Wolcott*, 119 Ga. App. 313, 167 S.E.2d 366 (1969); *Teal v. State*, 122 Ga. App. 532, 177 S.E.2d 840 (1970); *Evans v. State*, 227 Ga. 571, 181 S.E.2d 845 (1971); *Pass v. State*, 227 Ga. 730, 182 S.E.2d 779 (1971); *Witt v. State*, 124 Ga. App. 535, 184 S.E.2d 517 (1971); *Fisher v. Stynchcombe*, 336 F. Supp. 1308 (N.D. Ga. 1972); *Foster v. State*, 230 Ga. 666, 198 S.E.2d 847 (1973); *K.M.S. v. State*, 129 Ga. App. 683, 200 S.E.2d 916 (1973); *Caldwell v. Beard*, 232 Ga. 701, 208 S.E.2d 564 (1974); *Gaines v. State*, 232 Ga. 727, 208 S.E.2d 798 (1974); *Cain v. State*, 232 Ga. 804, 209 S.E.2d 158 (1974); *Hilton v. State*, 233 Ga. 11, 209 S.E.2d 606 (1974); *Proveaux v. State*, 233 Ga. 456, 211 S.E.2d 747 (1974); *Barker v. State*, 233 Ga. 781, 213 S.E.2d 624 (1975); *Favors v. State*, 234 Ga. 80, 214 S.E.2d 645 (1975); *Chenault v. State*, 234 Ga. 216, 215 S.E.2d 223 (1975); *Davis v. State*, 234 Ga. 730, 218 S.E.2d 20 (1975); *Sheppard v. State*, 235 Ga. 89, 218 S.E.2d 830 (1975); *McCullough v. State*, 137 Ga. App. 325, 223 S.E.2d 729 (1976); *Cromer v. State*, 238 Ga. 425, 233 S.E.2d 158 (1977); *Scott v. State*, 239 Ga. 130, 236 S.E.2d 75 (1977); *State v. Holmes*, 142 Ga. App. 847, 237 S.E.2d 406 (1977); *Hawes v. State*, 239 Ga. 630, 238 S.E.2d 418 (1977); *Harrison v. State*, 143 Ga. App. 883, 240 S.E.2d 263 (1977); *Smith v. State*, 242 Ga. 224, 248 S.E.2d 634 (1978); *Grace v. Hopper*, 566 F.2d 507 (5th Cir. 1978); *Taylor v. Hopper*, 596 F.2d 1284 (5th Cir. 1979); *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980); *Franklin v. State*,

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245 Ga. 141, 263 S.E.2d 666 (1980); Hardy v. State, 245 Ga. 272, 264 S.E.2d 209 (1980); Dampier v. State, 245 Ga. 427, 265 S.E.2d 565 (1980); Pitts v. State, 153 Ga. App. 666, 266 S.E.2d 321 (1980); Causey v. State, 154 Ga. App. 76, 267 S.E.2d 475 (1980); Lewis v. State, 246 Ga. 101, 268 S.E.2d 915 (1980); Hosch v. State, 246 Ga. 417, 271 S.E.2d 817 (1980); Jones v. State, 247 Ga. 268, 275 S.E.2d 67 (1981); Jordan v. State, 247 Ga. 328, 276 S.E.2d 224 (1981); Holt v. State, 247 Ga. 648, 278 S.E.2d 390 (1981); McMillan v. State, 157 Ga. App. 694, 278 S.E.2d 478 (1981); Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981); Moore v. State, 158 Ga. App. 579, 281 S.E.2d 322 (1981); Daniel v. State, 248 Ga. 271, 282 S.E.2d 314 (1981); Wallace v. State, 248 Ga. 255, 282 S.E.2d 325 (1981); Jackson v. State, 248 Ga. 480, 284 S.E.2d 267 (1981); United States v. Peacock, 654 F.2d 339 (5th Cir. 1981); McCorquodale v. Balkcom, 525 F. Supp. 408 (N.D. Ga. 1981); Young v. Zant, 677 F.2d 792 (11th Cir. 1982); Mitchell v. Hopper, 538 F. Supp. 77 (S.D. Ga. 1982); Maynor v. Green, 547 F. Supp. 264 (S.D. Ga. 1982); Hance v. Zant, 696 F.2d 940 (11th Cir. 1983); Cape v. Francis, 558 F. Supp. 1207 (M.D. Ga. 1983); Carter v. State, 252 Ga. 502, 315 S.E.2d 646 (1984); Boyd v. State, 253 Ga. 515, 322 S.E.2d 256 (1984); Drake v. Francis, 727 F.2d 990 (11th Cir. 1984); Cape v. Francis, 741 F.2d 1287 (11th Cir. 1984); Jones v. State, 253 Ga. 640, 322 S.E.2d 877 (1984); Crawford v. State, 254 Ga. 435, 330 S.E.2d 567 (1985); Williams v. State, 255 Ga. 21, 334 S.E.2d 691 (1985); Cox v. State, 180 Ga. App. 820, 350 S.E.2d 828 (1986); McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); Richie v. State, 258 Ga. 361, 369 S.E.2d 740 (1988); Baisden v. State, 258 Ga. 425, 369 S.E.2d 762 (1988); Mundy v. State, 259 Ga. 634, 385 S.E.2d 666 (1989); Kinsman v. State, 259 Ga. 89, 376 S.E.2d 845 (1989); Broomall v. State, 260 Ga. 220, 391 S.E.2d 918 (1990); Spencer v. State, 260 Ga. 640, 398 S.E.2d 179 (1990); Ferrell v. State, 261 Ga. 115, 401 S.E.2d 741 (1991); Potts v. State, 261 Ga. 716, 410 S.E.2d 89 (1991); Davis v. Thomas, 261 Ga. 687, 410

S.E.2d 110 (1991); Gooden v. State, 261 Ga. 691, 410 S.E.2d 113 (1991); Grace v. State, 262 Ga. 746, 425 S.E.2d 865 (1993); Dunn v. State, 263 Ga. 343, 434 S.E.2d 60 (1993); Lattimore v. State, 265 Ga. 102, 454 S.E.2d 474 (1995); Williams v. State, 270 Ga. 125, 508 S.E.2d 415 (1998); Rhode v. State, 274 Ga. 377, 552 S.E.2d 855 (2001); Johnson v. State, 275 Ga. 630, 570 S.E.2d 309 (2002); Adams v. State, 275 Ga. 867, 572 S.E.2d 545 (2002); Oken v. State, 378 Md. 179, 835 A.2d 1105 (2003); Rivera v. State, 282 Ga. 355, 647 S.E.2d 70 (2007); Teal v. State, 282 Ga. 319, 647 S.E.2d 15 (2007); Roberts v. State, 282 Ga. 548, 651 S.E.2d 689 (2007); Preston v. State, 282 Ga. 210, 647 S.E.2d 260 (2007); Miller v. Martin, No. 1:04-cv-1120-WSD-JFK, 2007 U.S. Dist. LEXIS 61192 (N.D. Ga. Aug. 20, 2007); Jones v. State, 282 Ga. 784, 653 S.E.2d 456 (2007); Walker v. Hale, 283 Ga. 131, 657 S.E.2d 227 (2008); Mitchell v. State, 283 Ga. 341, 659 S.E.2d 356 (2008); Robinson v. State, 283 Ga. 229, 657 S.E.2d 822 (2008); Robinson v. State, 283 Ga. 229, 657 S.E.2d 822 (2008); Armstrong v. State, 292 Ga. App. 145, 664 S.E.2d 242 (2008); Terry v. State, 284 Ga. 119, 663 S.E.2d 704 (2008); Jackson v. State, 284 Ga. 484, 668 S.E.2d 700 (2008); Bradshaw v. State, 284 Ga. 675, 671 S.E.2d 485 (2008); Gonzales v. State, 298 Ga. App. 821, 681 S.E.2d 248 (2009); Reeves v. State, 288 Ga. 545, 705 S.E.2d 159 (2011).

**Unlawfulness**

**Unlawfulness, in sense of absence of excuse or justification,** is an essential element of murder. Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981).

**Interpretation of unlawfulness.** — Only sensible way to interpret the unlawfulness requirement of O.C.G.A. § 16-5-1(a) is to read it to mean unjustified and unexcused. Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**Term “unlawfully” in O.C.G.A. § 16-5-1(a)** is not intended as a meaningless redundancy. The killing is not unlawful because it is murder; rather, part of the reason that the killing is murder is because it is unlawful. Holloway v. McElroy,

632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**Requirement does not refer to acts unlawful under other criminal statutes.** — Requirement of O.C.G.A. § 16-5-1(a), and by reference, of O.C.G.A. § 16-5-2, that killing be unlawful does not refer to acts that are unlawful under some other criminal statute, since O.C.G.A. § 16-5-3(a) and O.C.G.A. § 16-5-1(c) deal with deaths caused during commission of felonies and other unlawful acts. Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**Lawfulness is proved by establishing self-defense.** Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981).

**State must prove unlawfulness and malice aforethought beyond reasonable doubt.** — Georgia law has chosen to include unlawfulness and malice aforethought as elements of murder and the prosecution must prove all these elements beyond a reasonable doubt without benefit of presumptions, at least when some evidence has been adduced to negate those elements. Holloway v. McElroy, 474 F. Supp. 1363 (M.D. Ga. 1979), aff'd, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981), overruled on other grounds, Baker v. Montgomery, 811 F.2d 55 (11th Cir. 1987).

**Unlawful acts causing unintended death which constitute murder.** — An unlawful act may be of such nature as to make resulting homicide murder and not involuntary manslaughter, as (1) where intended act causing unintentional death is itself a felony; or (2) where such act is one which in its consequences naturally tends to destroy human life; or (3) where it is committed in prosecution of a riotous intent. Absence of intention to kill will not, in any of these instances, reduce killing from murder to involuntary manslaughter, but will do so in all other instances. Wells v. State, 44 Ga. App. 760, 162 S.E. 835 (1932) (decided under former Penal Code 1910, §§ 61, 62).

**Involuntary killing occurring during commission of unlawful act naturally tending to destroy life constitutes**

murder. Hammond v. State, 212 Ga. 186, 91 S.E.2d 615 (1956) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Intentionally pointing a pistol at another.** — To intentionally point a pistol at another, in fun or otherwise, save in instances excepted by statute, is unlawful; and if, while performing such unlawful act, the pistol is accidentally discharged, the person so acting, if not guilty of murder, would be guilty of involuntary manslaughter in commission of an unlawful act. Delegal v. State, 92 Ga. App. 744, 90 S.E.2d 32 (1955) (decided under former Code 1933, §§ 26-1003, 26-1004).

### Indictment

When an indictment charges murder it also charges manslaughter; under the criminal practice and procedure in this state a verdict of involuntary manslaughter would find support in such a pleading, because involuntary manslaughter is the unlawful killing of a human being, and such crime is always included in an indictment for murder. Perry v. State, 78 Ga. App. 273, 50 S.E.2d 709 (1948) (decided under former Code 1933, §§ 26-1003, 26-1004).

**That killing was unlawful need not be alleged in indictment.** Coxwell v. State, 66 Ga. 309 (1881) (decided under Code 1873, §§ 4321, 4322); Davis v. State, 153 Ga. 669, 113 S.E. 11 (1922) (decided under former Code 1910, §§ 61, 62).

**While indictment must allege malice aforethought,** words of equivalent meaning may be employed in lieu thereof. Gates v. State, 95 Ga. 340, 22 S.E. 836 (1895) (decided under former Code 1882, §§ 4321, 4322).

**Indictment need not specifically allege fact relied upon to establish malice.** — Under allegation of malice aforethought state may introduce any evidence which is relevant and material upon issue of malice, either express or implied, and it is unnecessary for indictment to more specifically allege fact which will be relied upon to establish malice. Perry v. State, 78 Ga. App. 273, 50 S.E.2d 709 (1948) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Indictment need not show detailed description of weapon, or location of**

**Indictment (Cont'd)**

**wound.** Bowens v. State, 106 Ga. 760, 32 S.E. 666 (1899) (decided under former Penal Code 1895, §§ 61, 62).

**Indictment mixing malice and felony murder elements was defective.**

— With regard to an indictment against a defendant which charged murder, felony murder, and concealment of a death, the count charging felony murder was quashed because the mixing of the elements of malice murder and felony murder constituted a material defect. Wagner v. State, 282 Ga. 149, 646 S.E.2d 676 (2007).

**Indictment properly charged malice murder and felony murder as distinct counts.** — Trial court erred in quashing the count of an indictment alleging felony murder predicated on the felony of aggravated battery because the indictment did not allege malice murder twice but properly charged malice murder and felony murder as distinct, alternative counts, and the trial court's finding that the state improperly alleged "malicious malice" was erroneous when the felony murder count alleged that the causing of bodily harm was malicious, not that the commission of the complete crime of aggravated battery was malicious; a defendant might have had malice in the form of the intent to cause bodily harm with no malice in the form of the intent to kill, and yet death might still occur, and in such a case the defendant would be guilty of felony murder but not malice murder. Pope v. State, 286 Ga. 1, 685 S.E.2d 272 (2009).

**Failure to allege county.** — Habeas petition was properly denied, despite an inmate's claim that the omission of the county in which a malice murder occurred rendered a conviction on that count void, as the defense was waived when the inmate plead guilty to the charge, and the inmate's allegations of trial counsel's ineffectiveness were meritless. Wright v. Hall, 281 Ga. 318, 638 S.E.2d 270 (2006).

**Indictment need not show that deceased was a human being.** Sutherland v. State, 121 Ga. 591, 49 S.E. 781 (1905) (decided under former Penal Code 1895, §§ 61, 62).

**Indictment alleging that person was killed on specified date** alleges that the person died on that date. Head v. State, 68 Ga. App. 759, 24 S.E.2d 145 (1943) (decided under former Code 1933, §§ 26-1003, 26-1004).

**One count indictment was sufficient.** — One-count indictment against the defendant was held sufficient and did not violate the defendant's due process rights, because the indictment charged the defendant with felony murder by causing the death of the victim while committing the felony of aggravated assault and was sufficient to have withstood a general demurrer; the fact that the defendant failed to raise a special demurrer to the indictment prior to pleading to the merits of the indictment was a waiver of that argument. Stinson v. State, 279 Ga. 177, 611 S.E.2d 52 (2005).

**Sufficiency of indictment for felony murder.** — A malice murder indictment which alleged that the defendant shot the victim with a pistol is sufficient to put the defendant on notice that defendant committed an aggravated assault on the victim and, therefore, may be charged with felony murder at trial. Jolley v. State, 254 Ga. 624, 331 S.E.2d 516 (1985).

**Whether one may be convicted of lower grade of felony depends upon indictment.** — Under indictment for murder, accused may be convicted of a lower grade of felony, or of a misdemeanor, if lesser offense is one involved in the homicide and is sufficiently charged in the indictment; but whether jury should be instructed on law of lesser offense, or would be authorized to convict of lesser offense, depends on evidence. Moore v. State, 55 Ga. App. 213, 189 S.E. 731 (1937) (decided under former Code 1933, §§ 26-1003, 26-1004).

Because an indictment, which included charging language that the defendant "unlawfully, and with malice aforethought, caused the death of the victim by striking," placed the defendant on notice of a possible conviction of an assault upon the victim with the intent to murder or commit a violent injury, the defendant could be convicted of aggravated assault as a lesser included crime of malice murder; the only difference was that the mal-

ice murder indictment alleged that the defendant actually accomplished the murder, in addition to having intended to accomplish the murder. *Reagan v. State*, 281 Ga. App. 708, 637 S.E.2d 113 (2006).

**Waiver of challenge to indictment.** — Defendants' contention that a felony murder indictment was deficient because the indictment did not contain all the essential elements of the underlying crime of aggravated assault was, in essence, a special demurrer seeking greater specificity with regard to the predicate felony. Pursuant to O.C.G.A. § 17-7-110, the defendant's failure to file a timely special demurrer seeking additional information constituted a waiver of the right to be tried on a perfect indictment. *Dasher v. State*, 285 Ga. 308, 676 S.E.2d 181 (2009).

**Indictment for felony murder and vehicular homicide.** — Defendant could be indicted for vehicular homicide under O.C.G.A. § 40-6-393 and felony murder during the commission of fleeing and attempting to elude a police officer under O.C.G.A. § 40-6-395. *State v. Tiraboschi*, 269 Ga. 812, 504 S.E.2d 689 (1998).

**Failure to file demurrer to indictment.** — Trial counsel was not ineffective in failing to challenge the felony murder count of an indictment because the indictment contained sufficient facts to put the defendant on notice that the defendant was accused of the death of the victim as a result of an aggravated assault when the indictment alleged a specific, offensive use of the defendant's hands and feet and that when the defendant's hands and feet were used in a particular way they were objects which were likely to and actually did result in serious bodily injury; the absence of self-defense, like general intent, did not have to be expressly alleged in an indictment, and even if some such allegation were necessary, language in the indictment asserting that defendant acted unlawfully and contrary to the laws of the state, the good order, peace, and dignity thereof was sufficient. *Lizana v. State*, 287 Ga. 184, 695 S.E.2d 208 (2010).

**Under indictment for murder, jury may find prisoner guilty of lesser offense of manslaughter,** either voluntary or involuntary, and verdict will be legal, although there is no count for manslaugh-

ter in indictment. *Perry v. State*, 78 Ga. App. 273, 50 S.E.2d 709 (1948).

When on indictment and trial for murder, offense of voluntary manslaughter may be reasonably deduced from evidence, or defendant's statement, considered separately or together, a charge upon law of voluntary manslaughter is authorized. *Tucker v. State*, 61 Ga. App. 661, 7 S.E.2d 193 (1940) (decided under former Code 1933, §§ 26-1003, 26-1004).

When evidence, or defendant's statement, or portions of evidence and portions of statement combined, raise doubt, however slight, as to whether homicide was murder or voluntary manslaughter, it is not error for court to instruct jury upon law of voluntary manslaughter. *Tucker v. State*, 61 Ga. App. 661, 7 S.E.2d 193 (1940) (decided under former Code 1933, §§ 26-1002, 26-1003, 26-1004).

**Indictment alleging that the defendant unlawfully and with malice aforethought did murder the victim** in a manner unknown to the grand jury was not subject to demurrer for failing to indicate whether the malice alleged was express or implied, because an indictment failing to specify the cause of death is sufficient when the circumstances of the case will not admit of greater certainty in stating the means of death. *Hinton v. State*, 280 Ga. 811, 631 S.E.2d 365 (2006).

## Intent and Malice

### 1. In General

**O.C.G.A. § 16-5-1(b) is not unconstitutional when given in charge to the jury.** *McMichael v. State*, 252 Ga. 305, 313 S.E.2d 693 (1984).

**Defendant did not act in self-defense and was guilty of malice murder.** — Evidence was sufficient to show that the defendant did not act in self-defense when the defendant made repeated threats to kill the victim, recruited family members to help and the defendant pursued and confronted the unarmed victim in the middle of the street and bragged to others about the crime; the defendant was not in imminent danger from the victim, but the defendant acted solely out of revenge for prior crimes and assaults allegedly committed against the

**Intent and Malice (Cont'd)****1. In General (Cont'd)**

defendant by the victim. *Slaughter v. State*, 278 Ga. 896, 608 S.E.2d 227 (2005).

Evidence was sufficient to support defendant's conviction of malice murder, in violation of O.C.G.A. § 16-5-1, based on an eyewitness's testimony that the eyewitness did not believe that defendant had acted in self-defense in fatally shooting the victim; the testimony was admissible over defendant's objection because the eyewitness based the testimony on personal observations, and there was also other evidence which allowed a rational trier of fact to have found sufficient proof beyond a reasonable doubt of defendant's guilt. *Smith v. State*, 281 Ga. 237, 637 S.E.2d 400 (2006).

Evidence that the victim had been stabbed 12 times, six times in the back, and the defendant's testimony that the defendant kicked in the door to the victim's house, that the victim confronted the defendant with a knife, and that the defendant took the knife from the victim and acted in self-defense was sufficient to convict the defendant of malice murder as the jury was entitled to reject the self-defense claim. *Timmreck v. State*, 285 Ga. 39, 673 S.E.2d 198 (2009).

**Malice must be shown.** — Malice is not confined to a particular animosity to deceased, but extends to an evil design in general, a wicked and corrupt motive, an intention to do evil, the event of which is fatal. *Roberts v. State*, 3 Ga. 310 (1847) (decided under former law).

In trial for murder it is absolutely essential that malice, express or implied, be shown. *Elder v. State*, 212 Ga. 705, 95 S.E.2d 373 (1956) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Malice defined.** — Legal malice is an unlawful intention to kill without justification or mitigation. *Bailey v. State*, 70 Ga. 617 (1883) (decided under former Code 1882, §§ 4321, 4322).

Legal malice is not ill will or hatred. *Bailey v. State*, 70 Ga. 617 (1883) (decided under former Code 1882, §§ 4321, 4322).

Malice is wickedness of purpose; a spiteful or malevolent design against another; a settled purpose to injure or destroy

another. *Patterson v. State*, 85 Ga. 131, 11 S.E. 620, 21 Am. St. R. 152 (1890) (decided under former Penal Code 1895, §§ 61, 62).

Legal malice is the intent unlawfully to take human life in cases which the law neither mitigates nor justifies. *Smithwick v. State*, 199 Ga. 292, 34 S.E.2d 28 (1945) (decided under former Code 1933, §§ 26-1003, 26-1004).

Malice means the intent to take life without legal justification, excuse, or mitigation. *Gatliff v. State*, 90 Ga. App. 869, 84 S.E.2d 588 (1954) (decided under former Code 1933, §§ 26-1003, 26-1004).

Malice is the unlawful, deliberate intention to kill a human being without excuse, justification, or mitigation. It is a state of mind and is a premeditated, deliberate intention and desire and design to unlawfully kill another human being. *Mason v. Balkcom*, 487 F. Supp. 554 (M.D. Ga. 1980), rev'd on other grounds, 669 F.2d 222 (5th Cir. 1982), cert. denied, 460 U.S. 1016, 103 S. Ct. 1260, 75 L. Ed. 2d 487 (1983).

Malice element, which distinguishes murder from the lesser offense of voluntary manslaughter, means simply the intent to kill in the absence of provocation. *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984), rev'd on other grounds sub nom. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), aff'd, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), cert. denied, 501 U.S. 1282, 112 S. Ct. 38, 115 L. Ed. 2d 1118 (1991).

**Express malice is the deliberate intention unlawfully to take a life**, manifested by external circumstances; malice could be implied where no considerable provocation appeared and the circumstances of the killing showed an abandoned and malignant heart. *Hill v. State*, 274 Ga. 591, 555 S.E.2d 696 (2001).

**Intent to kill is part of an essential element of murder, namely malice aforethought.** *Mason v. Balkcom*, 487 F. Supp. 554 (M.D. Ga. 1980), rev'd on other grounds, 669 F.2d 222 (5th Cir. 1982), cert. denied, 460 U.S. 1016, 103 S. Ct. 1260, 75 L. Ed. 2d 487 (1983).

**Intent to kill is necessary.** *Lott v. State*, 18 Ga. App. 747, 90 S.E. 727 (1916) (decided under former Penal Code 1910, §§ 60, 61, 62).

**Purpose and specific intent not required.** — Rather than affixing the terms of "specific intent" or "purpose" with respect to the mens rea required for murder, Georgia has opted for the common-law requirement of malice aforethought, which may be either express or implied. Accordingly, evidence which disproves "purpose" or "desire," such as evidence of mental deficiency, does not necessarily disprove malice aforethought. *Wallace v. Kemp*, 581 F. Supp. 1471 (M.D. Ga. 1984), rev'd on other grounds, 757 F.2d 1102 (11th Cir. 1985).

**Intent need not be directed toward person killed or injured.** — Offenses of murder, voluntary manslaughter, and aggravated assault do not require that the necessary element of intent, to kill or injure as the case may be, must have been directed toward the person who actually was killed or injured. *Cook v. State*, 255 Ga. 565, 340 S.E.2d 843, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

**Act committed is judged by nature of act intended.** — If one who was engaged in a personal difficulty with another fired upon the person with a pistol, but missing that person killed a third person who was nearby, such killing would be murder, and not involuntary manslaughter. *Durham v. State*, 70 Ga. 264 (1883) (decided under former Code 1882, §§ 4321, 4322).

If a person shoots at another under circumstances that, if death had ensued, the offense would be reduced from murder to voluntary manslaughter, and by accident the shot hits and kills another person standing by, for whom it was not intended, the offense would be voluntary manslaughter. *McLendon v. State*, 172 Ga. 267, 157 S.E. 475 (1931) (decided under former Penal Code 1910, §§ 61, 62).

If the defendant intended to kill the defendant's own child, but, under mistake as to identity, killed another child, the defendant's act would be measured by the same standard as if the defendant had killed the defendant's own child. *Wright v. State*, 199 Ga. 576, 34 S.E.2d 879 (1945) (decided under former Code 1933, §§ 26-1003, 26-1004).

Killing of innocent bystander while

making a murderous assault on another is murder; the thing done follows the nature of the thing intended to be done and guilt or innocence of slayer depends upon same considerations which would have governed had the slayer shot and killed the person against whom it was directed. *Montgomery v. State*, 78 Ga. App. 258, 50 S.E.2d 777 (1948) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Mere drunkenness will not negative specific intent to murder.** — One sober enough to intend to shoot at another, and actually to shoot at and hit the other, without any provocation or justification whatever, is deemed sober enough to form specific intent to murder; and mere drunkenness, whatever its degree, will not negative such intent. *Bradberry v. State*, 170 Ga. 859, 154 S.E. 344 (1930) (decided under former Penal Code 1910, §§ 61, 62).

**Assault or other equivalent circumstances may exclude idea of deliberate, wanton intention to take life.** *McLendon v. State*, 172 Ga. 267, 157 S.E. 475 (1931) (decided under former Penal Code 1910, §§ 61, 62).

**There is no difference between express and implied malice** except in mode of arriving at fact. *Jones v. State*, 39 Ga. 594 (1859) (decided under former law).

**One capable of forming simple intent to kill another is capable of malice.** *Jones v. State*, 29 Ga. 594 (1859) (decided under former law).

**One who can voluntarily shoot is capable of malice**, unless one can plead some infirmity besides drunkenness. To be too drunk to form intent to kill, one must be too drunk to form intent to shoot. *Cone v. State*, 193 Ga. 420, 18 S.E.2d 850 (1942) (decided under former law).

**To render homicide murder, malice must exist at time of killing.** *McMillan v. State*, 35 Ga. 54 (1866) (decided under former Code 1863, §§ 4218, 4219); *Phillips v. State*, 26 Ga. App. 263, 105 S.E. 823 (1921) (decided under former Penal Code 1910, §§ 61, 62).

**Malice need not exist for any particular length of time before killing.** *Bailey v. State*, 70 Ga. 617 (1883) (decided under former Code 1882, §§ 4321, 4322);

**Intent and Malice (Cont'd)****1. In General (Cont'd)**

Perry v. State, 102 Ga. 365, 30 S.E. 903 (1897) (decided under former Penal Code 1895, §§ 61, 62).

**Momentary deliberation suffices.** — Law does not fix time of deliberation, and if it is momentary, it is sufficient. Roberts v. State, 3 Ga. 310 (1846) (decided under former Code 1933, §§ 26-1003, 26-1004).

If malice is in mind of slayer at moment killing is done, and it moves slayer to do the killing, no matter how short a time it may have existed, such killing constitutes murder. Brown v. State, 190 Ga. 169, 8 S.E.2d 652 (1940) (decided under former Code 1933, §§ 26-1003, 26-1004).

**If malice appears, it cannot matter from what source the malice sprang.** Perry v. State, 102 Ga. 365, 30 S.E. 903 (1897) (decided under former Code 1895, §§ 61, 62).

**"Hot blood" requirement for voluntary manslaughter** is inconsistent with malice. Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**Intention of defendant is matter for jury.** Blakewood v. State, 196 Ga. 34, 25 S.E.2d 643 (1943) (decided under former Code 1933, §§ 26-1003, 26-1004).

Evidence adduced at trial that the victim was unarmed, that the victim made a 9-1-1 call for help moments before being shot, that the victim died of a single gunshot wound fired from a distance of between two and 20 feet away, and that the weapon used in the shooting could not be unintentionally fired, was sufficient to show that defendant did not accidentally shoot the victim. Jackson v. State, 276 Ga. 611, 581 S.E.2d 34 (2003).

**When weapon is used in manner not naturally calculated to produce death,** intent is fact issue. Delk v. State, 135 Ga. 312, 69 S.E. 541, 1912A Ann. Cas. 105 (1910) (decided under former Penal Code 1895, §§ 61, 62).

**Using weapon with intention to do act which will likely produce death** may constitute murder. Aiken v. State, 170 Ga. 895, 154 S.E. 368 (1930) (decided under former Penal Code 1910, §§ 61, 62).

**Inferring intention to kill by use of deadly weapon.** — Although the trial court erred by instructing the jury that it could infer that a person who used a deadly weapon in the manner in which it was usually used and that if the weapon caused a death, the jury could infer the intent to kill, the error was harmless in light of the overwhelming evidence of the defendant's guilt. Lewis v. State, 279 Ga. 69, 608 S.E.2d 602, cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478 (2005).

**It is for jury to determine whether killing is intentional and malicious** from all facts and circumstances. Blair v. State, 245 Ga. 611, 266 S.E.2d 214 (1980).

**When words, threats, menaces, or contemptuous gestures induce fear justifying homicide.** — While provocation by words, threats, menaces, or contemptuous gestures is not sufficient to justify excitement of passion and reduce homicide below grade of murder when killing is done not on account of any fear in mind of slayer, but solely to resent provocation given, it is nevertheless true that such acts may in some instances be sufficient to arouse fears of a reasonable man that the man's life is in danger, the same being a question to be determined by the jury, and that where words, threats, menaces, or contemptuous gestures may thus throw light upon that question, they should not be excluded from consideration of jury. Bird v. State, 71 Ga. App. 643, 31 S.E.2d 835 (1944) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Defendant's threat to kill deceased is relevant where identity of slayer is in issue.** — It is not error to permit a witness for the state to testify that a month before the homicide the witness heard the defendant threaten to kill the deceased, where one of the issues at the trial was the identity of the defendant as the slayer. Aycock v. State, 188 Ga. 551, 4 S.E.2d 221 (1939) (decided under former Code 1933, §§ 26-1003, 26-1004).

**In cases of provocation by threats, motive with which slayer acted** is for jury determination, and if it is claimed that homicide was committed, not in a spirit of revenge, but under fears of a reasonable man, it is for jury to decide

whether or not circumstances were sufficient to justify existence of such fear. *Moore v. State*, 228 Ga. 662, 187 S.E.2d 277 (1972).

**Existence of provocation does not preclude existence of malice.** Malice can be express or it can be implied where no considerable provocation appears. Whether or not a provocation, if any, is such a serious provocation as would be sufficient to excite a sudden, violent, and irresistible passion in a reasonable person, reducing the offense from murder to manslaughter, is generally a question for the jury. *Anderson v. State*, 248 Ga. 682, 285 S.E.2d 533 (1982).

**Former animosities, concerned plots, threats, or nature of act itself** may show express malice. *Roberts v. State*, 3 Ga. 310 (1847) (decided under former law).

**Previous threats, ancient grudges, and waylaying** are external circumstances illustrating express malice. *Mitchum v. State*, 11 Ga. 615 (1852) (decided under former law).

**Prior similar transaction evidence properly admitted to show intent and bent of mind.** — In a prosecution for felony murder during the commission of an aggravated assault, the trial court did not err in admitting relevant similar transaction evidence, consisting of a prior conviction for aggravated assault, considering the similarities between the two crimes, as such illustrated the defendant's course of conduct and bent of mind in resorting to the use of a knife to commit an unprovoked attack on one with whom the defendant was ostensibly socializing. *Nichols v. State*, 281 Ga. 483, 640 S.E.2d 40 (2007).

In a malice murder prosecution when the victim was violently stabbed and severely beaten, evidence that an officer saw the defendant violently attack an acquaintance as the result of a minor disagreement was properly submitted as a similar transaction to show the defendant's bent of mind and course of conduct. *Dixon v. State*, 285 Ga. 312, 677 S.E.2d 76 (2009), overruled on other grounds, 287 Ga. 242, 695 S.E.2d 255 (2010).

**One who conspires to commit murder does so with malice aforethought.** *Orkin v. State*, 236 Ga. 176, 223 S.E.2d 61 (1976).

**Use of "malice aforethought" in indictment.** — Term "malice aforethought" as the term appears in an indictment is not self-explanatory and may be incomprehensible to a layman, particularly one of limited mental capacity, without further explanation. *Gaddy v. Linahan*, 780 F.2d 935 (11th Cir. 1986).

**Malice murder as within scope of robbery conspiracy.** — Jury was not misled into imputing intent to kill from a conspiracy to commit robbery since the charge stressed that the crime charged, malice murder, must have been within the scope of the conspiracy before it could be charged to any coconspirator. *Solomon v. Kemp*, 735 F.2d 395 (11th Cir. 1984), cert. denied, 469 U.S. 1181, 105 S. Ct. 940, 83 L. Ed. 2d 952 (1985).

**Malice murder as within scope of arson.** — Defendant was improperly convicted of murder because, although the defendant was guilty of conspiracy to commit arson, the subsequent murder of one co-conspirator by another to keep the murdered co-conspirator quiet was not reasonably foreseen as a necessary, probable consequence of the arson conspiracy. *Everritt v. State*, 277 Ga. 457, 588 S.E.2d 691 (2003).

**Construed with O.C.G.A. § 40-6-390.** — Murder charge cannot be predicated upon "reckless disregard for safety of persons" under O.C.G.A. § 40-6-390. *Foster v. State*, 239 Ga. 302, 236 S.E.2d 644 (1977).

**Neglect and abuse of an infant may be done with malice aforethought.** — Neglect of an infant can be intentional and deliberate and can, in conjunction with starvation and physical abuse, be done with malice aforethought intended to cause death. *Lackey v. State*, 246 Ga. 331, 271 S.E.2d 478 (1980).

**Parent's state of mind relevant where death was from child neglect.** — Whether a child has been starved, neglected, and abused with malice so as to constitute murder, or has merely been harmed as a result of inability, carelessness, or accident, may often require considerable indirect proof to determine the parent's state of mind. The education, intelligence and work experience of parents in such cases are relevant to question of parent's state of mind and should gen-

**Intent and Malice (Cont'd)****1. In General (Cont'd)**

erally be admitted into evidence. Lackey v. State, 246 Ga. 331, 271 S.E.2d 478 (1980).

**"Neglect," as used in indictment for death of child.** — It was not error to overrule motion to dismiss indictment charging that defendants, with malice aforethought, killed their ten-month old daughter by means of starvation, neglect, and physical abuse on grounds that indictment was imperfect because "neglect" is inconsistent with malice aforethought and cannot constitute murder; neglect as used in indictment is not equivalent of negligence. Lackey v. State, 246 Ga. 331, 271 S.E.2d 478 (1980).

**Intent not admitted by self-defense plea.** — Defendant does not admit intent to kill by pleading that defendant acted in self-defense. Patterson v. Austin, 728 F.2d 1389 (11th Cir. 1984); Brantley v. State, 256 Ga. 136, 345 S.E.2d 329 (1986).

**Evidence of defendant's shooting another the day before homicide** was admissible as demonstrating defendant's bent of mind and propensity for use of a pistol. Bishop v. State, 257 Ga. 136, 356 S.E.2d 503 (1987).

**Homicide resulting from use of "spring gun" to defend habitation** was not justified where defendant was working and not at home when the gun activated. Bishop v. State, 257 Ga. 136, 356 S.E.2d 503 (1987).

**Finding of guilty but mentally ill rather than not guilty by reason of insanity.** — In a trial for murder of defendant's parents, a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that defendant was insane at the time of the crime. Thus, a rational trier of fact could have found defendant guilty but mentally ill beyond a reasonable doubt. Harris v. State, 256 Ga. 350, 349 S.E.2d 374 (1986).

**Shooting of motorcyclist following teenage children home sufficient for conviction.** — Evidence was sufficient to support the convictions of murder, aggravated assault, and firearm possession in connection with the shooting death of the

victim because the evidence showed that: (1) the defendant's teenage children made a cell phone call to the children's parents' home to tell them that the children were being followed by a motorcycle rider; (2) as the children arrived home, the defendant exited from the house with a handgun; (3) the defendant fired two warning shots at the rider when the rider rode past; (4) the rider turned the motorcycle around and when the rider rode past the house again, the defendant fired again as the defendant claimed that the rider swerved toward the defendant; and (5) this shot struck the victim, resulting in the victim's death. Gear v. State, 288 Ga. 500, 705 S.E.2d 632 (2011).

**Sufficient evidence of malice.** — Evidence of malice was sufficient to support the defendant's conviction for malice murder, as the evidence showed that the defendant drove by the victim who the defendant thought had killed the defendant's best friend, that the defendant immediately parked the defendant's car around the corner of a building, grabbed a gun from under a seat in the car, pushed aside a friend who tried to stop the defendant, ran to within a few feet of the victim, and shot the victim twice, even though the defendant could not show that the victim presented any immediate threat to the defendant. Garrett v. State, 276 Ga. 556, 580 S.E.2d 236 (2003).

Evidence supported defendant's convictions for malice murder, attempted arson, and related charges where: (1) the victim was found encased in concrete in a cattle trough on a farm defendant used for hunting; (2) the victim was killed by a .22 caliber bullet wound to the head and multiple stab wounds and the police executing a search warrant found a .22 caliber rifle and ammunition consistent with those used to kill the victim at defendant's home; (3) defendant's mailbox was painted with the same type of paint used on the cattle trough, and similar paint was found at defendant's home; (4) defendant purchased 10 80-pound bags of concrete and a cattle trough, like the one in which the victim was found; and (5) there was a heavy smell of kerosene and a

candle burned down to the stub under the victim's sofa, indicating that someone had unsuccessfully attempted to set the house on fire. *Fortson v. State*, 277 Ga. 164, 587 S.E.2d 39 (2003).

Evidence was sufficient to support defendant's convictions for malice murder, theft by taking, and financial transaction card fraud, as the evidence authorized any rational trier of fact to find defendant guilty of those crimes beyond a reasonable doubt; the evidence showed that defendant struck the victim multiple times with a wrench, causing the victim's death, that the defendant was in possession of a laptop computer that had been missing from the victim's office, and that defendant had used the victim's credit, posing as the victim's wife, on the day the victim died. *Baugh v. State*, 276 Ga. 736, 585 S.E.2d 616 (2003).

When the record revealed that defendant and his girlfriend went to a party together, that he became enraged when the girlfriend and another woman left the party without telling him, and that upon returning home, he strangled his girlfriend, whom he had a history of abusing, and he assaulted the other woman, there was sufficient evidence to support his convictions for malice murder in violation of O.C.G.A. § 16-5-1 and simple assault in violation of O.C.G.A. § 16-5-20. *Rickman v. State*, 277 Ga. 277, 587 S.E.2d 596 (2003).

Evidence was sufficient to support convictions for malice murder and possession of a firearm in the commission of a felony because an eyewitness identified the defendant as one of two armed persons seen getting out of a van and two other eyewitnesses testified that they saw the defendant fire shots at the victim; the medical evidence showed that the victim died from gunshot wounds to the head and neck. *Cox v. State*, 279 Ga. 223, 610 S.E.2d 521 (2005).

Evidence was sufficient to support the defendant's guilt of malice murder and possession of a firearm during the commission of a felony because, although the codefendant fired the shot that killed the victim, eyewitness testimony showed that the defendant was a party to the crimes. *Cox v. State*, 279 Ga. 223, 610 S.E.2d 521 (2005).

Evidence that the defendant fatally shot the victim while the victim knelt unarmed was sufficient to establish the offense of malice murder. *Weldon v. State*, 279 Ga. 185, 611 S.E.2d 36 (2005).

In an action in which the defendant was convicted of the murder of a parent's love interest, defense counsel failure to investigate the victim's violent nature was not ineffective; the jury was given considerable information concerning the victim's violent nature, that the victim had beaten the defendant's parent, and had consumed cocaine; even with further investigation, the outcome of the trial would not have changed; the jury rejected both the justification defense and the lesser charge because there was overwhelming evidence that the defendant committed malice murder. *Cooper v. State*, 279 Ga. 189, 612 S.E.2d 256 (2005).

Eyewitness's identification of the defendant and the statement made to police by the mother of the defendant's children in which the mother stated that the defendant admitted to shooting someone provided sufficient evidence to convict the defendant of malice murder in violation of O.C.G.A. § 16-5-1 and possession of a firearm during the commission of a felony in violation of O.C.G.A. § 16-11-106; the weight accorded to the identification and the statement to police was a matter for the jury. *Wells v. State*, 281 Ga. 253, 637 S.E.2d 8 (2006).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder as the defendant shot the victim from behind twice in the head during a drug deal and several witnesses testified that the defendant bragged to the witnesses about shooting the victim. *Rosser v. State*, 284 Ga. 335, 667 S.E.2d 62 (2008).

Evidence that the defendant shot at the victim until the defendant's gun ran out of bullets, and continued pulling the trigger thereafter, was sufficient to support the defendant's conviction of malice murder. *Brown v. State*, 285 Ga. 324, 676 S.E.2d 221 (2009).

Because testimony about the circumstances of the victim's visit to a home where defendant was shot was relevant and admissible to explain defendant's mo-

**Intent and Malice (Cont'd)**  
**1. In General (Cont'd)**

tive in shooting the victim, the evidence was sufficient to convict defendant of malice murder, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony. *Taylor v. State*, 287 Ga. 440, 696 S.E.2d 652 (2010).

Jury was authorized to find the defendant guilty of malice murder, even if the jury concluded that the defendant did not intend the victim's death, because implied malice was sufficient and the evidence supported a finding of both express and implied malice since the defendant had threatened to kill the victim in the past, and the defendant again threatened to kill the victim just hours before the shooting; there was no "considerable provocation" for the shooting, and a rational jury could find that the circumstances surrounding the killing showed that the defendant had an abandoned and malignant heart, thereby establishing implied malice. *Mills v. State*, 287 Ga. 828, 700 S.E.2d 544 (2010).

**Evidence of malice overwhelming.** — Evidence was sufficient to support the defendant's convictions of malice murder and possession of a firearm during the commission of a felony in relation to the shooting death of a person whom the defendant allegedly suspected of killing the defendant's parent after: (1) three witnesses identified the defendant as the shooter; (2) another witness, who had heard the defendant say that the defendant was going to kill the victim to avenge the death of the defendant's parent, placed the defendant at the crime scene with a gun; (3) two other witnesses averred that the defendant told them that the defendant had killed the victim; and (4) the defendant was arrested two weeks after the murder while carrying the same kind of weapon which was used to kill the victim. Furthermore, although the trial court erroneously charged the jury that it could infer the intent to kill from the defendant's intentional use of a deadly weapon, it was highly probable that the error did not contribute to the judgment and was, therefore, harmless as the evi-

dence of malice was overwhelming. *Smith v. State*, 276 Ga. 263, 577 S.E.2d 548 (2003).

**2. Implied Malice**

**Malice is a state of mind and frequently must be proven indirectly.** *Davis v. State*, 237 Ga. 279, 227 S.E.2d 249 (1976); *Lackey v. State*, 246 Ga. 331, 271 S.E.2d 478 (1980).

**When circumstances indicate an abandoned, malignant heart**, malice is implied absent showing of considerable provocation. *Davis v. State*, 237 Ga. 279, 227 S.E.2d 249 (1976).

**Implied malice or its equivalent must be expressly alleged** in indictment for murder. *Cole v. State*, 68 Ga. App. 179, 22 S.E.2d 529 (1942) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Willful, wanton violation of statutes designed for public safety.** — If the evidence discloses that defendant willfully and wantonly violated statutes designed to insure safety of traveling public on thoroughfares of state and natural and probable result of defendant's conduct was to take human life, malice is implied, and if infractions of such statutes cause another's death, defendant may be found guilty of murder. *Geter v. State*, 219 Ga. 125, 132 S.E.2d 30 (1963) (decided under former Code 1933, §§ 26-1003, 26-1004).

**When deadly weapon is used in homicide.** — If a deadly weapon is used in commission of a homicide, and it appears that the weapon was used in a manner in which such weapons are ordinarily used to kill, the law presumes an intention to kill, and malice will be implied. *Huntsinger v. State*, 200 Ga. 127, 36 S.E.2d 92 (1945) (decided under former Code 1933, §§ 26-1003, 26-1004).

**When one shoots another in sport, malice is implied from such recklessness.** *Collier v. State*, 39 Ga. 31, 99 Am. Dec. 449 (1869) (decided under former Code 1868, §§ 4255, 4256).

**Malice is implied where one shoots into crowd.** *Hamilton v. State*, 129 Ga. 747, 59 S.E. 803 (1907) (decided under former Code 1895, §§ 61, 62).

**Malice may be implied by blows on head with billet of wood.** *Bryant v.*

State, 157 Ga. 195, 121 S.E. 574 (1924) (decided under former Penal Code 1910, §§ 61, 62).

**When homicide is proved, and evidence shows no justification or alleviation, malice will be inferred.** Anderson v. State, 196 Ga. 468, 26 S.E.2d 755 (1943) (decided under former Code 1933, §§ 26-1003, 26-1004).

**“Reckless disregard for safety of persons” cannot serve as implied malice aforethought**, i.e., an abandoned and malignant heart, so as to authorize a murder conviction. Foster v. State, 239 Ga. 302, 236 S.E.2d 644 (1977).

**When criminal negligence constitutes implied malice.** — Criminal negligence constitutes implied malice for purposes of malice murder only when it is capable of producing violence resulting in the destruction of human life. Parker v. State, 270 Ga. 256, 507 S.E.2d 744 (1998), overruled on other grounds, 287 Ga. 881, 700 S.E.2d 394 (2010).

**When one intentionally kills another unlawfully, and neither mitigation nor justification appears,** malice is established, whether killing was done with a weapon likely to produce death or in some other manner. Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28 (1945) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Attempted vehicular suicide by colliding with another vehicle.** — Defendant who attempted to commit suicide by driving defendant's car head-on into another vehicle, whose occupant was killed, could be considered as having an “abandoned and malignant” heart for purposes of implying malice, despite the fact that the primary purpose of defendant's action was to kill self. Anderson v. State, 254 Ga. 470, 330 S.E.2d 592 (1985).

### 3. Presumption and Burden of Proof

**Law presumes intention to kill when slayer unlawfully uses a deadly weapon.** Rogers v. State, 87 Ga. App. 180, 73 S.E.2d 215 (1952) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Law presumes every homicide to be malicious until contrary appears** from facts or circumstances showing excuse or justification. Wiggins v. State, 221 Ga.

609, 146 S.E.2d 294 (1965) (decided under former Code 1933, §§ 26-1003, 26-1004).

**State bears burden of proving malice beyond reasonable doubt.** — Burden of producing some evidence of provocation is on defendant only after state shows circumstances from which malice may be implied, and ultimate burden of proving malice beyond a reasonable doubt is on state. Davis v. State, 237 Ga. 279, 227 S.E.2d 249 (1976).

**Malice is an element of the offense of murder** and must be proved beyond a reasonable doubt. West v. State, 251 Ga. 458, 306 S.E.2d 909 (1983).

**Prosecution has burden to prove intent to kill beyond a reasonable doubt.** Mason v. Balkcom, 487 F. Supp. 554 (M.D. Ga. 1980), rev'd on other grounds, 669 F.2d 222 (5th Cir. 1982), cert. denied, 460 U.S. 1016, 103 S. Ct. 1260, 75 L. Ed. 2d 487 (1983).

**Defendant's duty to produce some evidence of excuse, justification, or mitigation.** — While duty may be placed upon defendant to produce some evidence of excuse, justification, or mitigation before obligation devolves to prosecution to prove unlawfulness and malice beyond proving intentional homicide, prosecution bears ultimate burden of proof as to unlawfulness and malice. Holloway v. McElroy, 474 F. Supp. 1363 (M.D. Ga. 1979), aff'd, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981), overruled on other grounds, Baker v. Montgomery, 811 F.2d 55 (11th Cir. 1987).

**Unlawful acts resulting in death which justify presumption of malice.** — Not all unlawful acts resulting in death of a human being justify presumption of malice; this presumption exists only when killing should happen in commission of an unlawful act which, in its consequences, naturally tends to destroy life of a human being. Smith v. State, 200 Ga. 188, 36 S.E.2d 350 (1945) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Killing with weapon likely to produce death raises presumption of malice.** — Presumption of malice arises where a killing is shown to have been done unlawfully by use of a weapon likely to produce death, and no circumstances of

**Intent and Malice (Cont'd)****3. Presumption and Burden of Proof (Cont'd)**

justification or mitigation appear. Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28 (1945) (decided under former Code 1933, §§ 26-1003, 26-1004).

When state's evidence shows commission of homicide by accused, by use of a deadly weapon, the law presumes murder, and it is then incumbent upon the defendant to show killing to have been otherwise. Ogletree v. State, 209 Ga. 413, 73 S.E.2d 201 (1952) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Overcoming presumption of malice arising from use of deadly weapon.** — Presumption of malice arising from use of deadly weapon may be overcome not only by proof of circumstances of justification, but also by proof of accident or proof of lower grade of homicide; and where evidence for state shows killing by use of a deadly weapon and defendant's sole defense is that of accident, it is error to instruct jury in effect that they would be authorized to imply malice from use of such weapon and to convict defendant unless it be shown that defendant acted under fears of a reasonable man that defendant was in danger from deceased. Ayers v. State, 214 Ga. 156, 103 S.E.2d 574 (1958).

**Deadly weapon may be used in such manner as not necessarily to raise presumption of malice**, but to leave intent as question of fact for jury. Thus, to strike one with the barrel of a pistol, instead of shooting the person, or to strike with the handle of a dirk, instead of with the blade, would not be the ordinary way of using such weapon to kill, and intention to kill would be rather a question of fact than of presumption. Huntsinger v. State, 200 Ga. 127, 36 S.E.2d 92 (1945) (decided under former Code 1933, §§ 26-1003, 26-1004).

**When instrument employed is not per se a deadly weapon.** Huntsinger v. State, 200 Ga. 127, 36 S.E.2d 92 (1945) (decided under former Code 1933, §§ 26-1002, 26-1003, 26-1004).

**When weapon used was not likely to produce death.** — When killing is

shown to have been done unlawfully and intentionally without circumstances of justification or mitigation, though with a weapon not likely to produce death, absence of malice is not necessarily presumed. Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28 (1945) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Motive need not be proved in order to support presumption of malice.** Campbell v. State, 124 Ga. 432, 52 S.E. 914 (1905) (decided under former Penal Code 1895, §§ 61, 62).

**Secretly carrying deadly weapons** does not necessarily imply malice. Alford v. State, 33 Ga. 303, 81 Am. Dec. 209 (1862) (decided under former law).

**No presumption of malice when ax-helve is used** but not proved to be deadly. Henry v. State, 33 Ga. 441 (1863) (decided under former law).

**Malice not presumed where board is hastily picked up and used as a weapon**, and where there is no evidence to show that it had been prepared beforehand. Ray v. State, 15 Ga. 223 (1854) (decided under former law).

**Killing by using deadly weapon in manner likely to produce death**, raises presumption of intention to kill. Davis v. State, 233 Ga. 638, 212 S.E.2d 814 (1975).

**Presumption of intention to kill** arises from use of weapon that, in usual and natural manner in which it was used on occasion in question, is a weapon likely to produce death. Ayers v. State, 214 Ga. 156, 103 S.E.2d 574 (1958) (decided under former Code 1933, §§ 26-1002, 26-1003, 26-1004).

**Usual and natural method of using weapon.** — If a deadly weapon is used in commission of homicide in the usual and natural manner in which such weapon would produce the result, presumption of intention to kill arises. Hanvey v. State, 68 Ga. 612 (1882) (decided under former Code 1873, §§ 4321, 4322); Delk v. State, 135 Ga. 312, 69 S.E. 541, 1912A Ann. Cas. 105 (1910) (decided under former Penal Code 1895, §§ 61, 62).

**Presumption of intention to kill from use of pistol to kill another.** — When a deadly weapon (pistol) was used to accomplish the killing, and the weapon

was used in the usual and natural manner in which such a weapon would produce that result, a presumption of an intention to kill would arise. *Hilburn v. State*, 57 Ga. App. 854, 197 S.E. 73 (1938) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Intent to kill is presumed by stabbing in back with pocketknife.**

*Johnson v. State*, 4 Ga. App. 59, 60 S.E. 813 (1908) (decided under former Penal Code 1895, §§ 61, 62); *Lott v. State*, 18 Ga. App. 747, 90 S.E. 727 (1916) (decided under former Penal Code 1910, §§ 61, 62).

**Mandatory rebuttable presumption concerning the issue of intent** is impermissible under the due process clause, but any error is harmless where the overwhelming and unrebutted evidence negates any possibility that defendant acted impulsively or otherwise unintentionally. *Potts v. Kemp*, 814 F.2d 1512 (11th Cir. 1987), cert. denied, 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989).

**If a homicide is proved and evidence adduced to establish homicide shows neither mitigation nor justification**, malice will be presumed. *Boyd v. State*, 136 Ga. 340, 71 S.E. 416 (1911) (decided under former Penal Code 1910, §§ 61, 62).

**Evidence of alleviation or justification** may overcome malice presumption. *Boyd v. State*, 136 Ga. 340, 71 S.E. 416 (1911) (decided under former Penal Code 1910, §§ 61, 62).

Malice will not be presumed where proof of homicide is derived solely from admission of defendant which itself presents an exculpatory explanation of justification, excuse, or mitigation. *Elder v. State*, 212 Ga. 705, 95 S.E.2d 373 (1956) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Malice is not presumed where proof of homicide is derived through admission of defendant** which itself presents matters of exculpation. *Wall v. State*, 5 Ga. App. 305, 63 S.E. 27 (1908) (decided under former Penal Code 1895, §§ 61, 62).

### Defenses

**Defendant could not argue justification as a defense** since defendant de-

nied firing the weapon into the crowd; thus, defendant did not meet the elements of justification whereby the defendant admitted acting with the intent to inflict an injury, but claimed doing so while in reasonable fear of suffering immediate serious harm. *Broussard v. State*, 276 Ga. 216, 576 S.E.2d 883 (2003).

**Defense of accident.** — Trial court was not required, *sua sponte*, to instruct the jury that the state had the burden to disprove a defense of accident beyond a reasonable doubt, and the trial court's instructions in defendant's trial on charges of felony murder and cruelty to children in the first degree were adequate in the absence of a request for an additional charge; however, the state supreme court remanded the case so the trial court could hold a hearing on defendant's claim that defendant was denied effective assistance of trial counsel. *Shadron v. State*, 275 Ga. 767, 573 S.E.2d 73 (2002).

**Defense of self-defense.** — Felony murder and aggravated assault convictions were upheld on appeal as the defendant's defense of self-defense lacked merit given evidence that any imminent threat posed against the defendant had passed, the victim was shot in the head after a confrontation had ended, and the victim had retreated to the victim's car and was being driven away at the time the fatal shot was dealt. *Woolfolk v. State*, 282 Ga. 139, 644 S.E.2d 828 (2007).

In a malice murder prosecution, the defendant's testimony that an unarmed person approached the defendant aggressively with the person's hands up did not establish that the defendant had a reasonable belief that stabbing the person in a manner likely to, and which did, cause death was necessary to prevent the defendant's own death or great bodily injury. Thus, the defendant was not entitled to a justification instruction under O.C.G.A. § 16-3-21(a). *Boyd v. State*, 284 Ga. 46, 663 S.E.2d 218 (2008).

Defendant was properly convicted of malice murder, armed robbery, and possession of a firearm during the commission of a felony because although a witness testified that the defendant told the witness that the victim was about to pull a weapon, the evidence was more than suf-

**Defenses (Cont'd)**

ficient to enable a rational trier of fact to find that the defendant did not act in self-defense when the defendant shot the victim and that the defendant was guilty beyond a reasonable doubt of the crimes for which the defendant was convicted. *White v. State*, 287 Ga. 208, 695 S.E.2d 222 (2010).

**Effect of malice in self-defense murders.** — One may kill another against whom one entertains malice, and yet not be guilty of murder. One may harbor the most intense hatred toward another; one may court an opportunity to take one's life; and yet, if, to save one's own life, the facts showed that one was fully justified in slaying one's adversary, one's malice shall not be taken into account. *Shafer v. State*, 193 Ga. 748, 20 S.E.2d 34 (1942) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Defenses of self-defense and accident are inconsistent.** — See *Wilkerson v. State*, 183 Ga. App. 26, 357 S.E.2d 814, cert. denied, 183 Ga. App. 907, 357 S.E.2d 814 (1987).

**Accident not a defense to felony murder.** — Trial court did not err in charging the jury that, while accident can be a defense to the underlying felony of aggravated assault, it cannot be a defense to a felony murder predicated upon the underlying felony of aggravated assault. *Tessmer v. State*, 273 Ga. 220, 539 S.E.2d 816 (2000).

**Inneffective assistance of counsel in preparing defense.** — Habeas court correctly concluded that trial counsel rendered deficient performance by failing to investigate the factual defense to a crime and failing to obtain available testimony confirming that defense and their client's own statements to them. Furthermore, counsel's decision to end the investigation into an individual's involvement when they did was neither consistent with professional standards nor reasonable in light of the evidence obtained by habeas counsel, evidence that would have caused reasonably competent counsel to investigate further and therefore defendant was granted a new trial. *Terry v. Jenkins*, 280 Ga. 341, 627 S.E.2d 7 (2006).

**Evidence of Malice**

**Reckless disregard of human life.** — To demonstrate malice murder, evidence that the defendant acted in reckless disregard of human life is as equally probative as evidence that defendant acted with a specific intent to kill. *Parker v. State*, 270 Ga. 256, 507 S.E.2d 744 (1998), overruled on other grounds, 287 Ga. 881, 700 S.E.2d 394 (2010).

**Defendant's actions demonstrated malice.** — Based on defendant's behavior before the shooting, the obscene comment defendant made about the victim, and defendant's actions afterwards, defendant possessed the requisite malice, pursuant to O.C.G.A. § 16-5-1(a), when defendant shot and killed the victim. *Sapp v. State*, 273 Ga. 472, 543 S.E.2d 27 (2001).

Evidence was sufficient to support the defendant's conviction for malice murder where the defendant entered into an altercation with the victim, removed a pistol from behind the defendant's back and struck the victim with it resulting in a struggle over the pistol and it discharging, grazing the defendant's neck; the defendant gained control of the pistol and the victim went behind a nearby parked car where a bystander told the defendant that the defendant should not shoot the victim. The defendant stated that the victim shot the defendant with the defendant's own gun and the defendant approached the parked car and stated to the victim that the victim would die that day thereafter the defendant shot the victim several times, fatally hitting the victim once in the chest. *Barner v. State*, 276 Ga. 292, 578 S.E.2d 121 (2003).

There was sufficient evidence to support the jury's verdict that the defendant was guilty beyond a reasonable doubt of aggravated assault in violation of O.C.G.A. § 16-5-21 and of malice murder in violation of O.C.G.A. § 16-5-1, because the defendant saw the victim trying to break up a fight between the victim's sibling and another person, the defendant became angry and followed the victim and the victim's sibling after the fight broke up, the defendant then swore at them and shot at them, and the defendant's claim of self-defense was not found to be credible.

Harris v. State, 278 Ga. 596, 604 S.E.2d 788 (2004).

Evidence supported the defendant's conviction of malice murder because the defendant pointed a loaded revolver at the victim and pulled its trigger twice, while driving, fatally wounding the victim, the defendant did not call 9-1-1 from the defendant's cell phone and drove past a hospital, and the revolver had a hammer block, preventing it from firing unless pressure was applied to the trigger. Reed v. State, 279 Ga. 81, 610 S.E.2d 35 (2005).

Evidence introduced at trial was sufficient for a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of malice murder because, while the defendant and the victim were talking in the parking lot of a store during the early morning hours, the defendant shot the victim in the face and took the victim's wallet. Roop v. State, 279 Ga. 183, 611 S.E.2d 34 (2005).

Evidence of malice was sufficient for a conviction because the defendant was armed before going to the victim's home, shot the victim twice from a distance of five feet and, after some delay, the defendant shot a third time, into the victim's mouth and the victim was unarmed; the defendant told a police investigator that the victim got in the defendant's face so the defendant shot the victim. Cooper v. State, 279 Ga. 189, 612 S.E.2d 256 (2005).

Evidence was sufficient to support the defendant's convictions for malice murder and possession of a firearm during the commission of a felony, as the circumstantial evidence showed the defendant shot the victim three times, that the defendant did so in retaliation for the victim allegedly arranging to rob the codefendants of certain property they planned to sell to buy drugs, that the defendant did not report the shooting but, instead, fled the scene, and stated "just shot that damn boy," but did not claim to have shot the victim accidentally. Glenn v. State, 279 Ga. 277, 612 S.E.2d 478 (2005).

There was sufficient evidence to convict the defendant of malice murder under O.C.G.A. § 16-5-1 based upon the defendant's actions of instigating the gang attack on the victim and participating in the attack with a gun even though the defen-

dant did not actually shoot the victim; that the defendant was criminally responsible under O.C.G.A. § 16-2-20. Ros v. State, 279 Ga. 604, 619 S.E.2d 644 (2005).

There was sufficient evidence to uphold a defendant's convictions for malice murder, aggravated assault, and possession of a firearm during the commission of a crime in connection with the fatal shootings of two men, and the wounding of four other men, as the jury was authorized to accept an accomplice's version of events, including that robbery was the initial motive and that the defendant fired the shots that killed and wounded the victims. The fact that conflicts in the evidence were resolved adversely to the defendant did not render the evidence insufficient and there was ample evidence that the defendant acted with implied malice, therefore, there was no error in determining that the killings were malice murders rather than felony murders. Jackson v. State, 282 Ga. 668, 653 S.E.2d 28 (2007).

Legally sufficient evidence was presented to convict a defendant of malice murder as testimony was presented that the defendant contacted an individual to get rid of the defendant's spouse due to a contentious divorce and the individual made arrangements and brought a friend to the spouse's home where the friend posed as a flower delivery person and shot the spouse when the door was opened; the murder occurred on the day of the final divorce hearing. Sullivan v. State, 284 Ga. 358, 667 S.E.2d 32 (2008).

Evidence that the defendant went to the victim's home with a gun, intending to rob the victim, and that after fatally shooting the victim, the defendant continued with the defendant's plan to steal the victim's money, and later attempted to destroy evidence of the crimes, was sufficient to establish the malice required to convict the defendant of malice murder. Stahl v. State, 284 Ga. 316, 669 S.E.2d 655 (2008).

Defendant's conviction of malice murder was proper. Based on videotape evidence showing that the defendant followed the victim out of a store, jumped on the victim from behind, and stabbed the victim multiple times, the jury was authorized to determine that the defendant acted with malice aforethought. Brown v. State, 284 Ga. 838, 672 S.E.2d 651 (2009).

**Evidence of Malice (Cont'd)**

Trial court properly denied the defendant's motion for a directed verdict of acquittal in a trial for malice murder, O.C.G.A. § 16-5-1(b), because there was evidence that the victim did not provoke the defendant's attack and that the defendant acted with an abandoned and malignant heart by repeated acts of violence, including the use of a choke hold and the defendant's refusal to remove the defendant's body from the chest of the comatose victim. Hicks v. State, 285 Ga. 386, 677 S.E.2d 111 (2009).

**Defendant alone with victim.** — Evidence that the wounds a murder victim received in each side of the head were each sufficient to instantaneously debilitate the victim and render any voluntary movement on the victim's part impossible, along with the defendant's admission that the defendant was alone with the victim at the time of the victim's death, were sufficient to allow a jury to find the defendant committed malice murder and to allow the jury to reject the defendant's claim that the victim was responsible for the victim's own death. Brewer v. State, 280 Ga. 18, 622 S.E.2d 348 (2005).

**Contradictory testimony did not prohibit murder conviction.** — When defendant argued that the evidence was insufficient to sustain defendant's conviction for felony murder of a person, O.C.G.A. § 16-5-1, while in the commission of an aggravated assault, aggravated assault on another person, and two counts of possession of a firearm during the commission of a felony because codefendants who testified against the defendant gave contradictory testimony, the appellate court noted that the inconsistent testimony was put before the jury along with defendant's admission that the defendant was the driver, as well as other physical and circumstantial evidence of defendant's involvement in the shooting. Thus, the convictions were affirmed. Escutia v. State, 277 Ga. 400, 589 S.E.2d 66 (2003).

Despite the defendant's contention that a voluntary manslaughter verdict should have been returned, given that the victim invited a violent confrontation, eyewitness testimony which established that the

defendant was driving recklessly before confronting the victim with a knife, which led to the fatal stabbing, supported a malice murder conviction. Lonergan v. State, 281 Ga. 637, 641 S.E.2d 792 (2007).

**Evidence sufficient to support conviction.** — Evidence that defendant and another person hijacked the victim, put the victim in the trunk of the car, the other person later shot the victim, both subsequently dumped the body and returned the car, was sufficient to support defendant's conviction of malice murder and possession of a weapon during a felony. Washington v. State, 276 Ga. 655, 581 S.E.2d 518 (2003).

Evidence that right after the defendant lost money gambling, the defendant and two other persons agreed to go rob a store, that the defendant was armed for that purpose, that the defendant and the other persons then drove to the store, that the defendant entered the store to help facilitate the robbery, and that the defendant looked on as one of the other persons demanded money from the clerk and then shot the clerk was sufficient to support the defendant's conviction for malice murder. Collins v. State, 276 Ga. 726, 583 S.E.2d 26 (2003).

Evidence was sufficient to convict the defendant of malice murder when the defendant drove the defendant's sibling to a rendezvous with the victim, then drove while the sibling shot the victim to death in the defendant's car; thus, the defendant's life sentence was affirmed. Brown v. State, 277 Ga. 623, 593 S.E.2d 343 (2004).

Evidence that the defendant had previously had difficulties in the defendant's relationship with the murder victim, that the defendant had previously fired a gun into the bedroom where the murder victim and the victim's love interest were sleeping, that the defendant might have killed the victim if the victim woke the defendant and the defendant was mad, that the murder victim's body was found in the woods and the defendant stated that the defendant had been in the woods because the defendant's car broke down, and that the victim died of ligature strangulation, was sufficient to support the defendant's conviction for malice murder. Moody v. State, 277 Ga. 676, 594 S.E.2d 350 (2004).

Because the defendant fatally stabbed the defendant's estranged spouse's love interest, stabbed the spouse in the head, and then bragged about those actions, the evidence was sufficient to convict the defendant of malice murder and aggravated assault. *Henry v. State*, 279 Ga. 615, 619 S.E.2d 609 (2005).

Evidence that the defendant took money from the one victim, beat the victim while doing so, that the defendant was armed at the time, that the defendant had the victim removed from the defendant's house by the codefendants so that the one victim could be murdered elsewhere, and that the second victim was removed from the defendants house by another codefendant, all after the one victim and the second victim were suspected of plotting to rob the defendant, who was selling illegal drugs from the defendant's home, was sufficient to support the defendant's convictions for malice murder, kidnapping, armed robbery, and being in possession of a firearm during the commission of a felony. *Mason v. State*, 279 Ga. 636, 619 S.E.2d 621 (2005).

Evidence was sufficient to support the defendant's conviction for malice murder as the evidence showed that the defendant was with the victim shortly before the victim's body was found, that the defendant admitted stabbing the victim multiple times, and that police recovered evidence consistent with the defendant having stabbed the victim between 45 and 57 times after the defendant and the victim smoked crack cocaine together. *Cunningham v. State*, 279 Ga. 694, 620 S.E.2d 374 (2005).

Sufficient evidence supported the defendant's conviction for malice murder because: (1) two eyewitnesses who were the defendant's acquaintances saw the defendant commit the crime; (2) the defendant's fingerprints were found on the murder weapon, from which bullets and shell casings recovered from the crime scene and the victim's body were fired; (3) when the defendant was arrested the defendant was wearing the type of athletic shoes a witness testified the defendant was wearing on the night of the shooting; and (4) the defendant's love interest testified that the defendant sometimes drove a small

red car similar to the one a witness testified the defendant drove on the night of the crimes. *Washington v. State*, 279 Ga. 722, 620 S.E.2d 809 (2005).

Because the defendant asked the victim, a rival gang member, whether the victim had "put a hit" on the defendant, and the victim indicated that the victim had not done so, but did know who did it, whereupon the defendant turned and fatally stabbed the victim, the evidence supported the defendant's conviction of malice murder, in violation of O.C.G.A. § 16-5-1, as well as a conviction for possession of a knife during the commission of a crime. *Garrett v. State*, 280 Ga. 30, 622 S.E.2d 323 (2005).

Evidence was sufficient to support the defendant's convictions of burglary, armed robbery, and malice murder, in violation of O.C.G.A. §§ 16-5-1, 16-7-1(a), and 16-8-41, respectively, because the defendant and a friend decided to rob the victim and they entered the victim's apartment unlawfully with that intent, stabbed and bludgeoned the victim, and took a lock-box and left. *Redwine v. State*, 280 Ga. 58, 623 S.E.2d 485 (2005).

There was sufficient evidence to find the defendant guilty of malice murder, burglary, and possession of a gun during the commission of a crime because a witness testified that the witness, the defendant, and the defendant's sibling drove around looking for a home to burglarize and that while in a house, the two victims came home unexpectedly and were killed; also, DNA found at the crime scene matched the defendant. *Denny v. State*, 280 Ga. 81, 623 S.E.2d 483 (2005).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty of malice murder beyond a reasonable doubt because a witnesses testified that, after fighting over a debt, the defendant chased the victim on foot and then in a car, fatally shot the victim in the head, and then fled. *Jones v. State*, 280 Ga. 205, 625 S.E.2d 1 (2005).

Evidence was sufficient to support convictions of malice murder after the elderly victim was stabbed to death, although the victim usually kept large sums of money at the victim's home in a bank envelope, and should have had about \$800 in cash,

**Evidence of Malice (Cont'd)**

no money was found after the victim's death, the defendant was seen at the victim's home the day before the victim's body was found, the defendant was seen with about \$800, the defendant gave several people money for various reasons and said that the money was from a bank envelope from a person the defendant did work for, and when the defendant told police that the defendant worked for the victim on the day of the victim's death, and that the victim paid the defendant \$20, but denied that the defendant harmed the victim. Patterson v. State, 280 Ga. 132, 625 S.E.2d 395 (2006).

Malice murder and attempted arson convictions were upheld as: (1) the evidence presented showed that an attempted arson was inextricably linked to the victim's murder, and the jury was authorized to find beyond a reasonable doubt that the defendant was guilty; (2) the admission of two handwritten documents that the defendant had penned was proper as their prejudicial impact did not outweigh their probative value; and (3) the trial court did not abuse the court's discretion in determining that any prejudicial impact of a religious prayer asking for strength, and an expression of uncertainty as to what "makes me tick," did not outweigh the probative value of the evidence. Fortson v. State, 280 Ga. 376, 628 S.E.2d 104 (2006).

Defendant's conviction of malice murder was supported by sufficient evidence that, during a fight with the defendant, the victim threw a gun out of a car window and that the defendant retrieved the gun and shot the victim; later, when interrogated by the police, the defendant gave a statement and led police to the murder weapon; the element of malice was not negated simply because the defendant and the victim were fighting when the fatal shots were fired. Moore v. State, 280 Ga. 766, 632 S.E.2d 632 (2006).

Because each of the three defendants made statements implicating themselves in the crimes of malice murder in violation of O.C.G.A. § 16-5-1 and armed robbery in violation of O.C.G.A. § 16-8-41(a) and because money and electronic equipment

were stolen from the home, there was sufficient evidence to convict the defendants of the crimes. Brooks v. State, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 549 U.S. 1215, 127 S. Ct. 1266, 167 L. Ed. 2d 91 (2007).

Evidence was sufficient to convict the defendant of malice murder under O.C.G.A. § 16-5-1 and of possession of a knife in the commission of a felony in violation of O.C.G.A. § 16-11-106; the defendant called 9-1-1 to report the defendant's killing of the victim, who had earlier broken up with the defendant, and the victim was found with fatal stab wounds and a five-inch knife blade embedded in the victim's neck. Perez v. State, 281 Ga. 175, 637 S.E.2d 30 (2006).

Evidence was sufficient to convict the defendant of malice murder under O.C.G.A. § 16-5-1 and armed robbery under O.C.G.A. § 16-8-41 despite the defendant's alibi; the jury was permitted to reject the alibi testimony, and the jury could have found that the circumstantial evidence, which included the defendant's fingerprints and footprints at the scene and a car that defendant was known to drive, was sufficient to exclude every reasonable hypothesis save that of the defendant's guilt. Daniels v. State, 281 Ga. 226, 637 S.E.2d 403 (2006).

Evidence was sufficient to support a defendant's conviction for felony murder after the defendant's romantic friend testified to being present in the victim's motel room when the defendant shot the victim. White v. State, 283 Ga. 566, 662 S.E.2d 131 (2008).

Sufficient evidence supported the defendant's malice murder conviction. The jury was free to reject the defendant's claim that one of the victims fired the first shot, and evidence of a struggle between the defendant and one victim over control of a handgun did not require that there be a finding of voluntary manslaughter. As for intent, malice murder could be shown by evidence that the defendant acted where no considerable provocation appeared and where all the circumstances of the killing showed an abandoned and malignant heart. Allen v. State, 284 Ga. 310, 667 S.E.2d 54 (2008).

Since the evidence established the de-

fendant shot three men and took money from one of them, and two of the men survived and identified the defendant as the shooter, the evidence was sufficient to convict the defendant of malice murder. *Abdullah v. State*, 284 Ga. 399, 667 S.E.2d 584 (2008).

Sufficient evidence was presented to convict a defendant of malice murder because, although the defendant gave conflicting statements to the police, the defendant admitted shooting the victim, but in self defense, and eyewitness testimony indicated that an individual handed a gun to the defendant, who ran up to the victim, accused the victim of robbery, and fatally shot the victim in the head. *Hill v. State*, 284 Ga. 521, 668 S.E.2d 673 (2008).

Evidence was sufficient to support a defendant's conviction for malice murder and possession of a firearm during the commission of a crime when: (1) a person fitting the defendant's description was seen talking to a person in a car at the victim's home; (2) a neighbor found the victim sitting behind the wheel of the car with gunshot wounds to the head; (3) the victim told several witnesses that the defendant was the shooter and described the vehicle the defendant had been driving; and (4) paint found on the bumper of the defendant's vehicle was consistent with the paint on the victim's car. *Thomas v. State*, 284 Ga. 540, 668 S.E.2d 711 (2008).

Defendant's conviction for malice murder was supported by legally sufficient evidence because while the defendant claimed that the fatal gunshot could not have come from the defendant's gun as there was no stippling on the victim's body or clothes and, thus, the fatal shot had to be fired from more than three feet away, the precise location of the shooter based on the resting place of a casing could not be determined as the casings from the gun used by the defendant typically flew six to ten feet rearward and to the right when the gun was fired. *Baker v. State*, 284 Ga. 537, 668 S.E.2d 716 (2008).

Convictions against the defendant for malice murder, burglary, armed robbery, and aggravated assault were supported by evidence that the defendant entered the victim's home, hit the victim multiple times about the head and face with a tree

limb with a metal piece on it, and wrote a check in defendant's name from the victim's checkbook; evidence included witness testimony from the bank where defendant cashed the check, defendant's confession to police, and physical evidence. *Bell v. State*, 284 Ga. 790, 671 S.E.2d 815 (2009).

Convictions against the defendant for malice murder and possession of a firearm during the commission of a crime were supported by evidence that the defendant shot a victim in the back of the head during a drug sale because the victim allegedly set up the defendant's brother; at trial, there was testimony from witnesses to various parts of the incident as well as physical evidence that connected the defendant to the crime. *Sheppard v. State*, 284 Ga. 775, 671 S.E.2d 830 (2009).

Evidence was sufficient to enable the jury to find the defendant guilty of malice murder beyond a reasonable doubt as several witnesses saw the victim leave with the defendant in the defendant's car, and evidence showed that shortly after the murder the defendant repainted the car, and, shortly after the victim's remains were discovered, sold the car. *Manley v. State*, 284 Ga. 840, 672 S.E.2d 654 (2009).

Sufficient evidence was presented to convict a defendant of malice murder and cruelty to children under O.C.G.A. § 16-5-70(b) because the defendant testified that the defendant shook the five-year-old victim after the victim spit up dinner and in so doing, struck the victim's head against the railing of a bunk bed; the victim died a few days later of massive head trauma and intracranial bleeding. *Wright v. State*, 285 Ga. 57, 673 S.E.2d 249 (2009).

Evidence was sufficient to support defendant's conviction of murder, O.C.G.A. § 16-5-1, under circumstances in which, among other things, the record was replete with evidence that the defendant, not another buyer, arranged a drug sale with the victim, that the defendant knew the other buyer was armed when the drug sale occurred, that the defendant argued with the victim over the price for the drugs, precipitating the shooting, that the defendant fled the scene and destroyed evidence, and that the defendant threat-

**Evidence of Malice (Cont'd)**

ened a witness; the defendant testified that, during the drug transaction, the victim turned with a gun in the victim's hand and the other buyer shot the victim. Duggan v. State, 285 Ga. 363, 677 S.E.2d 92 (2009).

Evidence authorized the jury to conclude that the defendant was guilty beyond a reasonable doubt of malice murder, armed robbery, and aggravated assault because defendant and defendant's codefendants entered an apartment masked and armed with an assault rifle, and the defendant fired the rifle at the victim and fatally wounded the victim. Zackery v. State, 286 Ga. 399, 688 S.E.2d 354 (2010).

Because defendant admitted to being in the back seat of the victims' car and that defendant sold the victims' drugs, and because bullets recovered from the bodies matched the pistol and ammunition found in a box in defendant's house, the evidence was sufficient to find defendant guilty of malice murder and possession of a firearm during the commission of a felony. Barnes v. State, 287 Ga. 423, 696 S.E.2d 629 (2010).

Evidence was sufficient to support defendant's conviction for malice murder since there was testimony that the victim was going to require the defendant to move out of the victim's house because of the defendant's bizarre behavior brought about by drug use, and since the evidence was sufficient to authorize the jury to conclude that the defendant did not act in self-defense. White v. State, 287 Ga. 713, 699 S.E.2d 291 (2010).

Evidence was sufficient to authorize a rational trier of fact to find the defendants guilty beyond a reasonable doubt of malice murder and aggravated assault because the independent corroborating evidence in the case was substantial; an accomplice's testimony implicating the defendants was corroborated by the aggravated assault victim, who positively identified one of the defendants, that defendant's own admission to a woman in the defendant's apartment, evidence that the second defendant had sustained shotgun wounds on the evening of the crimes, ballistics evidence tying that defendant to the crime scene,

and the presence of that defendant's blood on the first defendant's clothing and in the getaway vehicle. Ward v. State, 288 Ga. 641, 706 S.E.2d 430 (2011).

Evidence was sufficient under O.C.G.A. § 24-4-6 to support the defendant's convictions for malice murder, felony murder, aggravated assault, possession of a knife during the commission of a crime, financial transaction card fraud, and recidivism because there was evidence placing the defendant at the victim's home during the time of the murder and evidence of the victim's blood on the defendant's shoes, which the defendant intentionally chose not to wear when being questioned by police; the evidence, together with the defendant's own statements regarding the defendant's use of the victim's debit card, was sufficient to authorize the jury to determine that the state excluded all reasonable hypotheses save that of the defendant's guilt and to find the defendant guilty beyond a reasonable doubt of the crimes of which the defendant was convicted. Johnson v. State, 288 Ga. 771, 707 S.E.2d 92 (2011).

**Evidence sufficient to support conviction of estranged spouse.** — Evidence was sufficient to support the defendant's conviction for malice murder because, after the entry of a family violence protective order, the defendant purchased a knife with a large blade, followed the victim, who was the defendant's estranged spouse, and attempted to talk with the victim, appeared at a grocery store where the victim was, yelled at the victim, and stabbed and slashed the victim multiple times, resulting in the victim's death. The defendant then waited for the police, and stated that the defendant would not hurt anyone else, that the defendant came to do what the defendant needed to do, that no one got away with hurting the defendant, and that the victim, whom the defendant called by a derogatory term, deserved it because of what the victim did to the defendant in court. Weaver v. State, 288 Ga. 540, 705 S.E.2d 627 (2011).

**Evidence sufficient to support conviction of murder of grandparents.** — There was sufficient evidence to support the defendant's convictions for murder,

committed while the defendant was engaged in the capital felonies of armed robbery, aggravated battery, and kidnapping with bodily injury, which included accomplice testimony and items belonging to the victims as well as blood found in the defendant's motel room. Defendant tried to rob a friend's love interest's grandparents, tortured them with a hot poker, and bashed their heads in with an axe. Sealey v. State, 277 Ga. 617, 593 S.E.2d 335 (2004).

**Evidence sufficient to support conviction of murder on parents.** — Evidence supported conviction for malice murder, burglary, and hindering a police officer because the defendant was at the back door of the defendant's parent's home without authorization, and fled when an officer tried to handcuff the defendant, the defendant's parent was found dead from massive head injuries, and the parent's rings, a lawn mower blade, and a hatchet were found on the defendant's person or stashed in bags outside the home. Smith v. State, 279 Ga. 172, 611 S.E.2d 1 (2005).

**Evidence sufficient to convict police officer of malice murder.** — Evidence was sufficient to allow a rational trier of fact to find the defendant guilty of malice murder because: (1) a blood trail led investigators to conclude the perpetrator had a pre-existing leg injury, which the defendant had; (2) the defendant had fresh bruises and cuts on the defendant's hands for which the defendant had no plausible explanation; (3) the defendant, who was a police officer, no longer had the defendant's service revolver, which was the same caliber weapon used to kill one of the victims; (4) expert testimony revealed the presence of the defendant's blood at several locations within the crime scene; and (5) a bloody shoe print matching shoe prints at the crime scene was found in the defendant's garage. Williams v. State, 279 Ga. 731, 620 S.E.2d 816 (2005).

**Strangulation as evidence of malice.** — Despite the fact that the defendant did not admit to every element of the charged offenses, the state presented sufficient evidence to corroborate the admissions made specifically, that the victim died from manual strangulation inflicted by another human being shortly after the

defendant was in the victim's company, and presented ample evidence of the defendant's intent to take the victim's life. Sheffield v. State, 281 Ga. 33, 635 S.E.2d 776 (2006).

**Sufficient evidence of malice in death of a child.** — With regard to a defendant's trial and conviction for malice murder arising from the severe physical abuse of the defendant's five-year-old nephew, sufficient evidence existed to support the defendant's conviction since the evidence established that the defendant struck and beat the victim and deprived him of necessary nutrition as alleged in the indictment and that those actions caused the child's death. Peterson v. State, 282 Ga. 286, 647 S.E.2d 592 (2007).

**Victim found in defendant's home.** — There was sufficient evidence to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder where the victim, found in the defendant's home, had been beaten and died from a severe blow to the head. Hannah v. State, 278 Ga. 195, 599 S.E.2d 177 (2004).

**Setting a fire as evidence of malice.** — Because the defendant admitted that, while the defendant's children were sleeping and to scare the defendant's love interest, the defendant used a cigarette lighter to set fire to the bedding on the corner of a child's bed, causing a fire in a trailer that killed three children, the evidence was sufficient to enable a rational trier of fact to find that the defendant was, beyond a reasonable doubt, guilty of three counts of malice murder, three counts of felony murder, and two counts of arson in the first degree; thus, the trial court did not err by denying the defendant's motion for a directed verdict of acquittal pursuant to O.C.G.A. § 17-9-1(a). Riley v. State, 278 Ga. 677, 604 S.E.2d 488 (2004).

**Poisoning of victim.** — With regard to a defendant's conviction for the malice murder of the defendant's husband, the trial court did not err in admitting evidence of a similar transaction as to the defendant poisoning a boyfriend with antifreeze via being fed green Jell-O, because the defendant was intimate with both victims; both men went to the hospital complaining of flu-like symptoms soon

**Evidence of Malice (Cont'd)**

before each man died; both men died from the unique cause of antifreeze poisoning; the defendant was the last person to see either man alive; both men died soon after the defendant served them Jell-O; and the defendant, who had financial problems before the deaths of both men, collected substantial money in connection with each man's death. *Turner v. State*, 281 Ga. 647, 641 S.E.2d 527 (2007).

**Introduction of civil dispute in murder prosecution.** — Defendant's malice murder and aggravated battery convictions were upheld on appeal as the trial court did not err in introducing into evidence the pleadings filed in a civil lawsuit brought by defendant against the victim and others as the evidence was introduced to show the defendant's motive or state of mind. *Taylor v. State*, 282 Ga. 44, 644 S.E.2d 850 (2007), cert. denied, 552 U.S. 950, 128 S. Ct. 384, 169 L. Ed. 2d 263 (2007).

**Evidence of wounding former wife.** — In defendant's prosecution for the murder of his present wife, evidence that defendant had shot his former wife in the shoulder with a pistol was admissible to show malice, intent, motive, and bent of mind and did not impermissibly place defendant's character in issue. *Clark v. State*, 255 Ga. 370, 338 S.E.2d 269 (1986).

**Evidence of prior difficulties was admissible.** Brown v. State, 51 Ga. 502 (1874) (decided under former Code 1873, §§ 4321, 4322).

Trial court did not err in denying the defendant's motion to suppress certain testimony about prior difficulties that had occurred between the defendant and the murder victim, as such evidence was relevant to the relationship between the victim and the defendant, and was admissible to show the defendant's motive, intent, and bent of mind in murdering the victim. *Moody v. State*, 277 Ga. 676, 594 S.E.2d 350 (2004).

**Evidence sufficient to show malice during heated argument.** — Facts and circumstances were sufficient to authorize the trial court to infer malice pursuant to O.C.G.A. § 16-5-1 as defendant shot the victim in the back during a heated argu-

ment in which the victim informed defendant that the victim was leaving the defendant. *Latimore v. State*, 262 Ga. 448, 421 S.E.2d 281 (1992).

**Threats, though remote, are admissible in murder trials** for purpose of showing motive and malice. *Pierce v. State*, 212 Ga. 88, 90 S.E.2d 417 (1955) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Threats by accused against deceased as tending to show malice.** — In trial for murder, threats by accused against deceased, though made a considerable period before homicide, are admissible in evidence for state as tending to show malice on part of accused; and mere omission of trial judge to charge jury as to what weight they should give to threats, or as to how jury should regard them in their deliberations, is not cause for new trial, particularly when accused was convicted of voluntary manslaughter only, the verdict thus negativing any conclusion that killing was done in malice. *Ellis v. State*, 72 Ga. App. 469, 34 S.E.2d 171 (1945) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Showing threats is good evidence of malice.** Phillips v. State, 26 Ga. App. 263, 105 S.E. 823 (1921) (decided under former Penal Code 1910, §§ 61, 62).

**Conditional threats are evidence of malice.** Golatt v. State, 130 Ga. 18, 60 S.E. 107 (1908) (decided under former Penal Code 1895, §§ 61, 62).

Witness, who was a friend of the deceased, was allowed to testify in defendant's murder trial under the "necessity" exception about the victim's relationship with the defendant. *Brinson v. State*, 276 Ga. 671, 581 S.E.2d 548 (2003).

**Even uncommunicated threats are evidence of malice.** Graham v. State, 125 Ga. 48, 53 S.E. 816 (1906) (decided under former Penal Code 1895, §§ 61, 62); *Rouse v. State*, 135 Ga. 227, 69 S.E. 180 (1910) (decided under former Penal Code 1895, §§ 61, 62).

**Evidence of state of feelings of parties is admissible to show malice.** Brooks v. State, 134 Ga. 784, 68 S.E. 504 (1910) (decided under former Penal Code 1895, §§ 61, 62).

**Uncommunicated statement tending to show state of feelings of parties**

**is admissible.** McCray v. State, 134 Ga. 416, 68 S.E. 62, 20 Ann. Cas. 101 (1910) (decided under former Penal Code 1895, §§ 61, 62).

**Evidence of difficulty between deceased's husband and accused** several months before homicide is admissible. On trial of man for homicide of his sister-in-law growing out of a difficulty in which her husband also was killed by accused, evidence tending to show previous difficulty between accused and husband although occurring several months prior to homicide, and existence of bad blood between them, was admissible as tending to show malice, intent, or motive in killing deceased. Jeffords v. State, 162 Ga. 573, 134 S.E. 169 (1926) (decided under former Penal Code 1910, §§ 61, 62).

**Evidence of threats made four or five days before homicide** is admissible. Stiles v. State, 57 Ga. 183 (1876) (decided under formal Code 1873, §§ 4321, 4322).

**Intervening time between threat and act determines probative force of threat.** Crumley v. State, 5 Ga. App. 231, 62 S.E. 1005 (1908) (decided under former Penal Code 1910, §§ 61, 62).

**Timely cruelty and ill-treatment by husband towards wife is admissible to show malice and motive.** Roberts v. State, 123 Ga. 146, 51 S.E. 374 (1905) (decided under former Code 1895, §§ 61, 62); Campbell v. State, 123 Ga. 533, 51 S.E. 644 (1905) (decided under former Code 1895, §§ 61, 62); Green v. State, 125 Ga. 742, 54 S.E. 724 (1906) (decided under former Code 1895, §§ 61, 62); Josey v. State, 137 Ga. 769, 74 S.E. 282 (1912) (decided under former Penal Code 1910, §§ 61, 62).

**Acts and declarations following infliction of mortal wound which evidence malice** are admissible. It is competent in trial for murder to prove that, shortly after mortal wound was inflicted, accused made declarations and did acts evidencing malice toward injured person or indifference to that person's fate. Perry v. State, 110 Ga. 234, 36 S.E. 781 (1900) (decided under former Penal Code 1895, §§ 61, 62).

**Mother who destroys her infant to conceal her shame has legal malice.** Jones v. State, 29 Ga. 594 (1859) (decided under former law).

**Providing weapon prior to killing is evidence of malice.** Hayes v. State, 58 Ga. 35 (1877) (decided under former Code 1895, §§ 61, 62); Perry v. State, 102 Ga. 365, 30 S.E. 903 (1897) (decided under former Penal Code 1910, §§ 61, 62).

**Use of weapon likely to produce death in brutal, bloodthirsty manner** as evidence of malice. Daniels v. State, 197 Ga. 754, 30 S.E.2d 625 (1944) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Deliberate violation of law as aid in establishing malice.** — Deliberate violation of law, whether statute or ordinance prohibiting shooting of firearms in city without consent of mayor, is a fact which may be relied upon to aid in establishing malice; while violation of the law in itself is insufficient to supply malice unless it is a felony, if considered in connection with all surrounding facts and circumstances, it is such an unlawful act as naturally tends to destroy human life, it may be relied upon as a fact tending to show an abandoned and malignant heart, and malice. Perry v. State, 78 Ga. App. 273, 50 S.E.2d 709 (1948) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Pouring alcohol upon another's clothing and lighting match to it.** — There being evidence that accused poured alcohol upon body and clothing of his wife, that alcohol is highly inflammable, that accused then applied a match, and that his wife died as a result of the burns, this was sufficient evidence for jury to find that accused intended to kill and that killing was with malice. Blakewood v. State, 196 Ga. 34, 25 S.E.2d 643 (1943) (decided under former Code 1933, §§ 26-1003, 26-1004).

Evidence of the malice murder held sufficient where defendant, while drinking, shot defendant's spouse, despite defendant's claim of accident. Rowe v. State, 276 Ga. 800, 582 S.E.2d 119 (2003).

**Malice, express or implied, is motive present at time of killing,** and no other motive need be shown. Carson v. State, 80 Ga. 170, 5 S.E. 295 (1887) (decided under former Code 1882, §§ 4321, 4322).

**Evidence of bad feeling between defendant and deceased** is admissible in

**Evidence of Malice (Cont'd)**

some cases. *Shaw v. State*, 60 Ga. 246 (1878) (decided under former Code 1873, §§ 4321, 4322).

**Repeated quarrels between the parties may be shown to establish ill will**, but proof may not go back to a remote period to show a particular quarrel or cause of grudge unless it is followed up with proof of a continued difference flowing from that source. *Monroe v. State*, 5 Ga. 85 (1848) (decided under former law).

**Evidence of bad feeling between father of accused and father of deceased** is admissible. *Rawlins v. State*, 124 Ga. 31, 52 S.E. 1 (1905), aff'd, 201 U.S. 638, 26 S. Ct. 560, 50 L. Ed. 899 (1906) (decided under former Penal Code 1895, §§ 61, 62).

**Fact that deceased testified against accused is relevant to show motive.** *Hayes v. State*, 126 Ga. 95, 54 S.E. 809 (1906) (decided under former Penal Code 1895, §§ 61, 62).

**Evidence showing probability of rape** is admissible for purpose of showing motive. *Robinson v. State*, 114 Ga. 56, 39 S.E. 862 (1901) (decided under former Penal Code 1895, §§ 61, 62).

**State may prove facts occurring after homicide which tend to illustrate motive.** *Hoxie v. State*, 114 Ga. 19, 39 S.E. 944 (1901) (decided under former Penal Code 1895, §§ 61, 62).

**Evidence of bad feelings of deceased for defendant, unknown to latter.** — When one is on trial for assassinating another, evidence of bad feeling on part of deceased toward defendant, unknown to defendant prior to killing is inadmissible against the defendant. *Sasser v. State*, 129 Ga. 541, 59 S.E. 255 (1907) (decided under former Penal Code 1895, §§ 61, 62).

**Existence of life insurance on deceased payable to defendant's spouse.** — In murder trial, court did not err in admitting evidence relating to insurance upon life of deceased, payable to defendant's spouse, since under other circumstances of case the evidence was admissible on question of motive. *Johnson v. State*, 186 Ga. 324, 197 S.E. 786 (1938)

(decided under former Code 1933, §§ 26-1003, 26-1004).

**Evidence that defendant intended to take money from the victim**, anticipated a fight, and, after robbing and shooting the victim, returned to the scene and intentionally shot the still-living victim a second time was sufficient to authorize the jury to infer malice. *Jackson v. State*, 267 Ga. 130, 475 S.E.2d 637 (1996).

**Malice murder appropriate when victim shot 14 times.** — Evidence supported the defendant's conviction for malice murder because the defendant admitted shooting the victim 14 times over 10 years ago and then burying the victim's body in a shallow grave because the defendant had been threatened with death for the defendant and the defendant's family members by a drug dealer who thought that the defendant and the victim stole money and drugs from the dealer. *Gravitt v. State*, 279 Ga. 33, 608 S.E.2d 202 (2005).

**Felony Murder****1. In General**

**Georgia legislature intended felony murder to encompass all felonies as defined in former Code 1933, § 26-401** and not just dangerous or forcible felonies. *Baker v. State*, 236 Ga. 754, 225 S.E.2d 269 (1976) (see O.C.G.A. § 16-1-3(5)).

Evidence was sufficient to find the defendant guilty of felony murder based on the felony of cruelty to children; the child's age, the extent of the child's injuries, the nature of the assault to which the child was subjected, and the force with which the child was struck was sufficient evidence from which a jury, applying generally-accepted societal norms, could conclude whether the defendant caused cruel or excessive physical pain. *Kennedy v. State*, 277 Ga. 588, 592 S.E.2d 830 (2004).

**Felony murder does not require malice or intent to kill.** It does, however, require that the defendant possess the requisite criminal intent to commit the underlying felony. *Holliman v. State*, 257 Ga. 209, 356 S.E.2d 886, cert. denied,

484 U.S. 933, 108 S. Ct. 306, 98 L. Ed. 2d 265 (1987).

Defendant's convictions for felony murder and the underlying crime of aggravated assault were supported by sufficient evidence because no proof of the defendant's criminal intent to murder was required for the felony murder conviction, and the aggravated assault conviction did not require proof that the defendant intended to injure the victim, as only proof that the defendant intended to do the act that placed the victim in reasonable apprehension of harm was required. *Smith v. State*, 280 Ga. 490, 629 S.E.2d 816 (2006).

**Felony murder does not require proof of intent, transferred or otherwise,** as an element of the homicide. *Towns v. State*, 260 Ga. 423, 396 S.E.2d 215 (1990), cert. denied, *Barrett v. State*, 263 Ga. 533, 436 S.E.2d 480 (1993), overruled on other grounds, *Wall v. State*, 269 Ga. 506, 500 S.E.2d 904 (1998).

**Person who commits felony is liable for any murder that occurs as result** of the commission of that felony, without regard to whether the person commits, intended to commit, or acted to commit the murder of the victim. *Roberts v. State*, 257 Ga. 180, 356 S.E.2d 871 (1987).

**Bifurcated trial on separate charges.** — Trial court did not violate defendant's double jeopardy rights when it bifurcated the trial, allowing defendant to be tried on a malice murder and felony murder charge. The killing for which defendant was charged was not the subject of another prosecution and defendant's guilt was determined by the same jury in the same prosecution. *Jones v. State*, 276 Ga. 663, 581 S.E.2d 546 (2003).

**Prosecutor's comments in opening statements were permissible.** — Trial court properly denied defendant's motion for a new trial pursuant to O.C.G.A. § 5-5-23 following defendant's conviction of felony murder; the prosecutor did not improperly bolster the credibility of a witness during opening statements. *Wilson v. State*, 276 Ga. 674, 581 S.E.2d 534 (2003).

**Conviction required reversal because evidence was improperly excluded.** — During a trial for felony murder while in the commission of cruelty to a child arising from the death of the defen-

dant's child from brain trauma sustained while the child was in the defendant's care, the defendant was improperly prevented from cross-examining a person who was in the apartment at the time about the person's history of inappropriate behavior toward the person's own child, including allegations of child abuse, because it was a crucial element of the defense that the person was a likely suspect, and, under O.C.G.A. § 24-4-6, the circumstantial evidence did not exclude the reasonable hypothesis that the person was the likely culprit; the defendant's conviction required reversal because it was not highly improbable that the jury's verdict would have been different if the evidence had been admitted, and the error therefore could not be considered harmless. *Scott v. State*, 281 Ga. 373, 637 S.E.2d 652 (2006).

**Only one felony is required to trigger felony-murder rule**, but the state could allege more than one armed robbery in indictment and thereby cause multiple robberies to become lesser included offenses. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

**When there are multiple underlying felonies**, the state is not required to elect between the felonies when charging the defendant with felony murder. *State v. McBride*, 261 Ga. 60, 401 S.E.2d 484 (1991).

Appropriate manner for charging felony murder in instances when more than one underlying felony is alleged is to indict for one count of felony murder, and enumerate the multiple underlying felonies. *State v. McBride*, 261 Ga. 60, 401 S.E.2d 484 (1991).

**Parties to crime.** — Given the testimony provided by both the codefendant and the codefendant's former wife, to whom the defendant admitted to firing the fatal shots killing the victim, which netted the victim's cellular phone and pager and evidence describing how the defendant

**Felony Murder (Cont'd)**  
**1. In General (Cont'd)**

participated in the events that happened before, during, and after the commission of the crimes, sufficient evidence was presented to uphold the defendant's convictions for felony murder and armed robbery as a party to the crimes. *Pruitt v. State*, 282 Ga. 30, 644 S.E.2d 837 (2007).

Evidence established more than the mere presence of the defendant during the commission of the offense of aggravated assault and felony murder predicated on aggravated assault: (1) the defendant assaulted the victim during the drive to the murder scene; (2) the defendant participated in a plot to burn the victim's body and stood lookout while the body was buried; (3) the defendant did not attempt to report the crime; and (4) the defendant watched as another person stabbed the victim before attempting to intervene. *Navarrete v. State*, 283 Ga. 156, 656 S.E.2d 814 (2008), cert. denied, 129 S. Ct. 104, 172 L.Ed.2d 33 (2008).

Evidence was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty as a party to malice murder, aggravated assault, possession of a firearm during the commission of a crime, and tampering with evidence because the evidence showed that before, during, and after the commission of the crimes, the defendant was present and shared the defendant's companionship with the defendant's brothers; the state's evidence authorized the inferences that the defendant, who had assisted the defendant's brothers in attacking the cousin of one of the victims, was not an innocent bystander, that the defendant drove the defendant's brothers to the crime scene knowing that one of the brothers was armed, that the defendant willingly stayed with the defendant's brothers while the brothers tried to start a fight and threatened to kill someone, and that the defendant ran to the defendant's car and drove the brothers away immediately after the brothers had shot one of the victims. *Teasley v. State*, 288 Ga. 468, 704 S.E.2d 800 (2010).

**Felony murder is subject to same penalties as malice murder.** *Burke v.*

*State*, 234 Ga. 512, 216 S.E.2d 812 (1975).

**Convictions for both voluntary manslaughter and felony murder.** — Verdicts of voluntary manslaughter and felony murder were not mutually exclusive under the facts of the case. *Smith v. State*, 272 Ga. 874, 536 S.E.2d 514 (2000).

**Felony murder was prohibited with malice murder conviction.** — When a prisoner was convicted of malice murder under O.C.G.A. § 16-5-1(a), a jury did not return a verdict on felony murder counts because O.C.G.A. § 16-1-7 prohibited a conviction for both offenses for the death of a single victim. Further, the defendant's crime of aggravated assault under O.C.G.A. § 16-5-21(a) also merged with the malice murder offense as it was a crime included within the greater offense. *Newland v. Hall*, 527 F.3d 1162 (11th Cir. 2008), cert. denied, U.S. , 129 S. Ct. 1336, 173 L. Ed. 2d 607 (2009).

**Self-defense may be a defense to felony murder.** *Heard v. State*, 261 Ga. 262, 403 S.E.2d 438 (1991).

**Polygraph results corroborated accomplice's testimony.** — Sufficient evidence supported the defendant's felony murder conviction because the defendant's polygraph results, which the defendant stipulated to admitting at trial, corroborated the accomplice's inculpatory testimony. *Thornton v. State*, 279 Ga. 676, 620 S.E.2d 356 (2005).

**Admission of irrelevant evidence did not require mistrial.** — During a trial for felony murder while in the commission of cruelty to a child, evidence that a defendant's romantic partner did not know that the defendant was married was irrelevant; although the defendant's objection to the admission of the evidence was improperly overruled, the defendant's motion for a mistrial was properly denied because a mistrial was not mandated. *Scott v. State*, 281 Ga. 373, 637 S.E.2d 652 (2006).

**Jury resolves conflicts in evidence.** — Defendant's conviction for felony murder and possession of a firearm in the commission of a crime was supported by sufficient evidence; while there was a conflict in the evidence as to whether the defendant shot the victim in self-defense, it was the role of the jury, not the court, to

resolve conflicts in the evidence. *Jackson v. State*, 279 Ga. 721, 620 S.E.2d 828 (2005).

**Felony murder not lesser included offense.** — In a prosecution on separate counts of malice murder, armed robbery, and kidnapping, the trial court did not err in failing to charge the jury on felony murder as a lesser included offense. *Henry v. State*, 265 Ga. 732, 462 S.E.2d 737 (1995).

**Multiple felony murder convictions, only one person killed.** — Under O.C.G.A. § 16-1-7(a), it was improper to sentence the defendant to two felony murder counts under O.C.G.A. § 16-5-1(c) because there was only one death involved. *Rhodes v. State*, 279 Ga. 587, 619 S.E.2d 659 (2005).

**When elements of malice and underlying felony both exist in murder case,** the law does not preclude verdicts of guilty of both malice and felony murder. However, where there is a single victim, the defendant may be sentenced on either but not both. *Smith v. State*, 258 Ga. 181, 366 S.E.2d 763 (1988).

**Victim need not die during commission of underlying felony.** — There is no merit to the contention that the victim must die during the commission of the underlying felony under a felony-murder indictment. O.C.G.A. § 16-5-1(c), defining felony murder, requires that the death need only be caused by an injury which occurred during the res gestae of the felony. *State v. Cross*, 260 Ga. 845, 401 S.E.2d 510 (1991).

**Sentence following felony murder and vehicular homicide conviction.** — After defendant was convicted of felony murder and vehicular homicide, the trial court properly sentenced defendant to life imprisonment for felony murder since the felony murder statute is separate from the vehicular homicide statute and is not ambiguous about the appropriate sentence. *Diamond v. State*, 267 Ga. 249, 477 S.E.2d 562 (1996).

**Circumstantial evidence was sufficient to sustain conviction in death of child.** — Evidence that a defendant's 13-month-old child died while in the defendant's care from brain trauma caused by being struck by or against an object or

violently shaken, at a time when one other person and that person's child were in the defendant's apartment, provided sufficient circumstantial evidence under O.C.G.A. § 24-4-6 to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder while in the commission of cruelty to a child; questions as to the reasonableness of hypotheses were to be decided by the jury, and the jury's authorized finding that evidence, though circumstantial, was sufficient to exclude every reasonable hypothesis save that of guilt was not to be disturbed unless the guilty verdict was insupportable as a matter of law. *Scott v. State*, 281 Ga. 373, 637 S.E.2d 652 (2006).

Circumstantial evidence supported the defendant's conviction of the felony murder of the defendant's two-month-old child. The victim's grandparent had not had contact with the victim on the day of the murder, and the evidence that the victim was well when the victim's other parent left the house, combined with a medical examiner's testimony and time line regarding the time of the child's death, excluded the other parent's guilt as well. *Nixon v. State*, 284 Ga. 800, 671 S.E.2d 503 (2009).

Contrary to a defendant's contention that the state presented only circumstantial evidence under O.C.G.A. § 24-4-6 that did not exclude all reasonable hypotheses except that of the defendant's guilt, the evidence was sufficient to support the conviction for felony murder and aggravated assault; the defendant's infant child died of a massive closed head trauma complicated by blunt force chest trauma, and the defendant had the sole care of the child just before the child suffered rib injuries allegedly due to the defendant pushing on the child's chest while the child was choking and just before the child suffered seizure-like symptoms. *Berryhill v. State*, 285 Ga. 198, 674 S.E.2d 920 (2009).

**Evidence was sufficient to support conviction.** — Evidence was sufficient to support convictions for felony murder, aggravated assault, and possession of a firearm during the commission of a crime since the record revealed that the defendant was riding in a car, made a gang sign

**Felony Murder (Cont'd)****1. In General (Cont'd)**

to some people on the street, and in response to their obscene gesture, the defendant took out a gun and fired at the people, killing two people and wounding one. Defendant's contention that the defendant was acting to protect the defendant and others in the car, that the defendant fired into the air, and that the defendant did not mean to hurt anyone was found to lack merit. *Ingram v. State*, 276 Ga. 223, 576 S.E.2d 855 (2003).

Evidence was sufficient to support the defendant's conviction for felony murder because the evidence showed that the defendant arrived at the apartment of a person the defendant had been dating, that the defendant started arguing with that person, that the murder victim, who was also dating that person, tried to escort the defendant out of the apartment, and that the defendant suddenly stabbed and killed the murder victim. *Daniels v. State*, 276 Ga. 632, 580 S.E.2d 221 (2003).

Defendant's conviction was not based solely on circumstantial evidence because there was ample direct evidence that the defendant committed the murder, including the defendant's own inculpatory statements. *White v. State*, 276 Ga. 583, 581 S.E.2d 18 (2003).

Because the defendant shot a victim in the head after an argument and also shot at another victim but failed to hit the second victim, a rational trier of fact could have found that defendant was guilty of felony murder, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon. *Hightower v. State*, 278 Ga. 39, 597 S.E.2d 362 (2004).

Evidence was sufficient to support the defendant's murder conviction because the defendant was with the victim the evening before the victim's body was discovered in the victim's bed, the defendant's freshly imprinted palm print was found on the wall above the bed, the defendant's blood-stained shirt was found stuffed into a toilet bowl in the victim's bathroom, the victim's blood was on another of the defendant's shirts found at the defendant's home, and post-mortem

testing showed that the defendant and the victim engaged in sex on the night of the murder. *Lassic v. State*, 278 Ga. 701, 606 S.E.2d 266 (2004).

When a victim paid the defendant money the victim owed, and, after the victim paid the money, the defendant told the victim that the victim was going to die anyway and shot the victim as the victim sat in a vehicle with two other people, the evidence was sufficient to allow a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder, possession of a weapon by a convicted felon, and possession of a weapon during the commission of a felony. *Stephens v. State*, 279 Ga. 43, 609 S.E.2d 344 (2005).

Evidence was sufficient to support the defendant's convictions for felony murder, aggravated assault, and giving a false statement when the defendant and the codefendant were arrested when the codefendant sought medical treatment for a gunshot wound sustained in the incident, the codefendant gave police a false name and said that the codefendant was shot when someone tried to rob the codefendant, the codefendant told a neighbor who saw the wound that someone else was worse off than the codefendant was, the defendant asked the neighbor's niece to tell police the codefendant was at the niece's house on the night of the crime and was robbed when leaving, and, while in jail, the defendant told one inmate the defendant shot someone in the incident and told another inmate that the defendant was involved in a robbery of this victim that went bad, and that the defendant and the codefendant had been looking for a safe with money and marijuana. *Styles v. State*, 279 Ga. 134, 610 S.E.2d 23 (2005).

Evidence that showed defendant and other members of a gang attacked rival gang members outside a restaurant and that defendant fired two shots into the back of the brother of two rival gang members after the victim had been beaten with a small bat, that defendant stated to another gang member that defendant had shot the victim, and that the gun used to kill the victim was found in defendant's backyard, supported the convictions for felony murder and possession of a firearm

during the commission of a felony. *Yat v. State*, 279 Ga. 611, 619 S.E.2d 637 (2005).

Evidence was sufficient to support defendant's convictions for felony murder, aggravated assault, and possession of a firearm in the commission of a felony in a case because defendant, who had engaged in previous altercations with the victim, got out of defendant's car after seeing the victim on the street, ran up to the victim, shot the victim, returned to defendant's car, ran back to the victim and shot the victim again, and then got in defendant's car and drove off, as all of the elements of those offenses were established. *Hayes v. State*, 279 Ga. 642, 619 S.E.2d 628 (2005).

Evidence that (1) the victim died as the result of a verbal altercation between the defendant and the victim, which escalated into a physical confrontation; (2) eyewitnesses saw the defendant swinging a knife; and (3) the state's expert said the victim died of a stab wound to the chest was sufficient to allow a trier of fact to find defendant guilty of felony murder in the course of an aggravated assault beyond a reasonable doubt. *McDaniel v. State*, 279 Ga. 801, 621 S.E.2d 424 (2005).

Circumstantial evidence was sufficient to allow a jury to find defendant committed felony murder and aggravated assault beyond a reasonable doubt when there was testimony that defendant was seen wearing a trench coat, waved down the victim's vehicle, leaned in through an open window in the vehicle, fled after firing two shots, saying, "I believe I shot him," forensic evidence was consistent with this testimony, defendant and the codefendant were earlier seen trying to sell a gun, a trench coat with missing buttons was found in the codefendant's house, and its buttons matched a button found in the victim's car. *Burns v. State*, 280 Ga. 24, 622 S.E.2d 352 (2005).

As defendant and the victim were engaged in a heated verbal exchange, defendant went to defendant's room and obtained a serrated knife, returned to where the victim was and stabbed the victim in the chest, which resulted in the victim's heart being punctured, and defendant later admitted to the stabbing, the evidence was sufficient to support the verdict finding defendant guilty of felony murder

and aggravated assault, in violation of O.C.G.A. §§ 16-5-1 and 16-5-21, as well as possession of a knife during the commission of a felony; the jury was authorized to find defendant's claim of self-defense lacking in credibility. *Delanova v. State*, 280 Ga. 36, 622 S.E.2d 811 (2005).

Defendant's convictions for felony murder, aggravated assault, and possession of a knife during the commission of a felony were supported by sufficient evidence; while defendant argued that defendant acted in self-defense in stabbing the victim in the chest during a confrontation, the jury was authorized to disbelieve the defendant's testimony in favor of the testimony of the state's witnesses. *Delanova v. State*, 280 Ga. 36, 622 S.E.2d 811 (2005).

Sufficient evidence was introduced to support defendant's convictions for felony murder and burglary despite defendant's claims that the defendant was not sufficiently involved in the crimes to be convicted on those charges. *Joyner v. State*, 280 Ga. 37, 622 S.E.2d 319 (2005).

Evidence was sufficient to support defendant's conviction for felony murder because defendant was involved in a physical altercation with the victim which escalated into a group fight, defendant was armed with a gun while the victim was unarmed, and defendant shot the victim while the victim kneeled before defendant on the ground. *Hudson v. State*, 280 Ga. 123, 623 S.E.2d 497 (2005).

Evidence was sufficient to support a felony murder conviction because: (1) the victim was stabbed to death in an apartment; (2) the defendant was alone in the apartment with the victim the night before the victim's body was found; (3) the defendant's bloody fingerprint was found in the apartment; (4) the victim's blood was found on the shorts the defendant was wearing on the night of the murder; and (5) the defendant told police that the defendant could not remember the events of the night in question, denied that the defendant had ever been in the victim's apartment, but believed that the defendant and the victim were attacked by unknown persons. *Rojas v. State*, 280 Ga. 139, 625 S.E.2d 750 (2006).

Sufficient evidence supported a convic-

**Felony Murder (Cont'd)**  
**1. In General (Cont'd)**

tion for felony murder while committing an aggravated assault because the defendant admitted that the defendant shot blindly at someone entering the room, rather than shooting accidentally. *Gabriel v. State*, 280 Ga. 237, 626 S.E.2d 491 (2006).

Evidence was sufficient to find the defendant guilty of voluntary manslaughter in violation of O.C.G.A. § 16-5-2, felony murder predicated on possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-5-1, two counts of aggravated assault in violation of O.C.G.A. § 16-5-21, possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-11-131, and possession of a firearm during the commission of a felony murder in violation of O.C.G.A. § 16-11-106, as the defendant was angered by the victim's presence in the residence, the defendant assaulted the victim with a baseball bat and threatened to kill the victim if the victim did not leave the residence, and when the victim returned to the residence, the defendant fatally shot the victim in the stomach. *Lawson v. State*, 280 Ga. 881, 635 S.E.2d 134 (2006).

Evidence supported a defendant's convictions for fleeing and attempting to elude a police officer as an underlying offense for felony murder, theft by taking, vehicular homicide, disregarding a traffic control device, failing to stop at a stop sign, and reckless driving as: (1) the defendant stole a vehicle and was spotted by an officer shortly after the vehicle was reported as stolen; (2) when the officer began to follow the vehicle, the vehicle rapidly accelerated; (3) the officer followed the stolen vehicle for several blocks, with both vehicles traveling between 60-70 miles per hour; (4) the vehicle continued to accelerate after the officer turned on the officer's blue lights and siren; (5) when the stolen vehicle ran a red light, the vehicle struck a car, killing the driver; and (6) the officer and the owner of the stolen vehicle identified the defendant as the person driving the stolen vehicle. *Ferguson v. State*, 280 Ga. 893, 635 S.E.2d 144 (2006).

Evidence supported a defendant's con-

viction for malice murder, felony murder while in commission of an aggravated assault, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony as: (1) the defendant came to a tenant's apartment and told the victim that the defendant just shot someone in the backyard; (2) the tenant heard the victim calling the tenant's name; (3) another witness heard a series of gunshots and then someone being beaten, was familiar with the victim and recognized the victim's voice as the victim hollered, "You stomping me. I've been shot. You already done shot me," and saw the defendant emerge from behind the residence with a gun in the defendant's hand; (4) the defendant held the gun to the head of the witness, but then instructed the witness to leave the area; and (5) the victim's death was caused by two fatal gunshot wounds to the neck and chest and there was blunt force trauma to the head. *Compton v. State*, 281 Ga. 45, 635 S.E.2d 766 (2006).

Because a rational trier of fact could have found the defendant guilty of felony murder, based on sufficient evidence that said defendant shot the unarmed victim after a failed attempt to purchase cocaine, thus rejecting a claim of self-defense, the defendant's felony murder conviction was upheld on appeal. *McNeal v. State*, 281 Ga. 427, 637 S.E.2d 375 (2006).

When the victim was killed during the theft of the victim's vehicle, the evidence was sufficient for a jury to convict the defendant of felony murder, aggravated assault, and armed robbery; the defendant told others where the vehicle was, then stripped the vehicle; a call was placed from the victim's cell phone to the house of one of the defendant's grandparents; police found some of the victim's belongings at the home of the defendant's cousin; and a witness and two cousins of the defendant stated that the defendant admitted shooting the victim. *Paige v. State*, 281 Ga. 504, 639 S.E.2d 478 (2007).

Defendant's conviction for felony murder and related charges was upheld on appeal because the evidence showed that the defendant admitted to killing to the defendant's girlfriend and others and the gun used to shoot the victim was the same

that the defendant had shot at a party earlier in the evening; the defendant had asked the victim for a ride home from the party and the evidence indicated that defendant shot the victim twice and dumped the body in a wooded area. *Lee v. State*, 281 Ga. 511, 640 S.E.2d 287 (2007).

There was sufficient evidence to support the defendant's convictions of felony murder and aggravated assault resulting from an incident when shots were fired from a van at the victims, who were riding in a car that had formerly belonged to a drug dealer; the defendant had argued with the drug dealer the day of the shooting, the defendant's wrecked car was found in the same place as the van, the surviving victim identified the defendant as the driver of the van, the van had been traded to the defendant's brother, and even if the defendant did not actually fire the shots, being the driver would authorize the defendant's conviction under O.C.G.A. § 16-2-20(a). *Yancey v. State*, 281 Ga. 664, 641 S.E.2d 524 (2007).

Sufficient evidence existed to support five defendants' convictions for felony murder and burglary as the evidence enabled any rational trier of fact to have found the defendants guilty beyond a reasonable doubt based on the state's introduction of both direct and circumstantial evidence to prove that the defendants rode together in a truck and participated in the invasion of the victim's house; although much of the state's case depended on accomplice testimony, the state presented additional corroborating evidence in the nature of the black clothing, weapons, and cellular telephone records, which tended to connect defendants to the crime. *Guyton v. State*, 281 Ga. 789, 642 S.E.2d 67 (2007).

Because sufficient evidence was presented that the defendant was provoked by an attack on a sibling, and that the defendant had a history of abusive relationships with several men, the voluntary manslaughter of the male victim was supported by the evidence; moreover, evidence of the victim's stabbing and death also supported the jury's verdict with respect to the aggravated assault with a deadly weapon, felony murder, and possession of a knife during the commission

of a felony charges. *Breland v. State*, 285 Ga. App. 251, 648 S.E.2d 389 (2007).

There was sufficient evidence to support the defendant's convictions of felony murder, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony; a witness who sold drugs for the defendant had gotten into a dispute with a third person over drugs before the shooting, the defendant upon seeing the victim asked the witness if the victim was the third person in question and then shot the victim, and witnesses placed the defendant at the scene of the crime and testified that the witnesses saw the defendant carrying a gun. *Johnson v. State*, 282 Ga. 235, 647 S.E.2d 48 (2007).

Evidence from eyewitnesses that the defendant had been in a heated argument with the victim, the defendant left the scene and returned with a gun, the defendant again argued with the victim, pulling out the gun and shooting the victim three times, and that the bullets recovered from the victim confirmed that the bullets were fired from the defendant's weapon, was sufficient to enable a rational trier of fact to reject the defendant's self-defense claim and to support the defendant's convictions for felony murder, aggravated assault, and possession of a firearm during the commission of a felony. *Bolston v. State*, 282 Ga. 400, 651 S.E.2d 19 (2007).

It was not necessary for the state's circumstantial evidence against a defendant to exclude every conceivable hypothesis, and contrary to the defendant's assertions, the state of undress the victim was found in, coupled with DNA evidence that linked the defendant to the victim, was sufficient to support a jury's conclusion that the defendant raped and murdered the victim as opposed to having committed necrophilia or having engaged in consensual sex with the victim before the victim died. *Walker v. State*, 282 Ga. 406, 651 S.E.2d 12 (2007).

There was sufficient evidence to support a defendant's conviction for felony murder of the love interest of the defendant's spouse, and the trial court did not err by denying the defendant's motions for a directed verdict or for a new trial; the trial court properly concluded that the defen-

**Felony Murder (Cont'd)**  
**1. In General (Cont'd)**

dant failed to prove by a preponderance of the evidence that the defendant was incompetent to stand trial based on the testimony of a state psychiatrist who determined that the defendant had some intellectual limitations and a problem with literacy, but found the defendant capable of rational and logical discussion about the circumstances of the incident to be tried, was capable of assisting in the defense, and that defendant understood the nature and object of the legal proceedings. The trial court also did not err by refusing the defendant's requested jury charges as the charges either did not relate to the evidence or the charge given was all that was necessary. *Velazquez v. State*, 282 Ga. 871, 655 S.E.2d 806 (2008).

Evidence was sufficient to enable a jury to conclude that the defendant was guilty of committing the crimes of murder, felony murder, aggravated assault, burglary, and armed robbery beyond a reasonable doubt based on the evidence showing that: (1) a security guard at the hotel wherein the victim was murdered saw the vehicle the defendant often borrowed; (2) a homeless woman identified the defendant fleeing from the scene shortly after the shots were fired; (3) an acquaintance of the defendant's testified that the defendant said the defendant was going to get some money and flashed a .25 caliber handgun and invited the acquaintance to participate; and (4) the crime lab technician testified that the bullets that killed the victim came from the same gun that killed another victim the defendant was alleged to have murdered. *McKnight v. State*, 283 Ga. 56, 656 S.E.2d 830 (2008).

With regard to defendant's felony murder conviction, it was within the jury's province to reject the voluntary manslaughter option on the special verdict form, finding instead that defendant was guilty of felony murder as, although defendant testified that defendant believed the victim was reaching for a weapon, police investigators testified that defendant had not told the investigators that, and the jury was not required to accept as true the version of events to which defen-

dant testified, but could assess defendant's credibility and weigh defendant's testimony against other evidence. *Sewell v. State*, 283 Ga. 558, 662 S.E.2d 537 (2008).

Testimony from an eyewitness that the defendant and the victim scuffled and fell to the ground, and that the defendant knelt over the victim, stabbing the victim repeatedly with a knife, was sufficient to support the defendant's convictions of felony murder and aggravated assault with a deadly weapon. *Lampley v. State*, 284 Ga. 37, 663 S.E.2d 184 (2008).

Evidence supported a defendant's convictions of felony murder, aggravated assault, and possession of a firearm during the commission of a felony. Witnesses saw the defendant walk with the victim from a store to the victim's car and later run from the scene following the sounds of a gunshot and a car crash, and the defendant admitted pulling a gun on the victim and said that the gun had gone off during a struggle, after which the victim tried to drive away. *Petty v. State*, 283 Ga. 268, 658 S.E.2d 599 (2008).

Evidence was sufficient to support two defendants' conviction of felony murder based on robbery when the defendants and a third person arranged to meet the victim to buy marijuana but decided before the meeting to take the marijuana instead; the first defendant brought a pistol and handed the pistol to the third person; the defendants and the third person ran away after the victim handed them the marijuana; and the third person fatally shot the victim when the victim pursued the three. *Allen v. State*, 283 Ga. 304, 658 S.E.2d 580 (2008).

Evidence supported defendant's convictions of felony murder during commission of aggravated assault and of possessing a firearm while committing the murder; after defendant argued with the victim and hit the victim while they were riding in a car, defendant and the victim got out of the car where defendant shot at the victim multiple times, defendant fled the scene but later surrendered to authorities and stated that defendant had murdered the victim, and at trial defendant claimed that the gun accidentally discharged when defendant was trying to return the

gun to the victim. *Lashley v. State*, 283 Ga. 465, 660 S.E.2d 370 (2008).

Evidence was sufficient to support a defendant's conviction for felony murder based on aggravated assault and theft of the victim's car since the evidence established, *inter alia*, that the victim met the defendant at a motel, that the victim's blood was found in the motel room, and that a witness observed a female body in a tub in the trunk of the victim's car, which the defendant had been driving. *Edmond v. State*, 283 Ga. 507, 661 S.E.2d 520 (2008).

Evidence that showed that, *inter alia*, a victim was standing in the driveway of the victim's employer with the victim's spouse when the defendant approached the victim in an angry manner, that they entered into a brief verbal exchange, and that the defendant then fired a gun, striking the victim in the head, was sufficient to support the defendant's conviction for felony murder. *Browning v. State*, 283 Ga. 528, 661 S.E.2d 552 (2008).

Evidence was sufficient to support convictions of murder, felony murder, and armed robbery when the defendant and the codefendant offered to give the victim a ride, the defendant pointed a gun at the victim and told the victim to give the defendant the victim's money; the defendant became angry when the defendant saw that there was no money in the victim's wallet, and the defendant shot the victim in the neck, then dumped the victim's body and the wallet in a parking lot. *Lockheart v. State*, 284 Ga. 78, 663 S.E.2d 213 (2008).

Sufficient evidence was presented to convict a defendant of felony murder based on evidence that the defendant and a codefendant approached the victims' rental car and brandished guns; while pistol whipping the victims and robbing them of their property, the defendant's gun went off and fatally wounded the first victim; and a gun matching the caliber of bullet recovered from the first victim during the autopsy was found during the execution of a search warrant at a hotel where the defendant had visited a guest on three occasions. *Watkins v. State*, 285 Ga. 107, 674 S.E.2d 275 (2009).

Evidence supported the convictions of

felony murder, aggravated assault, and possession of a knife during the commission of a felony. The victim's grandchild saw the defendant stab the victim after an argument, then went to a relative for help; the defendant then attacked the relative and fled, throwing the knife the defendant used to stab the victim in the bushes; when the defendant was found by police shortly thereafter, the defendant admitted to stabbing the victim; and a medical examiner testified that the bulk of the victim's stabs came from behind and that the cut on the defendant's hand was an offensive wound likely sustained as the defendant was stabbing the victim with enough force to break one of the victim's ribs. *Butler v. State*, 285 Ga. 518, 678 S.E.2d 92 (2009).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder, aggravated assault, and possession of a firearm during the commission of a crime because a witness identified the defendant as the person the witness saw shooting and running, and witnesses testified that the day of the shooting the defendant told the witnesses that the victim had robbed the defendant; the mother of the defendant's children testified that the night of the shooting, the defendant came to her apartment in the same complex where the shooting took place, breathing heavily and wearing a shirt with bullet holes in the shirt. *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder while in the commission of aggravated assault because psychiatric testimony regarding the defendant's brain impairment and paranoid schizophrenia, and how defendant's mental condition would affect defendant's responses in an interview, did not make defendant's confession involuntary when the psychiatrist who testified as to the defendant's mental condition also testified that the defendant was competent to stand trial, was not delusional, and knew the difference between right and wrong; the evidence was not made insufficient by asserted inconsistencies in the defendant's confession,

**Felony Murder** (Cont'd)  
**1. In General** (Cont'd)

whether the inconsistencies were internal or with respect to other evidence, regarding identification of the weapon, how many times the defendant went to the victim's home, and defendant's knowledge of what killed the victim. *Williams v. State*, 287 Ga. 199, 695 S.E.2d 246 (2010).

Conviction for felony murder during the commission of criminal attempt to commit armed robbery was affirmed because evidence was presented that: (1) the defendant, the codefendant, and an accomplice went to a drug dealer's apartment to steal money; (2) the accomplice entered the apartment to buy marijuana; (3) the defendant and the codefendant then entered the apartment; (4) when the drug dealer resisted, the defendant shot and killed the drug dealer; (5) the accomplice, in exchange for a plea deal, assisted the police in recording incriminating telephone conversations with the codefendant; and (6) the gun that was used in the shooting was found in the codefendant's apartment. *Moon v. State*, 288 Ga. 508, 705 S.E.2d 649 (2011).

Evidence supported the defendant's convictions for felony murder predicated on armed robbery, armed robbery, and aggravated assault because the evidence showed that the defendant and the codefendant, after discussing the idea of stealing marijuana and whatever cash the victim had on the victim, arranged to meet with the victim to buy marijuana from the victim. When the victim got into the back seat of the defendant's vehicle and pulled out a bag of marijuana, the codefendant drew a gun and shot the victim, fatally wounding the victim. *Herbert v. State*, 288 Ga. 843, 708 S.E.2d 260 (2011).

**Felony murder after backing over victim with car.** — Evidence supported convictions for aggravated assault, theft by taking, and felony murder when the evidence showed that the defendant pulled the victim out of the victim's car, beat the victim with a pistol, stole the car, and deliberately backed over the victim; before the crime, the defendant told an eyewitness to those acts that the defendant planned to rob the victim; and the

defendant used the victim's phone after the victim's death. *Lupoe v. State*, 284 Ga. 576, 669 S.E.2d 133 (2008).

**Felony murder in conjunction with robbery.** — Evidence was sufficient to support convictions of felony murder and possession of cocaine. A person fitting the defendant's description, wearing black clothing and carrying a black garbage bag, ran from the store where the victim worked; within an hour of the shooting, the defendant, who lived three blocks away, gave a neighbor's child "cigars without tobacco" and lottery tickets from a black garbage bag, and said that the defendant had "hit a lick"; packages of tobacco tubes were found on the ground between the store and the defendant's apartment complex; the victim's wallet was found in a trash receptacle at the complex, and a police dog followed the scent on the wallet to the defendant's apartment; officers searching the defendant's apartment found cocaine, a handgun, black clothing, a black stocking, and a novelty dollar bill of the sort that had been given to the victim the night before the shooting; and the bullet that killed the victim was fired from the handgun in the defendant's room. *Jones v. State*, 284 Ga. 672, 670 S.E.2d 790 (2008).

**Felony murder in gang activity.** — As the defendant drove a car slowly by a house where rival gang members were while a car passenger repeatedly fired an assault rifle at the house, resulting in the death of two victims and injuries to two others, the defendant's convictions for felony murder, aggravated assault, and possession of a firearm during the commission of a felony were supported by the evidence. *Deleon v. State*, 285 Ga. 306, 676 S.E.2d 184 (2009).

Evidence authorized the jury to find the defendant guilty beyond a reasonable doubt of murder, felony murder, aggravated assault, and possession of a weapon during the commission of a felony because contrary to the defendant's arguments, the evidence showed that the person who was sitting in the back seat of the victim's car was not sitting directly behind the victim, but instead, that person was in the rear seat on the passenger's side of the car; the forensics testing showed that the

murderer was located to the left of the victim, not the right, and there was blood spatter on the seat behind the victim from which the jury could have inferred that no one was sitting there at the time of the shooting. *Julius v. State*, 286 Ga. 413, 687 S.E.2d 828 (2010).

Evidence adduced was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of felony murder, armed robbery, and aggravated assault for attacking six people in a home because one of the victims stated that the victim saw defendant in the doorway after shots had been fired; whether the deal a codefendant made with the state rendered the codefendant's testimony biased to a degree that left the codefendant less creditworthy was a determination to be made by the jury. *Mikell v. State*, 286 Ga. 434, 689 S.E.2d 286, overruled on other grounds, 287 Ga. 338, 698 S.E.2d 301 (2010).

**Verdicts not inconsistent.** — Verdicts convicting a defendant of felony murder and vehicular homicide were not inconsistent because the felony murder and the underlying aggravated assault were based on the defendant driving a vehicle at the victim's vehicle, while the vehicular homicide charge was based on the defendant causing the victim's death by intentionally changing lanes when it was not safe to do so, meaning that the two crimes were based on distinct underlying acts, and it was neither legally nor logically impossible to convict the defendant of both crimes. *Mills v. State*, 280 Ga. 232, 626 S.E.2d 495 (2006).

**Similar offense evidence properly admitted.** — With regard to a defendant's convictions for malice murder, aggravated assault, and possession of a firearm by a convicted felon arising out of the shooting deaths of a woman and her unborn child and the shooting at another person, because the evidence was sufficient to establish the required similarity between the charged crimes and a 1989 shooting offense, the trial court's allowance of the evidence regarding the 1989 offense was not clearly erroneous. *Biggs v. State*, 281 Ga. 627, 642 S.E.2d 74 (2007).

**Direct or approximate cause resulted in felony murder conviction.** —

Evidence was sufficient to convict a defendant on a charge of felony murder as the evidence showed that the defendant had leveled two blows with a pistol to the victim's head and testimony from the medical examiner established that either the blows or the victim's striking the victim's head on the pavement when the victim fell as a result of the blows caused the victim's fatal injuries; thus, the defendant's blows were either the direct or proximate cause of the victim's death. *Chaney v. State*, 281 Ga. 481, 640 S.E.2d 37 (2007).

**Bragging about murder as evidence.** — Felony murder shown when the defendant was overheard bragging about shooting the victim. *Watkins v. State*, 276 Ga. 578, 581 S.E.2d 23 (2003).

**Evidence sufficient for malice murder of business partner.** — Evidence that the defendant and the victim disagreed about how their car wash business was to be run, that the defendant started removing supplies from the business, that the defendant obtained a gun and returned to the car wash, that the defendant talked to the victim outside the car wash while witnesses were inside the car wash, that the witnesses saw the defendant fire shots toward the ground and the victim's body was later found on the ground, and that the defendant admitted shooting the victim because the defendant was tired of the victim taking money from the business, was sufficient to support the defendant's conviction for malice murder although a new trial had to be held due to procedural errors that occurred. *Laster v. State*, 276 Ga. 645, 581 S.E.2d 522 (2003).

**Felony murder in death of a child.** — Evidence was sufficient to support the defendant's convictions for felony murder in violation of O.C.G.A. § 16-5-1(c) and child cruelty in violation of O.C.G.A. § 16-5-70(b) after the record revealed that the eight-month old victim suffered a lacerated liver resulting from blunt force trauma to the abdomen, the injury was inflicted 12-24 hours prior to death, and that despite the infant's obvious pain and tenderness in the abdominal area, the defendant refused to take the infant, or to allow the child's parent to take the infant, or to seek medical attention for fear that the

**Felony Murder (Cont'd)**  
**1. In General (Cont'd)**

baby would be taken away; although the indictment did not charge that the defendant committed the predicate act of child cruelty with malice within the count alleging felony murder, such was not insufficient because the separate count alleging child cruelty indicated that it was committed with malice. *Mikenney v. State*, 277 Ga. 64, 586 S.E.2d 328 (2003).

Evidence supported the defendant's convictions of felony murder while in the commission of cruelty to children in the first degree and making a false statement to a government agency after a 23-month-old child whom the defendant had been baby-sitting died from severe aspiration pneumonia due to brain swelling and bleeding on the surface of the brain caused by multiple blows to the child's head and face; the defendant was the only adult with the child during the afternoon and early evening in question, the child had appeared uninjured and was walking when the child visited a store earlier in the day, the child had "pattern injury" contusions indicating that hair had been pulled out, a medical examiner testified that the child's brain swelling would have prevented the child from performing normal functions such as walking, talking, or waking, and the defendant told several conflicting stories about how the child had been injured. *Banta v. State*, 282 Ga. 392, 651 S.E.2d 21 (2007).

There was sufficient evidence to support the defendant's convictions for the felony murder and aggravated battery of the defendant's two-month-old child: (1) the child, who had been in good health at a pediatric checkup earlier in the day, was limp and cold when the defendant brought the child to an office where the child's other parent had an appointment; (2) the child was diagnosed as a "shaken baby"; and (3) the defendant was the only person with the child during and immediately prior to the onset of the child's symptoms. *Smith v. State*, 283 Ga. 237, 657 S.E.2d 523 (2008).

**Felony murder committed by vehicle.** — Evidence was sufficient to support felony murder and aggravated assault

convictions because: (1) the defendant, after exchanging blows with the defendant's spouse while in a car, left the area but returned shortly thereafter in the car; (2) one eyewitness saw the defendant strike the spouse with the front of the car, back up striking the spouse again with the rear of the car, and drive off; (3) other witnesses saw two persons brought to the scene by the defendant beating and stomping the victim; and (4) the medical examiner testified that the victim died from blunt force head trauma consistent with being struck by a vehicle and that the force of the fatal blow would most likely have left the victim unconscious or unable to walk around. *Rankin v. State*, 278 Ga. 704, 606 S.E.2d 269 (2004).

Sufficient evidence supported a conviction for felony murder because the testimony of witnesses established that, when the victim's vehicle re-entered a highway, after defendant had run the victim off the road, it was safe to do so and the defendant then abruptly changed lanes, rammed the vehicle into the rear of the victim's vehicle, and pushed the vehicle along the highway without applying the brakes. *Mills v. State*, 280 Ga. 232, 626 S.E.2d 495 (2006).

When defendants struck another car while fleeing from the scene of an armed robbery defendants' committed, and expert testimony established that the driver of the car was killed by blunt impact injuries caused by the crash, the evidence was sufficient to support defendants' felony murder convictions. *Mitchell v. State*, 282 Ga. 416, 651 S.E.2d 49 (2007).

**Evidence sufficient for felony murder conviction despite absence of victim's body.** — In a murder prosecution in which the victim's body was never found, the evidence established that defendant and the victim had left a ball park where they worked within five minutes of each other, that the victim's car was found abandoned at a gas station adjacent to the park, that a person whose voice characteristics matched defendant's said on the telephone that defendant had taken the victim at "the station," and that defendant made incriminating statements to fellow inmates, was sufficient evidence to convict defendant of murder, and to deny a di-

rected verdict of acquittal. Hinton v. State, 280 Ga. 811, 631 S.E.2d 365 (2006).

**Felony murder committed by inmates against another inmate.** — Evidence supported a defendant's conviction for felony murder (aggravated assault) as: (1) the authorities received a note stating the victim had not committed suicide in the victim's jail pod, but that the pod's inmates had murdered the victim; (2) the defendant told an agent that the defendant had complied with a co-indictee's directive to give the victim a bearhug and, when the defendant picked up the victim, the co-indictee strangled the victim with an elastic bandage; (3) the defendant also told the agent that some of the inmates believed that the victim was going to report to authorities that some inmates were chipping away at the defendant's window in an attempt to escape; (4) the chiseling around the defendant's window and a rod that served as the chisel were discovered; and (5) a forensic pathologist testified that the victim's injuries were not commonly found in a hanging, but were consistent with a ligature strangulation. McKinney v. State, 281 Ga. 92, 635 S.E.2d 153 (2006).

## 2. Underlying Felony

**"Felony" defined.** — Under the felony-murder statute, a "felony" means any felony that is dangerous per se or which by the attendant circumstances creates a foreseeable risk of death. Ford v. State, 262 Ga. 602, 423 S.E.2d 255 (1992).

**Proof of felony required.** — Proof of elements of offense of felony murder necessarily requires proof of elements of felony. Woods v. State, 233 Ga. 495, 212 S.E.2d 322 (1975); Atkins v. Hopper, 234 Ga. 330, 216 S.E.2d 89 (1975).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failure to request a bifurcated trial on felony murder under O.C.G.A. § 16-5-1 and on possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-11-131; because the possession count was a predicate offense for the felony murder count, the prior conviction that was admitted into evidence was relevant to the felony murder count, and it was not necessary to

sever the possession count. Wells v. State, 281 Ga. 253, 637 S.E.2d 8 (2006).

**Evidence was insufficient to support conviction for offense of felony murder** based on armed robbery since there was no evidence to show that the defendants took any money or items from the restaurant at which the crime occurred or its employees, or even that they entered the restaurant after firing a fatal shot from the doorway threshold. Prater v. State, 273 Ga. 477, 541 S.E.2d 351 (2001).

Conviction of the defendants for felony murder could not be upheld on the basis that they committed attempted armed robbery and killed the victim in the course of such crime since the court instructed the jury with regard to armed robbery but not with regard to attempted armed robbery. Prater v. State, 273 Ga. 477, 541 S.E.2d 351 (2001).

**"He causes" defined.** — Supreme Court of Georgia overrules State v. Crane, 247 Ga. 779 (1981), and its subsequent cases relying upon Crane. The felony murder statute, O.C.G.A. § 16-5-1(c), requires only that the defendant's felonious conduct proximately cause the death of another person. The causation issue should be decided by a properly instructed jury at trial, using the customary proximate cause standard. State v. Jackson, 287 Ga. 646, 697 S.E.2d 757 (2010).

**Underlying felony is a lesser included offense of felony murder** under former Code 1933, § 26-505. Woods v. State, 233 Ga. 495, 212 S.E.2d 322 (1975); Atkins v. Hopper, 234 Ga. 330, 216 S.E.2d 89 (1975) (see O.C.G.A. § 16-1-6).

**Felony fleeing and attempting to elude a police officer** under O.C.G.A. § 40-6-395 served as a predicate to felony murder. State v. Tiraboschi, 269 Ga. 812, 504 S.E.2d 689 (1998).

**Felony murder may be predicated upon underlying felony** which is itself part of the homicide. Baker v. State, 236 Ga. 754, 225 S.E.2d 269 (1976).

Conviction of felony murder, predicated upon underlying felony which is itself a part of the homicide, does not violate doctrine of due process. Larkin v. State, 247 Ga. 586, 278 S.E.2d 365 (1981).

**Location of underlying felony.** — Defendant's murder of the victim was

**Felony Murder (Cont'd)****2. Underlying Felony (Cont'd)**

within the *res gestae* of the kidnapping with bodily injury since the victim was under the continuous control of the defendant until the victim was killed; to hold otherwise would lead to the absurdity that a defendant who commits kidnapping with bodily injury in one county, and abducts the victim to a second county where defendant kills the victim without malice aforethought, could not be charged with felony murder in either county. *Lee v. State*, 270 Ga. 798, 514 S.E.2d 1 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

**Possession of a weapon on school property.** — Because defendant's possession of a weapon on school property was dangerous under the circumstances, the offense was sufficient to support defendant's conviction for felony murder. *Mosley v. State*, 272 Ga. 881, 536 S.E.2d 150 (2000).

**Aggravated assault can be felony triggering operation of felony-murder rule.** To demonstrate malice murder, evidence that the defendant acted in reckless disregard of human life is as equally probative as evidence that defendant acted with a specific intent to kill. *Sutton v. State*, 245 Ga. 192, 264 S.E.2d 184 (1980).

Aggravated assault is a felony, and a death, although unintended, resulting from such assault may constitute felony murder. *Marable v. State*, 154 Ga. App. 426, 268 S.E.2d 720 (1980).

Aggravated assault, assault with a deadly weapon, upon the homicide victim can support a finding of felony murder. *Strong v. State*, 251 Ga. 540, 307 S.E.2d 912 (1983).

**Aggravated assault as underlying felony.** — When a defendant was charged in an indictment with malice murder and with possession of a pistol during the commission of a crime, and the indictment alleged that appellant shot the victim with a pistol contrary to the laws of Georgia, the trial court could charge the jury on felony murder, with aggravated assault as the supporting felony. *Middlebrooks v. State*, 253 Ga. 707, 324 S.E.2d 192 (1985).

Evidence was sufficient to support con-

victions of the aggravated assault of one victim and of the felony murder of another victim, based on the underlying felony of aggravated assault of that victim. *Walker v. State*, 258 Ga. 443, 370 S.E.2d 149 (1988).

When defendant killed the victim by stabbing the victim with a knife, the trial court was authorized in charging the jury on the principle of felony murder, the felony being aggravated assault. *Catchings v. State*, 256 Ga. 241, 347 S.E.2d 572 (1986).

Defendant's aggravated assault conviction did not merge into a felony murder conviction, because neither the murder nor the underlying felony of criminal attempt to commit armed robbery required the state to prove the element of reasonable apprehension of receiving a violent injury, which was a required element of the aggravated assault count as indicted. *Willingham v. State*, 281 Ga. 577, 642 S.E.2d 43 (2007).

Two defendants were properly convicted of felony murder with aggravated assault, O.C.G.A. § 16-5-21(a)(2), as the predicate felony since the evidence established that the defendants killed the victim by repeatedly striking the victim's face and head, and the jury was authorized to conclude that the defendants' hands and feet were used as deadly weapons. *Dasher v. State*, 285 Ga. 308, 676 S.E.2d 181 (2009).

Evidence was sufficient to enable the trial court to find, beyond a reasonable doubt, that the defendant possessed the intent necessary to commit aggravated assault, O.C.G.A. § 16-5-21(a), and felony murder, O.C.G.A. § 16-5-1(c), because the defendant used a vehicle as an offensive weapon while the defendant was extremely drunk, and the evidence was sufficient to prove both forms of simply assault under O.C.G.A. § 16-5-20(a)(1)-(2) by the defendant against all six of the victims; the defendant engaged in an extended high-speed car chase with a driver, deliberately rammed the other driver's truck, and attempted to smash into the other driver head-on after the truck stalled, and within minutes after the driver escaped, the defendant came upon the other five victims by swerving sharply

into oncoming traffic and slamming into a vehicle. Guyse v. State, 286 Ga. 574, 690 S.E.2d 406 (2010).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of murder and aggravated assault because the defendant's conduct before, during, and after the crimes supported the finding that the defendant was a party thereto, notwithstanding the jury's acquittal of the defendant on three weapons charges. Allen v. State, 288 Ga. 263, 702 S.E.2d 869 (2010).

**Aggravated assault, possession of firearm, and discharge of firearm sufficient to support felony murder conviction.** — Because the defendant and an accomplice ordered the victim and another individual against a wall, took the victim's money at gunpoint, and the defendant began to point and wave the gun when it fired, resulting in the victim being shot and subsequently dying, the evidence was sufficient for a rational trier of fact to find the defendant guilty of felony murder while committing aggravated assault and of possession of a firearm. Taylor v. State, 279 Ga. 706, 620 S.E.2d 363 (2005).

**Accomplice to aggravated assault.** — Evidence that the defendant was seen making notes at the crime scene the day of the shooting, that the defendant accompanied the coconspirator knowing that the coconspirator intended to rob a cab driver, and that the defendant drove the coconspirator away after the shooting of the cab driver authorized the jury to find that the defendant was a party to the crime of aggravated assault committed with a deadly weapon, and hence to felony murder. Brown v. State, 278 Ga. 724, 609 S.E.2d 312 (2004).

**Even if defendant decided to take victim's money only after twice shooting the victim,** the jury was authorized to find that the offense of murder was committed while defendant was engaged in the commission of the offense of armed robbery. Davis v. State, 255 Ga. 588, 340 S.E.2d 862, cert. denied, 479 U.S. 871, 107 S. Ct. 243, 93 L. Ed. 2d 168 (1986).

Evidence was sufficient to support the defendant's convictions on two counts of felony murder predicated on the underlying

felony of aggravated assault, one count of armed robbery, and two counts of possession of a firearm in the commission of a crime, as the evidence showed that the defendant brandished a handgun and forced the two victims to give the defendant money, and that the defendant then fatally shot them after one victim argued with other people the defendant was with regarding the purity of a drug purchase the one victim had just made. Harden v. State, 278 Ga. 40, 597 S.E.2d 380 (2004).

**Death growing out of aggravated assault** is either malice murder or felony murder, or else it is not punishable as a homicide. Baker v. State, 236 Ga. 754, 225 S.E.2d 269 (1976); Cole v. State, 254 Ga. 286, 329 S.E.2d 146 (1985).

**Escape as lesser offense of felony murder.** — Conviction for escape must be set aside, where it merges into greater crime of felony murder. Gore v. State, 246 Ga. 575, 272 S.E.2d 306 (1980).

**Underlying felony of armed robbery did not merge** with defendant's felony-murder conviction, where the underlying felony charged in the indictment was committed upon one victim and the felony murder charged in another count of the indictment was committed upon another person. Kimbrough v. State, 254 Ga. 504, 330 S.E.2d 875 (1985).

**Criminal attempt-armed robbery is a lesser included offense of felony murder.** To demonstrate malice murder, evidence that the defendant acted in reckless disregard of human life is as equally probative as evidence that defendant acted with a specific intent to kill. Farley v. State, 238 Ga. 181, 231 S.E.2d 761 (1977).

**Charges of burglary and murder not legally incompatible.** — Charge of burglary based on defendant's intent to commit aggravated assault on occupant of dwelling and murder for death of occupant during burglary were neither legally incompatible nor lesser included offenses of each other. Williams v. State, 250 Ga. 553, 300 S.E.2d 301, cert. denied, 462 U.S. 1124, 103 S. Ct. 3097, 77 L. Ed. 2d 1356 (1983).

Evidence was sufficient to support defendant's convictions for malice murder and burglary, where defendant entered

**Felony Murder (Cont'd)****2. Underlying Felony (Cont'd)**

the victim's apartment with keys that defendant had as a maintenance worker. Oliver v. State, 276 Ga. 665, 581 S.E.2d 538 (2003).

**Homicide within res gestae of underlying felony of burglary.** — Defendants' conviction for felony murder was affirmed because the homicide was within the res gestae of the underlying felony of burglary for the purpose of the felony-murder rule since defendants were observed in the area of the burglaries, their vehicle was parked at one of the burglarized homes, and police maintained continuous observation of defendants and their vehicle throughout the chase and subsequent death of another motorist. Westmoreland v. State, 287 Ga. 688, 699 S.E.2d 13 (2010).

**Cruelty to children as defined by O.C.G.A. § 16-5-70 may constitute the underlying felony in a felony murder prosecution.** Estes v. State, 251 Ga. 347, 305 S.E.2d 778 (1983).

Evidence that the cause of death was loss of blood due to a laceration of the liver caused by blunt force trauma to the abdomen, most likely a punch with a fist, was sufficient to show either excessive pain or the malice required for a conviction of felony murder with cruelty to children. Folsom v. State, 278 Ga. 690, 606 S.E.2d 262 (2004).

Evidence that there was an 80 to 90 percent chance that injuries that caused the death of a defendant's 10-month-old child were inflicted within an hour of the child's death, that the defendant left the apartment at 4:10 P.M., that an attending physician was called to the emergency room at 5:46 P.M., and that the child was dead on arrival at the emergency room was sufficient to support the defendant's convictions for felony murder while in commission of cruelty to a child in the second degree, aggravated assault, and cruelty to a child in the first degree; the evidence permitted the jury to conclude that the time frame in which the child's injuries were inflicted included the time before the defendant left for work, there was evidence concerning the defendant's

actions before and after the child's death that indicated the defendant's guilt, and the jury was not required to accept the defendant's version of events. White v. State, 281 Ga. 276, 637 S.E.2d 645 (2006).

Sufficient evidence supported a conviction of felony murder while in the commission of cruelty to children in the first degree: (1) the pathologist who performed the child's autopsy testified that the 14-month-old child, who had been injured while left in the defendant's care, died from multiple blunt force injuries that were inconsistent with falling off a bed or being dropped, as claimed by the defendant; (2) a defense pathologist agreed that there were at least seven distinct impact sites on the child's head and about 105 impact sites on the child's body; and (3) there was evidence that two years before, the defendant's six-month-old child had been left in the defendant's care and had been returned to the child's parent with unexplained bruises and other injuries. Moore v. State, 283 Ga. 151, 656 S.E.2d 796 (2008).

**Conspiracy to commit armed robbery.** — Since murder is probable consequence of conspiracy to commit armed robbery, codefendant is equally responsible for murder although the codefendant was not actual slayer and was not present at the time of killing. Fortner v. State, 248 Ga. 107, 281 S.E.2d 533 (1981).

**Cardiac arrest during burglary.** — Evidence that the cause of death was cardiac arrest caused by the victim's small coronary arteries and the stress of events during the burglary was sufficient to sustain a conviction for felony murder. Durden v. State, 250 Ga. 325, 297 S.E.2d 237 (1982).

**Possession of firearm by convicted felon.** — Crime of possession of a firearm by a convicted felon does not merge with act of shooting the firearm; therefore, a jury may find a convicted felon guilty of felony murder by treating the felon's possession of a firearm in committing the murder as the underlying felony. Scott v. State, 250 Ga. 195, 297 S.E.2d 18 (1982); Brand v. State, 258 Ga. 378, 369 S.E.2d 896 (1988).

A status felony, including the possession of a firearm by a convicted felon, is not

inherently dangerous and, under circumstances which involve no assault or any other criminal conduct, is not a felony upon which a felony murder conviction may be obtained. *Ford v. State*, 262 Ga. 602, 423 S.E.2d 255 (1992).

Defendant's demurrer to a charge of felony murder, predicated on a charge of possession of a weapon by a convicted felon, in violation of O.C.G.A. § 16-11-131, which was predicated on defendant's out-of-state misdemeanor conviction for involuntary manslaughter, for which the maximum sentence was five years imprisonment, was properly sustained, because § 16-11-131(a) did not give defendant adequate notice that defendant's misdemeanor conviction could be used as the predicate felony for a charge of possession of a firearm by a convicted felon. *State v. Langlands*, 276 Ga. 721, 583 S.E.2d 18 (2003).

Defendant's conviction of possession of a firearm by a convicted felon under O.C.G.A. § 16-11-131 merged with the defendant's conviction of felony murder under O.C.G.A. § 16-5-1(c) predicated on possession of a firearm by a convicted felon. *Lawson v. State*, 280 Ga. 881, 635 S.E.2d 134 (2006).

Defendant's conviction of voluntary manslaughter under O.C.G.A. § 16-5-2 did not require reversal of the defendant's conviction of felony murder under O.C.G.A. § 16-5-1(c) when the underlying felony was possession of a firearm by a convicted felon, as those offenses did not merge. *Lawson v. State*, 280 Ga. 881, 635 S.E.2d 134 (2006).

**Conviction of felony murder upheld.** — When the state's evidence showed that the defendant pulled into a parking lot while the victim was robbing a friend of the defendant's, waited in the defendant's car until the victim came around a corner, and then shot the victim three times without the victim ever having aimed the victim's gun at the defendant, there was sufficient evidence to convict the defendant of felony murder based on the defendant's killing the victim while being a convicted felon in possession of a firearm in violation of O.C.G.A. § 16-11-131; although the defendant claimed that the defendant acted in

self-defense, the jury was free to reject the defendant's claim. *Roper v. State*, 281 Ga. 878, 644 S.E.2d 120 (2007).

**Convicted felon in possession of a firearm who furnishes it to another** for the purpose of shooting a third person may be found guilty of felony murder even though the trigger-man is found guilty of malice murder. *Whitehead v. State*, 255 Ga. 526, 340 S.E.2d 885 (1986).

**Victim shot during theft.** — Felony-murder rule is applicable where defendant's purpose in shooting victim was to commit theft. *Edwards v. State*, 233 Ga. 625, 212 S.E.2d 802 (1975).

**Offense of misuse of a firearm while hunting** can serve as the predicate felony to a felony murder conviction. *Chapman v. State*, 266 Ga. 356, 467 S.E.2d 497 (1996).

**Distributing controlled substance as underlying felony.** — Defendant may be convicted of felony murder based on the underlying felony of distributing a controlled substance if that felony is inherently dangerous, and if the defendant directly causes the death of the victim while in the commission of the felony. *Hulme v. State*, 273 Ga. 676, 544 S.E.2d 138 (2001).

Evidence was sufficient to support conviction of felony murder based on the underlying felony of distributing a controlled substance since the defendant controlled the dosages of methadone that the victim took on a daily basis and gave the victim a dosage on the day of the victim's death that could have been lethal without regard to other drugs the victim might have consumed. *Hulme v. State*, 273 Ga. 676, 544 S.E.2d 138 (2001).

Evidence that the defendants knew the victim had been drinking and taking drugs when they injected the victim with oxycodone, and that the victim died of a drug overdose was sufficient to prove that the defendants directly caused the victim's death in the commission of a felony, the distribution of oxycodone. *Carter v. State*, 285 Ga. 394, 677 S.E.2d 71 (2009).

**Child abuse.** — Ample evidence concerning the child victim's condition and expert testimony regarding the same was presented to authorize the jury to find defendant guilty of committing felony murder by holding the child in scalding water, and guilty of committing cruelty to

**Felony Murder (Cont'd)****2. Underlying Felony (Cont'd)**

a child by failing to provide medical attention, and to reject the evidence and hypotheses defendant presented in an attempt to refute the charges. Robles v. State, 277 Ga. 415, 589 S.E.2d 566 (2003).

**Voluntary and involuntary manslaughter do not invoke felony murder rule.** — Voluntary manslaughter, and felony of involuntary manslaughter where it applies, are not themselves felonies which will invoke felony-murder rule as to death of main victim. Therefore, if a jury finds felonious manslaughter, they should not go on to reason that this offense, being itself a felony, turns the killing into a felony murder. The jury should be instructed in accordance with this principle. Malone v. State, 238 Ga. 251, 232 S.E.2d 907 (1977).

When the jury renders a verdict for voluntary manslaughter, the jury cannot also find felony murder based on the same underlying aggravated assault. Edge v. State, 261 Ga. 865, 414 S.E.2d 463 (1992).

**Voluntary manslaughter is a lesser included offense of felony murder.** Young v. State, 141 Ga. App. 261, 233 S.E.2d 221 (1977).

With respect to jury instructions, voluntary manslaughter is a lesser included offense of felony murder under O.C.G.A. §§ 16-1-6 and 16-5-1(c), because an act done in passion involves a less culpable mental state than the state of real or imputed malice which is the foundation of the felony-murder rule. Therefore, where facts warrant it, a charge on voluntary manslaughter may indeed be given in a felony-murder trial. Malone v. State, 238 Ga. 251, 232 S.E.2d 907 (1977).

Defendant, who shot the victim in the abdomen, should not have been convicted of both voluntary manslaughter in violation of O.C.G.A. § 16-5-2 and felony murder while in the commission of an aggravated assault in violation of O.C.G.A. § 16-5-1(c); there was one assault, and the jury found that the fatal assault was mitigated by provocation and passion, so only the voluntary manslaughter conviction was proper. Lawson v. State, 280 Ga. 881, 635 S.E.2d 134 (2006).

**Conviction of both felony murder and underlying felony is proscribed,** since latter is lesser included offense of former. Woods v. State, 233 Ga. 495, 212 S.E.2d 322 (1975); Atkins v. Hopper, 234 Ga. 330, 216 S.E.2d 89 (1975).

Defendant in felony-murder trial cannot be convicted of felony upon which conviction of felony murder is based, as it is a lesser included offense of felony murder. Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981); Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82 (2002).

Defendant may not be convicted lawfully of both felony murder and an underlying felony if the felony murder and underlying felony were committed on different victims, and when the count of the indictment alleging felony murder sets forth the underlying felony or felonies supporting the charge of felony murder. Walker v. State, 254 Ga. 149, 327 S.E.2d 475, cert. denied, 474 U.S. 865, 106 S. Ct. 185, 88 L. Ed. 2d 154 (1985).

Defendant may not be convicted of felony murder and also be convicted of the underlying felony (cruelty to children) which was alleged by the indictment to support the conviction of felony murder. Zackery v. State, 257 Ga. 442, 360 S.E.2d 269 (1987).

Defendant may not be convicted of felony murder and also be convicted of the underlying felony which was alleged by the indictment to support the felony murder conviction; and sentence for the aggravated assault was therefore vacated. Jones v. State, 264 Ga. 144, 442 S.E.2d 245 (1994).

**Challenge to felony murder conviction moot.** — Defendant's challenge to the defendant's felony murder conviction was moot because that conviction was vacated by operation of law. Mills v. State, 287 Ga. 828, 700 S.E.2d 544 (2010).

**3. Termination of Underlying Felony**

**Homicide as felony murder committed after technical completion of**

**underlying felony.** — Murder may be committed in commission of a felony so as to come within O.C.G.A. § 16-5-1(c), although the murder does not take place until after the felony itself has been technically completed, if it is committed within res gestae of the felony. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

**Whether felony is terminated is question of fact for jury** unless evidence is so overwhelming that reasonable people could not differ. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

**When underlying felony terminates for purposes of felony-murder rule.** — Weight of authority holds that underlying felony continues during escape phase of felony if there is continuous pursuit immediately organized, and felony terminates at point perpetrator has arrived at place of seeming security or when perpetrator is no longer pursued by authorities. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

**What constitutes pursuit so as to continue underlying felony during escape.** — Mere fact of delay in beginning pursuit until alarm can be sounded and pursuit organized and instituted does not necessarily segregate flight and prevent its being part and parcel of crime. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), over-

ruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

**Homicide committed in flight from felony invokes felony-murder rule.** — Homicide is within res gestae of underlying felony for purpose of felony-murder rule if it is committed while fleeing scene of crime. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

**When victims were killed while defendant was fleeing the scene of a burglary,** defendant was still in the commission of the burglary for purposes of the felony murder rule. *Diamond v. State*, 267 Ga. 249, 477 S.E.2d 562 (1996).

There was no fatal variance between a felony-murder indictment, which alleged that the defendant and an accomplice beat and choked a home-invasion robbery victim, and the proof at trial, which showed that the victim died of smoke inhalation after being left unconscious in a burning house, because the choking rendered the victim unconscious and proximately caused the victim's death in the fire. *Cooper v. State*, 286 Ga. 66, 685 S.E.2d 285 (2009).

**Effect of perpetrator's arrest.** — Underlying felony can terminate for purpose of felony-murder rule if perpetrator is arrested. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

For arrest to terminate felony for purpose of felony-murder rule, perpetrator must be subjected to complete custody; perpetrator must acquiesce and submit to arrest; and perpetrator's surrender must

**Felony Murder (Cont'd)****3. Termination of Underlying Felony (Cont'd)**

be complete and continuous. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

**Deadly Weapons**

**That instrument is a weapon likely to produce death may be shown by circumstantial evidence.** — An instrument may be shown to be a weapon likely to produce death, by direct proof as to its character, by exhibition of it to jury, or by evidence as to nature of wound, or other evidence such as would warrant jury in finding the instrument was one calculated to produce death; the evidence need not be direct, but may be circumstantial. *Kennedy v. State*, 191 Ga. 22, 11 S.E.2d 179 (1940) (decided under former Code 1933, §§ 26-1003, 26-1004).

**That weapon is one likely to produce death may be shown by nature of wound.** *Blakewood v. State*, 196 Ga. 34, 25 S.E.2d 643 (1943) (decided under former Code 1933, §§ 26-1003, 26-1004).

**An automobile is not per se a deadly weapon;** when death results from its reckless or unlawful use, state relies upon implied malice in prosecution for murder in such instance. *Huntsinger v. State*, 200 Ga. 127, 36 S.E.2d 92 (1945) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Shoe or boot as weapon likely to produce death.** — Shoe or boot, when used to severely and brutally kick a helpless man, lying down, on his head, could be properly classified as a blunt instrument and a weapon likely to produce death. *Goss v. State*, 61 Ga. App. 621, 7 S.E.2d 87 (1940) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Whether limb of tree is a weapon likely to produce death is a jury question.** *Smithwick v. State*, 199 Ga. 292, 34 S.E.2d 28 (1945) (decided under former

Code 1933, §§ 26-1003, 26-1004).

**Hands as deadly weapons.** — Evidence that the victim was hit so hard by the defendant from behind that the victim's arms flew up in the air as the victim fell, causing the victim's fatal vertebral artery hemorrhage, was sufficient to authorize a jury to find defendant used defendant's hands as deadly weapons to commit felony aggravated assault, and thus felony murder. *Miller v. State*, 275 Ga. 730, 571 S.E.2d 788 (2002), cert. denied, 538 U.S. 1004, 123 S. Ct. 1911, 155 L. Ed. 2d 835 (2003).

**Automobile as deadly weapon.** — Defendant's possession of a stolen automobile was sufficient to support a felony murder conviction, as the vehicle's possession played a role in the defendant's decision to flee, and a decision to remain in the stolen car in order to flee created a foreseeable risk of death; further, the jury was authorized to infer from this conduct that the defendant had an intent to injure in attempting to elude the police. *Turner v. State*, 281 Ga. 487, 640 S.E.2d 25 (2007).

**Lamps as deadly weapons.** — Evidence was sufficient to support convictions of felony murder and of aggravated assault when during an argument the defendant threw a glass-jug lamp, fatally injuring one victim and causing the other to lose consciousness and require seven stitches. *Hester v. State*, 283 Ga. 367, 659 S.E.2d 600 (2008).

When the defendant was accused of felony murder and aggravated assault by throwing a lamp at the victims, because the indictment alleged that the lamp was an object that when used offensively against a person was likely to and actually did result in serious bodily injury, an allegation that the lamp was a deadly weapon was not required. Furthermore, the indictment was not too vague as the defendant clearly was apprised that the defendant would have to defend against the allegation that the defendant struck one victim on and about the head with the lamp, and the defendant admitted to a law enforcement officer that the defendant had thrown the lamp at the other victim. *Hester v. State*, 283 Ga. 367, 659 S.E.2d 600 (2008).

**Evidence of cause of death.** — Evidence authorized a jury to find that the

victim died as a result of blows inflicted by the defendant because an emergency room physician testified that the victim was beaten with a blunt instrument, received multiple, and serious, head blows, and that the victim died from brain injuries when the victim was later removed from life support systems. Phillips v. State, 280 Ga. 728, 632 S.E.2d 131 (2006).

### Jury Instructions

#### Court charging regarding both murder and voluntary manslaughter.

— If there is a doubt, however slight, as to whether offense is that of murder or voluntary manslaughter, it is the duty of the court to submit the law of both murder and manslaughter and let the jury determine the grade of the offense of the homicide. Thomas v. State, 47 Ga. App. 237, 170 S.E. 303 (1933) (decided under former Penal Code 1910, §§ 61, 62); Thomas v. State, 51 Ga. App. 455, 180 S.E. 760 (1935) (decided under former Code 1933, §§ 26-1003, 26-1004); Hayes v. State, 51 Ga. App. 462, 180 S.E. 762 (1935) (decided under former Code 1933, §§ 26-1003, 26-1004); Goldsmith v. State, 54 Ga. App. 268, 187 S.E. 694 (1936) (decided under former Code 1933, §§ 26-1003, 26-1004); Dickey v. State, 60 Ga. App. 199, 3 S.E.2d 238 (1939) (decided under former Code 1933, §§ 26-1003, 26-1004); North v. State, 69 Ga. App. 836, 26 S.E.2d 892 (1943) (decided under former Code 1933, §§ 26-1003, 26-1004); Harris v. State, 77 Ga. App. 842, 50 S.E.2d 152 (1948) (decided under former Code 1933, §§ 26-1003, 26-1004).

Taken as a whole, jury re-charge did not lead the jury to believe that passion and provocation were relevant only as to felony murder or permit the jury to convict the defendant of malice murder despite having found that the defendant killed the victim while acting in sudden passion resulting from serious provocation; in the initial charge the jury was informed that a finding of malice was necessary for a homicide to constitute murder, was given the definition of express malice, and was told malice could be implied if there was no considerable provocation. Williams v. State, 279 Ga. 154, 611 S.E.2d 19 (2005).

Since the defendant was convicted of

malice murder, any error in charging the jury to consider voluntary manslaughter only after finding reasonable doubt as to the existence of malice murder was harmless. Williams v. State, 279 Ga. 154, 611 S.E.2d 19 (2005).

Jury was properly charged that it could not find the defendant guilty of felony murder if it concluded the underlying felony of aggravated assault was the result of passion and provocation, but would be authorized to find the defendant guilty of voluntary manslaughter. Williams v. State, 279 Ga. 154, 611 S.E.2d 19 (2005).

In a murder prosecution, a defendant was not entitled to an instruction on voluntary manslaughter because testimony that the defendant shot the victim because the defendant panicked and was frightened showed, at best, that the defendant was attempting to repel an attack, not that there was sufficient anger to invoke passion. Bell v. State, 280 Ga. 562, 629 S.E.2d 213 (2006).

**Charge on manslaughter unnecessary where state's unrefuted evidence shows premeditation.** — Where state's evidence shows that homicide was premeditated murder, and defendant introduces no evidence, and there is nothing in defendant's statement that indicates in the slightest that the homicide was manslaughter, court does not err in failing to charge on law of manslaughter. Murray v. State, 214 Ga. 350, 104 S.E.2d 905 (1958) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Instructing on logical order in which to consider offenses.** — Instructions were not subject to objection, where the trial court did not instruct the jury that it had to find the defendant not guilty of any particular offense prior to considering any lesser offense; rather, it simply gave the jury a logical order in which to consider the offenses. Zackery v. State, 257 Ga. 442, 360 S.E.2d 269 (1987).

**"Shall be implied" language of instruction** did not unconstitutionally shift burden of proof to the defendant, as the language instructed the jury that the jury must find malice if the state proved the predicate facts of no considerable provocation and an abandoned and malignant heart. Humphrey v. Boney, 785 F.2d 1495 (11th Cir. 1986).

**Jury Instructions (Cont'd)**

**Charge that malice is presumed from intentional killing** and that it rests with defendant to show justification or excuse unless they appear from state's evidence is not unconstitutionally burden-shifting. *Burger v. State*, 238 Ga. 171, 231 S.E.2d 769 (1977).

**Charge on malice need not be in exact language of section.** — When judge on trial of one charged with murder, undertakes to define that offense, and malice, as employed in definition of murder, it is better to charge in language of statute, but failure to use this identical language does not constitute prejudicial error, where no essential element is omitted from the definition, and nothing is added to impair meaning as expressed in the statute. *Adams v. State*, 188 Ga. 668, 4 S.E.2d 663 (1939) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Slight variation from language of section in charge on implied malice** does not constitute error where section is substantially complied with. *Shepherd v. State*, 150 Ga. 799, 105 S.E. 485 (1920) (decided under former Penal Code 1910, §§ 61, 62).

**No error in recharging jury.** — There was no error either in the jury recharge clarifying malice murder, or in the reception of the guilty verdicts; the actual guilty verdicts against both defendants were not received and published until after the jurors heard the recharge and then retired for further deliberations. *Cox v. State*, 279 Ga. 223, 610 S.E.2d 521 (2005).

**Denying request to recharge jury on affirmative defenses not reversible error.** — Because no abuse of discretion resulted from the trial court's order denying defense counsel's request that the court recharge the jury on the affirmative defenses of accident and reasonable discipline of a minor, but the court granted the jury's request for a recharge as to the offenses of malice murder and felony murder, the defendant's felony murder and cruelty to children convictions were affirmed. *Johnson v. State*, 281 Ga. 770, 642 S.E.2d 827 (2007).

**Charge of mutual combat.** — Erroneous failure to charge on mutual combat is

reversible error where verdict is for murder. *Davis v. State*, 76 Ga. App. 427, 46 S.E.2d 520 (1948) (decided under former Code 1933, §§ 26-1003, 26-1004).

When the defendant maintained that the trial court erred in failing to charge the law of mutual combat, but the evidence showed at most that the defendant and the victim pushed one another and "threw a few punches," and there was no evidence that they mutually agreed or intended to fight with deadly weapons, the requested charge was not warranted by the evidence and the trial court did not err in refusing to give the instruction. *Martin v. State*, 258 Ga. 300, 368 S.E.2d 515 (1988).

Trial court properly chose not to give a jury charge on mutual combat in the defendant's criminal trial, whereupon the defendant was convicted of felony murder, as there was no evidence that during the physical altercation between the defendant, the victim, and others, the victim was armed with a deadly weapon; in fact, the evidence allowed the jury to find that the victim was unarmed during the fight while the defendant was armed with a gun. *Hudson v. State*, 280 Ga. 123, 623 S.E.2d 497 (2005).

**Motive as proper subject for attorneys' closing arguments.** — The motive for the killing, or lack thereof, is proper subject matter for the closing arguments of both the prosecution and the defense. *Wade v. State*, 258 Ga. 324, 368 S.E.2d 482 (1988), cert. denied, 502 U.S. 1060, 112 S. Ct. 941, 117 L. Ed. 2d 111 (1992).

**Charge on intent in murder trial did not unconstitutionally shift the burden of proof.** *Parker v. State*, 256 Ga. 363, 349 S.E.2d 379 (1986).

**Instruction on voluntary manslaughter warranted.** — Although there was sufficient evidence to support a defendant's conviction for murder beyond a reasonable doubt with regard to the stabbing death of the victim, which the defendant claimed was in self-defense, the defendant's conviction was reversed as the trial court erred in failing to give a jury instruction on voluntary manslaughter because there was evidence that the defendant overreacted and was outnumbered by the victim and another and could have

felt threatened. *Webb v. State*, 284 Ga. 122, 663 S.E.2d 690 (2008).

**Instruction on voluntary manslaughter not warranted.** — Where defendant was convicted of malice murder, the trial court properly refused to charge the jury on voluntary manslaughter, as there was no evidence that defendant stabbed the victim as the result of passion arising from reasonable provocation. *Bell v. State*, 276 Ga. 206, 576 S.E.2d 876 (2003).

In a murder prosecution, the trial court properly refused to give jury instructions on voluntary manslaughter, involuntary manslaughter, pointing a pistol at another, and accident as: (1) no evidence of provocation was presented; (2) the victim faced a window through which the defendant pointed a pistol and reacted to the presence of a gun; (3) a demand from the defendant showed an apprehension of receiving a violent injury; and (4) the evidence showed that the victim was killed during the defendant's effort to rob the victim at gunpoint. *Roberts v. State*, 282 Ga. 548, 651 S.E.2d 689 (2007).

Because the evidence presented showed that the defendant acted in a rational and calculating fashion in retrieving a car jack, breaking out the exterior light to darken the scene, and then quietly snuck into and through the victim's house in search of the victim, and did not show that the defendant's actions were the result of a sudden, violent, and irresistible passion, the defendant was not entitled to a charge on voluntary manslaughter, and a malice murder conviction was upheld on appeal. *Taylor v. State*, 282 Ga. 502, 651 S.E.2d 715 (2007).

In a malice murder prosecution, as the evidence did not show the defendant was provoked seriously enough to cause a reasonable person to fatally stab the victim, the defendant was not entitled to a voluntary manslaughter instruction under O.C.G.A. § 16-5-2(a). *Boyd v. State*, 284 Ga. 46, 663 S.E.2d 218 (2008).

Trial court did not err by refusing to give the defendant's request for a jury instruction on voluntary manslaughter because the record failed to reveal any evidence that would support a voluntary manslaughter charge; the evidence and

testimony at trial revealed that although a gun was in the victim's car at the time of the murder, the victim did not say or do anything before the defendant shot the victim, let alone do anything that would constitute the "serious provocation" necessary to warrant a charge on voluntary manslaughter. *Lawrence v. State*, 286 Ga. 533, 690 S.E.2d 801 (2010).

During the defendant's trial for murder, the trial court did not err by refusing the defendant's request to charge the jury on voluntary manslaughter because in the absence of any evidence of a romantic relationship between the defendant and the teenaged victim, there could be no serious provocation created by the victim's call to her ex-boyfriend that could have aroused passion in a reasonable person pursuant to O.C.G.A. § 16-5-2(a). *Crawford v. State*, 288 Ga. 425, 704 S.E.2d 772 (2011).

**Instruction on involuntary manslaughter warranted.** — With regard to a defendant's conviction for the felony murder of the defendant's wife, with aggravated assault as the underlying felony, the trial court erred by refusing the defendant's requested charge on involuntary manslaughter with pointing a pistol at another as the predicate misdemeanor, which entitled the defendant to a new trial based on the defendant testifying that the shooting occurred inadvertently when, in the course of horseplay with the pistol, the defendant pulled the trigger while pointing the pistol at the victim's head, not knowing there was a round in the chamber. *Manzano v. State*, 282 Ga. 557, 651 S.E.2d 661 (2007).

**Instruction on involuntary manslaughter not warranted.** — Because the state did not allege that the felony murder victim died as a result of non-felony conduct, but the victim's death occurred as a result of the defendant's commission of a felony in the course of fleeing and attempting to elude the police, an involuntary manslaughter instruction was not warranted. *Turner v. State*, 281 Ga. 487, 640 S.E.2d 25 (2007).

When evidence established either that defendant intentionally shot and killed the victim or that a pistol discharged accidentally and no offenses occurred, this

**Jury Instructions (Cont'd)**

showed either commission of felony murder and aggravated assault or commission of no offense, and the trial court did not err in refusing to give a lesser included offense charge on involuntary manslaughter based on reckless conduct. *Lashley v. State*, 283 Ga. 465, 660 S.E.2d 370 (2008).

When the defendant was charged with felony murder, with cruelty to a child in the first degree as the underlying felony, the trial court properly denied the defendant's request for a jury instruction on felony involuntary manslaughter under O.C.G.A. § 16-5-3(a) as a lesser included offense. Contrary to the defendant's argument, the state did not present any evidence that the child died as a result of lack of medical care; furthermore, because the defendant argued that it was the child's parent who shook the child and that the defendant only tried to revive the child, such an instruction was not necessary because the evidence showed either the charged crime or no crime. *Bostic v. State*, 284 Ga. 864, 672 S.E.2d 630 (2009).

Trial court did not err in refusing to instruct the jury on voluntary manslaughter as a lesser included crime of malice murder because a charge on voluntary manslaughter was precluded by the evidence when there was no evidence to illustrate the existence of provocation before the fatal shots were fired; the defendant assaulted the victim with a deadly weapon and then fired the fatal shots into the victim's back, and there was no evidence that the defendant had any type of relationship with the friend who was arguing with the victim that would explain an impassioned attack. *Hicks v. State*, 287 Ga. 260, 695 S.E.2d 195 (2010).

**Charge on party to crime proper.** — During the defendant's trial for felony murder, the trial court did not err in giving a charge on party to a crime because the charge given was legally correct and was supported by evidence presented at trial; in addition to the evidence linking the defendant to the commission of the crimes for which the defendant was convicted, there was evidence from an expert firearms examiner concerning the amount of time it would take for one person to

shoot and re-load the two-shot derringer believed to be the murder weapon in order to fire six shots into the two victims, there was evidence that a confidential informant had told authorities that two shooters killed the victims, and the defendant testified that a drug dealer knew about the drug transaction between the defendant and one of the victims, that the defendant had loaned the defendant's truck to the drug dealer and had sold the defendant's derringers to the drug dealer prior to the murder of the victims. *Baptiste v. State*, 288 Ga. 653, 706 S.E.2d 442 (2011).

**Failure to charge on implied malice** is not harmful when the jury is instructed that the jury must find actual malice before finding defendant guilty of malice murder. *Jackson v. State*, 269 Ga. 494, 500 S.E.2d 902 (1998).

**Instruction defining express and implied malice** as requiring neither pre-meditation nor a preconceived intention to kill was a correct statement of the law. *Wright v. State*, 255 Ga. 109, 335 S.E.2d 857 (1985).

**Presumption that killing was intentional and malicious.** — In prosecution for murder, trial court correctly charged that if state proved that defendant killed person named in indictment by use of a deadly weapon, the killing would be presumed to be intentional and malicious unless circumstances of alleviation, excuse, or justification appeared to satisfaction of jury. *Felts v. State*, 244 Ga. 503, 260 S.E.2d 887 (1979), aff'd, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981), overruled on other grounds, *Baker v. Montgomery*, 811 F.2d 55 (11th Cir. 1987); but see *Holloway v. McElroy*, 474 F. Supp. 1363 (M.D. Ga. 1979), aff'd, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981), overruled on other grounds, *Baker v. Montgomery*, 811 F.2d 55 (11th Cir. 1987).

As to a charge of malice murder, because the trial court erroneously gave the state's requested jury instruction that the law presumed an intention to kill and malice was to be implied from the use of a deadly weapon, the defendant's malice

murder conviction had to be reversed. Further, the error could not be considered harmless as: (1) there were no witnesses to the shooting; (2) the victim was shot only once; (3) the defendant claimed to have fired the weapon during a struggle with the victim after the defendant's accomplices fled the scene; and (4) the fact that the fatal shot was fired from a distance of three or more feet was not inconsistent with the defendant's story of a struggle and did not overwhelmingly establish that the defendant acted with malice in shooting the victim. Warren v. State, 283 Ga. 42, 656 S.E.2d 803 (2008).

**Constitutionality of presumptions of malice and intent.** — Charges in homicide prosecution that malice is presumed from intentional killing and that intent is presumed from use of a deadly weapon did not violate due process, because there is a rational connection between facts proved and facts presumed. Patterson v. State, 239 Ga. 409, 238 S.E.2d 2 (1977), aff'd, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981), overruled on other grounds, Baker v. Montgomery, 811 F.2d 55 (11th Cir. 1987); but see Holloway v. McElroy, 474 F. Supp. 1363 (M.D. Ga. 1979), aff'd, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981), overruled on other grounds, Baker v. Montgomery, 811 F.2d 55 (11th Cir. 1987).

**Charge on assault with intent to murder when death not necessarily caused by intentional shooting.** — When one is charged with murder by shooting and evidence does not demand finding that victim died from such gunshot wounds and defendant admits shooting, a verdict of guilty of assault with intent to murder may be authorized and it is not error to charge the jury on such lesser crime. Kimbro v. State, 113 Ga. App. 314, 147 S.E.2d 876 (1966) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Jury instructions on presumption of intent did not shift burden.** — Jury charge that "a presumption is a conclusion which the law draws from given facts"; that presumptions are rebuttable; and that the state must prove every element of

the crime, including intent, beyond a reasonable doubt as a whole did not impermissibly shift the burden of proof to the defendant. Roberson v. State, 253 Ga. 239, 319 S.E.2d 444 (1984).

**Presumptions as to intent and malice are not unconstitutionally burden-shifting.** — It is not unconstitutionally burden-shifting to presume that intentional homicide is malicious until the contrary appears, nor to presume intent to kill from use of deadly weapon. Such charges to a jury lay no burden of proof on defendant, but merely require defendant in certain circumstances to go forward with evidence. Thomas v. State, 240 Ga. 454, 241 S.E.2d 204 (1978).

**Instruction on presumption must note it is rebuttable.** — Court erred in charging the jury that, "If you find that a homicide is proved to have been committed in this case by the defendant, and with a weapon that you find was, in the manner in which it was used upon the occasion in question, a weapon likely to produce death, the law would presume malice and the intent to kill," without also informing the jury that the presumption of intent may be rebutted. Trenor v. State, 252 Ga. 264, 313 S.E.2d 482 (1984).

**Instruction removing presumption of innocence.** — Instruction which told the jury, at defendant's trial for felony-murder based upon the commission of armed robbery, that the acts of a person of sound mind and discretion are presumed to be the product of the person's will was reversible error, because it removed the presumption of innocence and relieved the state of the burden of proving beyond a reasonable doubt that defendant intentionally committed the felony of armed robbery by requiring the jury to presume that the defendant intended to perform defendant's actions. Hall v. Kelso, 892 F.2d 1541 (11th Cir. 1990).

**Instruction on inferred intent and malice from proven circumstances.** — Trial court's jury instruction in a murder prosecution that intent may be inferred from proven circumstances or by the acts and conduct of the defendant or may be presumed when it would be the natural and necessary consequence of the particular acts did not impermissibly relieve the

**Jury Instructions (Cont'd)**

prosecution of the prosecution's burden of proving intent beyond a reasonable doubt or otherwise undermine the fact-finding responsibility of the jury. *Lamb v. Jernigan*, 683 F.2d 1332 (11th Cir. 1982), cert. denied, 460 U.S. 1024, 103 S. Ct. 1276, 75 L. Ed. 2d 496 (1983).

**Instruction on the presumption of malice** was not interpreted as burden-shifting. *Jarrell v. Balkcom*, 735 F.2d 1242 (11th Cir. 1984), cert. denied, 471 U.S. 1103, 105 S. Ct. 2331, 85 L. Ed. 2d 848 (1985).

**Instruction on implying malice.** — Jury instruction in a murder prosecution that malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart could not, in view of the strong circumstantial evidence that preceded it, have been interpreted by the jury as changing the reasonable-doubt burden of proof they were initially told that the prosecution had to meet. *Lamb v. Jernigan*, 683 F.2d 1332 (11th Cir. 1982), cert. denied, 460 U.S. 1024, 103 S. Ct. 1276, 75 L. Ed. 2d 496 (1983).

Instruction that "malice shall be implied where no considerable provocation appears and where all of the circumstances of the killing show an abandoned and malignant heart" did not improperly relieve the state of its burden of proving malice. *Walden v. State*, 251 Ga. 505, 307 S.E.2d 474 (1983).

Trial court does not err in charging, relative to implied malice, the language of O.C.G.A. § 16-5-1. *Mapp v. State*, 258 Ga. 273, 368 S.E.2d 511 (1988).

When the defendant was charged with murder under O.C.G.A. § 16-5-1, the post-evidentiary charge, in which the jury was instructed that malice may be implied when no considerable provocation appears and when all the circumstances of the killing show an abandoned and malignant heart, being more favorable to appellant than the acceptable statutory charge, was not reversible error. *Gambrel v. State*, 260 Ga. 197, 391 S.E.2d 406 (1990).

**Instruction stating "malice may be inferred"** did not impermissibly shift

burden of proof to the defendant. *Adams v. State*, 255 Ga. 356, 338 S.E.2d 860 (1986).

**Instruction on inferring intent from use of deadly weapon.** — Although the trial court erred by instructing the jury that it could infer intent to kill from the use of a deadly weapon, the error was harmless because defendant was found guilty of felony murder rather than malice murder. *Ross v. State*, 276 Ga. 747, 583 S.E.2d 850 (2003).

Defendant's challenge to a jury instruction regarding inferring the intent to kill from the use of a deadly weapon failed; because felony murder did not require intent to kill (defendant only had to have intended to commit the underlying felony), any inference regarding the intent to kill would have had no bearing on the commission of felony murder. *Brown v. State*, 278 Ga. 544, 604 S.E.2d 503 (2004) (Unpublished).

In a trial on a charge of malice murder, while the trial court erred in charging the jury that it could infer the intent to kill if a person used a deadly weapon and caused the death of a human being, the error was harmless because there was overwhelming evidence of malice, and thus, it was highly probable that the improper charge did not contribute to the verdict. *Davis v. State*, 279 Ga. 11, 608 S.E.2d 628 (2005).

*Harris v. State*, 273 Ga. 608, 543 S.E.2d 716 (2001), which held that a jury charge on malice that allowed a jury to infer an intent to kill by a defendant's use of a deadly weapon, applied to the defendant's case, which was pending on direct review when *Harris* was decided; however, any error in giving the jury the erroneous charge was harmless in light of the overwhelming evidence of malice. *Flanders v. State*, 279 Ga. 35, 609 S.E.2d 346 (2005).

**Instruction on the effect of a deadly weapon**, which stated that malice and intent to kill would be presumed if the murder was committed with a "weapon likely to produce death," was upheld. *Jarrell v. Balkcom*, 735 F.2d 1242 (11th Cir. 1984), cert. denied, 471 U.S. 1103, 105 S. Ct. 2331, 85 L. Ed. 2d 848 (1985).

**Instruction erroneously shifted burden to defendant.** — It was erroneous to charge in a homicide prosecution

that the law presumes that every homicide is malicious until the contrary appears from the circumstances of alleviation, excuse, or justification and that it is incumbent upon the accused to make out such circumstances to the jury's satisfaction unless such circumstances appear from the evidence produced against the accused; but the error was harmless beyond a reasonable doubt where the evidence of guilt was so overwhelming that the error could not have contributed to the jury's decision to convict. *Lamb v. Jernigan*, 683 F.2d 1332 (11th Cir. 1982), cert. denied, 460 U.S. 1024, 103 S. Ct. 1276, 75 L. Ed. 2d 496 (1983).

**Instructions on malice and flight not burden-shifting.** — See *Ingram v. State*, 253 Ga. 622, 323 S.E.2d 801 (1984), cert. denied, 473 U.S. 911, 105 S. Ct. 3538, 87 L. Ed. 2d 661 (1985).

**Following jury instruction impermissibly shifted the burden on to the defendant to disprove malice:** "When and if a killing is proved to your satisfaction to be the intentional act of the defendant, himself, the presumption of innocence with which he enters upon the trial is removed from him. And, the burden is upon him to justify or mitigate the homicide, unless the evidence introduced against him shows justification or mitigation." *Dix v. Newsome*, 584 F. Supp. 1052 (N.D. Ga. 1984).

**Instruction which unconstitutionally shifted the burden of proof** was harmless error where, even absent the erroneous charge, no rational jury would have drawn any other inferences from defendant's conduct but that defendant intended to kill the victim. *Lancaster v. Newsome*, 880 F.2d 362 (11th Cir. 1989).

"Use of deadly weapon" charge is error, whether or not it is accompanied by an instruction that the jury has discretion to make the inference. This new rule of criminal procedure will be applied to all cases in the pipeline. *Harris v. State*, 273 Ga. 608, 543 S.E.2d 716 (2001).

**Jury instructions regarding intent impermissibly shifted burden of proof** and rendered conviction invalid. *Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983), aff'd, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).

**Erroneous instruction harmless if intent not at issue.** — An instruction which could lead a reasonable juror to understand as creating a mandatory presumption of intent may nevertheless be found to be harmless if intent is not at issue in the case or is overwhelmingly proved. *Burger v. Kemp*, 785 F.2d 890 (11th Cir. 1986); aff'd, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987).

**Instruction shifting burden where defendant claims self-defense.** — An erroneous charge to the jury that shifted the burden of persuasion to defendant on the element of intent was harmless, where defendant relied on the defense of self-defense. *White v. State*, 255 Ga. 731, 342 S.E.2d 304 (1986).

**Trial court erred in failing to charge a jury on the principles of retreat** when self-defense was a defendant's sole defense, the prosecution placed the concept of retreat in issue during cross-examination of the defendant, and evidence of the defendant's guilt on charges that included aggravated assault was not overwhelming. *Felder v. State*, 291 Ga. App. 740, 662 S.E.2d 826 (2008).

**Charge that when defendant admits killing defendant must show justification is not erroneous.** — On trial of one charged with murder, it is not error to charge jury that if the defendant admits the killing, the law places upon the defendant the burden to satisfy the jury that the defendant was justified under some rule of law, unless admissions, together with evidence in the case against the defendant, or statement of the defendant, show justification or mitigation. *Gay v. State*, 173 Ga. 793, 161 S.E. 603 (1931) (decided under former Penal Code 1910, §§ 61, 62).

**When defendant admits homicide without stating excuse or justification.** — Charge on confessions is authorized when accused admits homicide of which accused is charged and in connection therewith states no facts or circumstances showing excuse or justification for killing; and this is true although, when referring on another occasion to the killing, the accused states facts or circumstances showing excuse or justification therefor. *Weatherby v. State*, 213 Ga. 188,

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97 S.E.2d 698 (1957) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Effect of state's evidence showing mitigating circumstances, justification, or alleviation.** — When any of the state's evidence shows mitigating circumstances, justification, or alleviation, it is error to charge that malice will be presumed from commission of homicide with a deadly weapon, and that burden rests upon the accused to show justification or mitigation. *Jordon v. State*, 232 Ga. 749, 208 S.E.2d 840 (1974).

**When the evidence as to provocation and self-defense is in dispute**, it should be submitted to the jury to determine if the killing was with malice, express or implied. *West v. State*, 251 Ga. 458, 306 S.E.2d 909 (1983).

**Erroneous instruction on implied malice.** — In prosecution for murder it was error to instruct that "implied malice is an intention to kill which is proven either by the act of the killing itself, the surrounding circumstances, or the absence of any provocation"; a reasonable juror could have construed the instruction as an irrebuttable direction to find intention to kill upon proof of either (1) absence of provocation or (2) the act of killing itself. *Parks v. State*, 254 Ga. 403, 330 S.E.2d 686 (1985).

**Charge on felony murder under malice murder indictment** is not error where warranted by evidence. *Marable v. State*, 154 Ga. App. 426, 268 S.E.2d 720 (1980).

**Instructions on felony murder and aggravated assault moot in light of malice murder conviction.** — Any issue concerning the trial court's issuance of instructions to the jury on the offenses of felony murder and aggravated assault became moot when a defendant was convicted and sentenced on a charge of malice murder. *Parker v. State*, 282 Ga. 897, 655 S.E.2d 582 (2008).

**Charge of felony-murder without defining elements of underlying felony** is harmful error. *Edwards v. State*, 233 Ga. 625, 212 S.E.2d 802 (1975).

**Application of forcible felony instruction.** — On appeal from a conviction

for voluntary manslaughter as a lesser-included offense of malice murder, the appeals court found that no error or prejudice resulted from the trial court's denial of the defendant's request for an aggravated battery charge as a forcible felony in support of the defendant's justification claim, and affirmed the trial court's choice to charge on aggravated assault and rape as the defendant failed to present evidence of any reasonable belief that the use of force was necessary to prevent the commission of an aggravated battery. *Wicker v. State*, 285 Ga. App. 294, 645 S.E.2d 712 (2007).

**Charge of self-defense and accident.** — Where the defendant based the defense upon a claim of justification, and the court charged the jury as to self defense and accident, the court's refusal to charge involuntary manslaughter was not error. *Willis v. State*, 258 Ga. 477, 371 S.E.2d 376 (1988).

**Instruction on alibi.** — Where the evidence in support of the defense of alibi does not show the impossibility of the defendant's presence at the scene of the crime at the time of its commission, the failure of the court to charge the law of alibi is not error. *Hulett v. State*, 262 Ga. 194, 415 S.E.2d 642 (1992).

**Trial court did not sua sponte err in failing to charge jury on identity as:** (1) there was Georgia law requiring a trial judge to warn the jury against the possible dangers of mistaken identification of an accused as the person committing a crime; and (2) such was not required after the jury had already been charged as to the presumption of innocence, reasonable doubt, burden of proof, credibility of witnesses, and impeachment of witnesses. *Lee v. State*, 281 Ga. 776, 642 S.E.2d 835 (2007).

**Issuance of sequential jury charge in trial for malice, murder, felony murder, and aggravated assault.** — In a prosecution for malice murder, felony murder, and aggravated assault, although no error resulted from the trial court's issuance of a sequential jury charge, because the jury found in the defendant's favor on the defense of justification as to the malice murder count, the finding also applied to the felony murder charge.

Thus, the trial court erred in finding the defendant guilty of both felony murder and the underlying felony of aggravated assault. *Turner v. State*, 283 Ga. 17, 655 S.E.2d 589 (2008).

**Instructions on both murder and voluntary manslaughter should be given where warranted.** — On trial of murder case, if there is any evidence, however slight, as to whether offense is murder or voluntary manslaughter, instruction as to law of both offenses should be given to jury. *Birdsong v. State*, 140 Ga. App. 719, 231 S.E.2d 813 (1976); *Raines v. State*, 247 Ga. 504, 277 S.E.2d 47 (1981); *Coleman v. State*, 256 Ga. 306, 348 S.E.2d 632 (1986).

It is permissible for the court to instruct the jury that it might consider voluntary manslaughter if it did not believe that the defendant was guilty of malice murder and if it did not believe that defendant was guilty of felony murder. This is not a "sequential" charge of the type disallowed by the holding in *Edge v. State*, 261 Ga. 865(2), 414 S.E.2d 463 (1992). *Shaw v. State*, 263 Ga. 88, 428 S.E.2d 566 (1993).

**Error in charge on presumed intent was harmless where defendant had pleaded self-defense.** — Error, if any, in jury charge on presumed intent in trial for malice murder was harmless where defendant had pleaded self-defense at trial and had acknowledged that homicide was intentional. *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980).

**Evidence of good character** alone does not require charge on voluntary manslaughter in murder case, although good character may of itself constitute a defense in behalf of an accused so as to generate reasonable doubt of guilt. *Swett v. State*, 242 Ga. 228, 248 S.E.2d 629 (1978).

**Self-defense instruction properly refused.** — When, in a trial for homicide, the record contained no evidence of a verbal threat made by the victim to the defendant, and there was testimony that the victim said he could "get out of the car and discuss this like a man," whereupon the victim exited his car and "reached for" the defendant, but after the victim saw the defendant's handgun, he re-entered his automobile, these acts, standing alone,

did not constitute a sufficient threat to render pointing a loaded pistol at another a lawful act of self-defense. *Rhodes v. State*, 257 Ga. 368, 359 S.E.2d 670 (1987).

While the defendant admitted shooting the victim, the defendant, with the help of an expert witness, attempted to show that the defendant had shot the victim in order to release oneself and the defendant's family from a voodoo or "roots" spell the victim had cast over them for a long period of time, the trial court's refusal to charge on self-defense was proper. *McDaniel v. State*, 257 Ga. 345, 359 S.E.2d 642 (1987).

Because no construction of the evidence would support a finding that the defendant shot in self-defense pursuant to O.C.G.A. § 16-3-21(a), the trial court properly refused to charge on that issue; the defendant pointed to no evidence that the defendant entered a fracas between the victim and the victim's friend in defense of the friend, and the unarmed victim was shot three times in the back as the victim was attempting to flee after the defendant assaulted the victim with a firearm. *Hicks v. State*, 287 Ga. 260, 695 S.E.2d 195 (2010).

**Charge on accident not warranted.** — Where in a murder trial the defendant testified that defendant deliberately fired through a glass window pane at a large figure, a charge on accident was not authorized. *Duke v. State*, 256 Ga. 671, 352 S.E.2d 561 (1987).

Because the defendant admitted killing the defendant's spouse and witnesses testified that the spouse feared the defendant would kill the spouse if the spouse left, the evidence was sufficient to find the defendant guilty of malice murder; consequently, the trial court did not err in declining to give a charge on "accident." *Mathis v. State*, 279 Ga. 100, 610 S.E.2d 62 (2005).

Trial court did not err in rejecting the defendant's request to instruct the jury on the affirmative defense of accident, O.C.G.A. § 16-2-2, since although the defendant said that the defendant did not fire a gun intentionally, the defendant also testified that the defendant climbed into bed with the victim holding a loaded handgun with the defendant's finger on the trigger because the defendant wanted

**Jury Instructions (Cont'd)**

the victim to understand the seriousness of the defendant's concerns about infidelity; while the defendant initially denied pointing the gun at the victim and said the defendant kept the gun by the defendant's side, the defendant later admitted that the defendant did point the gun at the victim's head and that the gun went off when the victim smacked the gun away, and misuse of a firearm in the manner described by the defendant showed a degree of culpability that constituted criminal negligence. Mills v. State, 287 Ga. 828, 700 S.E.2d 544 (2010).

**Reckless conduct instruction unwarranted in felony murder trial.** — Because the evidence in the defendant's felony murder trial, with aggravated assault as the underlying felony, showed without dispute that, although the defendant might not have intended to kill the victim, the defendant intentionally gunned the engine and then drove at the victim, who was acting aggressively and was armed with a knife, the trial judge did not err in denying the defendant's request for a reckless conduct instruction, but properly instructed the jury on the issue of justification. Berry v. State, 282 Ga. 376, 651 S.E.2d 1 (2007).

**Instruction on mistake of fact not warranted.** — In a murder prosecution, the fact that the defendant testified to a belief that the defendant was required to defend self because the victim was about to drag the defendant down the street with a truck did not entitle the defendant to a mistake of fact defense under O.C.G.A. § 16-3-5, because the trial court gave a complete charge on the principles of law relating to the asserted defenses of justification and self-defense. Bell v. State, 280 Ga. 562, 629 S.E.2d 213 (2006).

**"Flight" charge not warranted.** — When the state's evidence in a murder case was that prior to trial, while the defendant was free on bond and before a trial date had been set, the defendant married a member of the armed services and went with the spouse for a period of time to West Germany, but the defendant made no attempt to evade trial nor failed to appear at trial, and the undisputed

evidence showed that the defendant fully cooperated with the authorities in their investigation of the victim's death, there was no evidence of "flight" from which an inference of a consciousness of guilt might be drawn, and a flight charge should not have been given. Duke v. State, 256 Ga. 671, 352 S.E.2d 561 (1987).

**No harm from alleged error in instructions on murder** where defendant convicted of manslaughter and thereby acquitted of murder. Chancellor v. State, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

**Charge on lesser offense of voluntary manslaughter warranted.** — See Wesley v. State, 166 Ga. App. 28, 303 S.E.2d 124 (1983).

**Lack of proper jury instruction resulted in improper conviction.** — When an original indictment charged the defendant with murder and with possessing a firearm during the commission of that murder, but the jury found the defendant guilty of the lesser included offense of voluntary manslaughter, the defendant was improperly convicted of possession of a firearm during the commission of a crime as there was no instruction identifying voluntary manslaughter as a felony. Prather v. State, 259 Ga. App. 441, 576 S.E.2d 904 (2003).

**Failure to charge on lesser included offense of voluntary manslaughter** not error absent written request made at or before close of evidence in trial for malice murder. Howe v. State, 250 Ga. 811, 301 S.E.2d 280 (1983).

Court did not err in refusing to charge the jury on voluntary manslaughter when, even if the evidence had justified such a charge, absent a written request, it is not error to fail to so charge. Mosley v. State, 257 Ga. 382, 359 S.E.2d 653 (1987).

Voluntary manslaughter charge is not warranted when the only alleged evidence of provocation is the victim resisting an armed robbery. Nance v. State, 272 Ga. 217, 526 S.E.2d 560, cert. denied, 531 U.S. 950, 121 S. Ct. 353, 148 L. Ed. 2d 284 (2000).

In a murder prosecution, a jury charge on voluntary manslaughter, as a lesser-included offense, was unwarranted, as the evidence showed that the defendant had the chance to walk away from a

heated argument with the victim, but instead calmly retrieved a knife, concealed it, and deliberately re-initiated the argument before plunging the knife into the victim's abdomen. *Ballard v. State*, 281 Ga. 232, 637 S.E.2d 401 (2006).

Trial court's refusal to charge the jury on voluntary manslaughter as a lesser included offense of murder was not erroneous when evidence of a sudden, violent, and irresistible passion resulting from serious provocation was lacking. *Walker v. State*, 281 Ga. 521, 640 S.E.2d 274 (2007).

**Failure to charge on involuntary manslaughter as a lesser included offense of felony murder.** — Trial court did not err by refusing to charge the jury on involuntary manslaughter in the commission of a lawful act in an unlawful manner, O.C.G.A. § 16-5-3(b), as a lesser included offense of a felony murder charge based on the underlying offense of cruelty to children: the defendant had not requested such a charge in writing; moreover, the evidence, including the defendant's claim that the child's death was caused by an accidental fall while the defendant was playing with the child, did not warrant a charge on lawful act-unlawful manner involuntary manslaughter. *Moore v. State*, 283 Ga. 151, 656 S.E.2d 796 (2008).

**Instruction on terroristic threats.** — In a trial for murder of her husband, defendant's requested jury charge regarding terroristic threats was properly refused, where none of the alleged threats by the victim were corroborated as contemplated by O.C.G.A. § 16-11-37. *Chapman v. State*, 258 Ga. 214, 367 S.E.2d 541 (1988).

**Instruction on concealing a death.** — Concealing a death, O.C.G.A. § 16-10-31, and felony murder, O.C.G.A. § 16-5-1, have entirely different elements and require proof of totally different facts, and thus, the crime of concealing a death is not included, as a matter of fact or law, in felony murder during the commission of aggravated assault; a trial court's refusal to give a requested charge on concealing the death of another as a lesser included offense of felony murder was proper. *Chapman v. State*, 280 Ga. 560, 629 S.E.2d 220 (2006).

Absent request, judge need not charge regarding turbulent or violent character of the deceased. *Fudge v. State*, 190 Ga. 340, 9 S.E.2d 259 (1940) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Jury charge held harmless error.** — See *Stephens v. Kemp*, 846 F.2d 642 (11th Cir.), cert. denied, 488 U.S. 872, 109 S. Ct. 189, 102 L. Ed. 2d 158 (1988).

Although the trial court erred in charging the jury that if a person of sound mind and discretion intentionally and without justification used a deadly weapon or instrumentality in the manner in which such weapon or instrumentality was ordinarily used and thereby caused the death of a human being, the jury could infer malice and the intent to kill, it was highly probable that the erroneous instruction did not contribute to the verdict because there was evidence that the defendant participated in two meetings to plan the murder, instructed a codefendant on how to perform the murder, was present at the victim's home on the morning the victim was killed, and accepted payment for the murder. *Owens v. State*, 286 Ga. 821, , cert. denied, U.S. , 131 S. Ct. 156, 178 L. Ed. 2d 93 (2010).

**Sequential charge held reversible error.** — Because trial court's recharge improperly emphasized malice murder and felony murder, preventing the jury from giving full consideration to voluntary manslaughter, this amounted to reversible error; thus, defendant's felony murder conviction had to be reversed. *Lewis v. State*, 283 Ga. 191, 657 S.E.2d 854 (2008).

**Court did not err in failing to recharge jury as to mutual combat** when the jury requested a recharge on murder and voluntary manslaughter, but there was no request as to a recharge on mutual combat. *Welch v. State*, 257 Ga. 197, 357 S.E.2d 70 (1987).

**Erroneous failure to charge on mutual combat.** — When one is on trial for murder and a verdict for voluntary manslaughter is returned, it is not reversible error for the court to fail to charge law of mutual combat as applied to self-defense, since a verdict for voluntary manslaughter is an acquittal of murder. *Davis v. State*, 76 Ga. App. 427, 46 S.E.2d 520

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(1948) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Erroneous charge on malice is harmless error where only issue is identity of accused.** — When the only issue was as to the identity of the accused, it appearing without dispute that the persons who killed the deceased were guilty of the offense of murder, it was not cause for a new trial that the trial judge did not define express malice in the exact language of the statute, in that the judge omitted the word "unlawfully" as contained therein. *Peeples v. State*, 178 Ga. 675, 173 S.E. 850 (1934) (decided under former 1933, Code §§ 26-1002, 26-1003, 26-1004).

**Cruelty to children instruction not required in malice murder prosecution.** — In a prosecution for malice murder, the trial court did not err in refusing to give an instruction on cruelty to children as an included offense. *Loren v. State*, 268 Ga. 792, 493 S.E.2d 175 (1997).

**Instruction on parental obligations under § 19-7-2.** — In a prosecution for malice murder of defendant's minor child, the trial court did not err in refusing to give an instruction on the parental obligation to provide for the maintenance, protection, and education of a minor child under O.C.G.A. § 19-7-2. *Loren v. State*, 268 Ga. 792, 493 S.E.2d 175 (1997).

**Instruction that "a reckless disregard for human life may be equivalent to the specific intent to kill" was not error.** *Walden v. State*, 251 Ga. 505, 307 S.E.2d 474 (1983).

**Charges in homicide prosecution that malice is presumed from intentional killing and that intent is presumed from use of deadly weapon** are not constitutionally burden-shifting because the instruction does not shift any burden of proof or persuasion to defendant. *Patterson v. State*, 239 Ga. 409, 238 S.E.2d 2 (1977).

**No error in failing to charge on mere presence.** — Evidence elicited at trial did not support a charge on mere presence because the defendant took an active role in the crime; the defendant drove the codefendants to the crime scene

with the intent to rob, the defendant turned off the car's lights to assist in accosting the victims by surprise, the defendant drove the defendant's comrades away from the crime, and the defendant tried to get rid of the stolen car. *Huckabee v. State*, 287 Ga. 728, 699 S.E.2d 531 (2010).

**No error in failing to charge on accessory after the fact.** — Because the defendant was not charged with being an accessory after the fact, the trial court did not err when the court refused to give a charge on accessory after the fact. *Huckabee v. State*, 287 Ga. 728, 699 S.E.2d 531 (2010).

**Death Penalty**

**Punishment of death does not invariably violate the Constitution.** *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

**Death penalty statutes not racially discriminatory.** — Petitioner, a death row inmate, in a federal habeas petition challenged the imposition of the death penalty, arguing that the death penalty was being administered in a racially discriminatory manner, the argument failed because the statistical evidence was not so strong as to permit no inference other than that the results were the product of a racially discriminatory intent or purpose in that the death penalty was sought in 58 percent of the possible death penalty cases where the defendant was black but in only 40 percent of the cases where the defendant was white, and sought in only 25 percent of the cases where the victim was black and 54 percent of the cases where the victim was white. *Jefferson v. Terry*, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), aff'd in part and rev'd in part, 570 F.3d 1283 (11th Cir. Ga. 2009).

**Prerequisite to involving death penalty.** — Before convicted defendant may be sentenced to death, jury, or trial judge in cases tried without a jury, must find beyond a reasonable doubt one of ten aggravating circumstances specified in former Code 1933, § 27-2534.1. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (see O.C.G.A. § 17-10-30).

**Procedural safeguards to prevent abuse of death penalty are constitutionally adequate.** — Imposition of death penalty on proof of felony murder does not lead to freakish and wanton executions because procedural safeguards were enacted in order to prevent such abuses and have been held to be constitutionally adequate in that regard. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

**Sentence not disproportionate where defendant active party to murder.** — When the defendant was not only present at the scene of the murder and participated in the assault and rape of two girls, but also assisted the codefendant in stripping the girls and binding the girls' hands, then turned the defendant's car around in the road, presumably to facilitate a quick getaway, and stood by the codefendant in the road while the latter shot the victims, the jury reasonably found that the defendant was an active party in the murder, and the defendant's death sentence was not disproportionate to the crime. *Johnson v. Kemp*, 585 F. Supp. 1496 (S.D. Ga. 1984), rev'd on other grounds, 759 F.2d 1503 (11th Cir. 1985).

Defendant's death sentence for malice murder was affirmed as the sentence was neither excessive nor disproportionate to the penalties imposed in similar cases in Georgia as the defendant had murdered at least four people and had attempted or planned to murder several other people; the defendant's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. *Williams v. State*, 281 Ga. 87, 635 S.E.2d 146 (2006), cert. denied, U.S. , 128 S. Ct. 2046, 170 L. Ed. 2d 793 (2008).

**Presentence hearing not required where death penalty not sought.** — Since upon conviction for murder where death penalty is not sought, the only punishment to be lawfully imposed is that of life imprisonment, there is no necessity to conduct a presentence hearing on issue of

punishment, as trial court possesses no discretion in such instance. *Brown v. State*, 246 Ga. 251, 271 S.E.2d 163 (1980).

**Life sentence automatic if death penalty not sought.** — If defendant is found guilty of murder, defendant automatically receives a life sentence under the murder statute if death penalty had not been asked for by prosecution. *Parks v. State*, 230 Ga. 157, 195 S.E.2d 911 (1973).

**Death sentence for 17-year-old defendant prohibited.** — Habeas court found as a matter of fact that the defendant was 17 years old at the time of the murders for which the defendant was convicted and vacated the defendant's death sentences in light of the holding of the U.S. Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (Eighth Amendment forbids imposition of death penalty on juvenile offenders under age 18), that death sentences for crimes committed by persons under the age of 18 violate the Constitution of the United States. *Terry v. Jenkins*, 280 Ga. 341, 627 S.E.2d 7 (2006).

### Merger

**Aggravated battery conviction merged into the malice murder conviction** where the medical examiner's testimony established that the same act caused the aggravated battery and the victim's death; thus, the same evidence was used to prove both crimes. *Fulton v. State*, 278 Ga. 58, 597 S.E.2d 396 (2004).

**No merger of aggravated assault and merger.** — A conviction for possession of a firearm during the commission of a felony (O.C.G.A. § 16-11-106) does not merge with a conviction for felony murder. *Hawkins v. State*, 262 Ga. 193, 415 S.E.2d 636 (1992).

A conviction for discharging a gun within 50 yards of a public highway (O.C.G.A. § 16-11-103) does not merge into a felony murder conviction. *Hawkins v. State*, 262 Ga. 193, 415 S.E.2d 636 (1992).

An aggravated assault conviction did not merge as a matter of fact with a murder conviction because the evidence presented at trial showed that the defendant inflicted a severe, but non-fatal, beating upon the victim that was separate

**Merger (Cont'd)**

and distinct from the choking and strangling which resulted in the victim's death. Starks v. State, 283 Ga. 164, 656 S.E.2d 518 (2008).

**Lesser offense held not to merge with conviction.** — Because the jury could reasonably have concluded that the victim's first two injuries from two non-fatal shots resulted from a separate offense than the third, the earlier shots were sufficient to support the aggravated assault conviction, separate from the third and fatal shot, and there was no merger of the aggravated assault offense with a separate charge of malice murder. Parker v. State, 281 Ga. 490, 640 S.E.2d 44 (2007).

Although both malice murder and cruelty to children required a malicious intent, O.C.G.A. §§ 16-5-1(a) and 16-5-70(b), the fact that such intent supported an element in each crime did not warrant merging of the sentences when other mutually exclusive elements of the crimes remained, and the other elements of the two offenses had to be compared; malice murder, but not cruelty to children, required proof that defendant caused the death of another human being, O.C.G.A. § 16-5-1(a), and cruelty to children, but not malice murder, required proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain, O.C.G.A. § 16-5-70(b). Each crime required proof of at least one additional element which the other did not and the crimes of malice murder and cruelty to children were not so closely related that multiple convictions were prohibited under other provisions of O.C.G.A. §§ 16-1-6 and 16-1-7; accordingly, even if the same conduct established the commission of both malice murder and cruelty to children, the two crimes did not merge. Linson v. State, 287 Ga. 881, 700 S.E.2d 394 (2010).

**Merger of cruelty to children, aggravated assault, and murder.** — Because separate cruelty to children and aggravated assault counts were based upon acts committed by the defendant on the day preceding the death of the victim, neither of those convictions merged into

the felony murder count also filed against the defendant and, accordingly, separate sentences for those crimes were authorized. Christian v. State, 281 Ga. 474, 640 S.E.2d 21 (2007).

**Merger doctrine is rejected with respect to felony-murder rule in Georgia.** Baker v. State, 236 Ga. 754, 225 S.E.2d 269 (1976).

**Merger of manslaughter conviction.** — When the defendant was engaged in a shoot-out with another and accidentally struck and killed an innocent third party, the defendant's conviction for voluntary manslaughter could be merged into a felony-murder conviction. Foster v. State, 264 Ga. 369, 444 S.E.2d 296 (1994).

Defendant's conviction of voluntary manslaughter under O.C.G.A. § 16-5-2 was improper as the defendant was also convicted of felony murder under O.C.G.A. § 16-5-1(c) for the same transaction, and this would have subjected the defendant to multiple convictions and punishments for one crime, which would have placed the defendant in double jeopardy in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XVIII and U.S. Const., amend. 5. Lawson v. State, 280 Ga. 881, 635 S.E.2d 134 (2006).

**Modified merger and double jeopardy.** — Modified merger rule, which speaks to the validity of a verdict on a charge of felony murder when the jury also finds the accused guilty of voluntary manslaughter, is effective at the time the jury renders the jury's verdict and is not destroyed by the granting of a motion for new trial on the voluntary manslaughter charge; likewise, the presence or absence of a separate charge of aggravated assault in the indictment has no effect on a court's application of the modified merger rule because while the existence of a separate aggravated assault charge must be carefully considered in applying the rule and making determinations as to proper sentencing, its existence does not render the rule inapplicable. Williams v. State, 288 Ga. 7, 700 S.E.2d 564 (2010).

**Modified merger rule applies.** — When the evidence would support a conviction for either felony murder or voluntary manslaughter, and the jury finds the defendant guilty of each offense, the mod-

ified merger rule applies if the underlying felony is directed against the homicide victim and is not independent, but rather is an integral part of the killing; under such rule, the defendant cannot be convicted and sentenced for felony murder because the voluntary manslaughter verdict indicates that the underlying felony is mitigated by provocation and passion. *Sanders v. State*, 281 Ga. 36, 635 S.E.2d 772 (2006).

**Merger of underlying felony.** — Trial court erred in imposing a 20 year sentence for the burglary conviction since this conviction, as the underlying felony in the felony murder conviction, should have merged with the felony murder conviction. *Sumrall v. State*, 264 Ga. 148, 442 S.E.2d 246, cert. denied, 513 U.S. 1020, 115 S. Ct. 585, 130 L. Ed. 2d 499 (1994).

Defendant's conviction for felony fleeing and attempting to elude was vacated as the offense served as the underlying felony for a felony murder conviction and merged with the conviction for felony murder. *Ferguson v. State*, 280 Ga. 893, 635 S.E.2d 144 (2006).

Judgment convicting a defendant of cruelty to a child in the first degree and the sentence entered thereon were vacated because the crime should have merged for sentencing purposes with the defendant's felony murder conviction based on the underlying felony of cruelty to a child in the second degree; the state agreed that the crimes merged in fact, and an examination of the evidence in the context of the trial court's instructions to the jury indicated that the judgment and sentence had to be vacated. *White v. State*, 281 Ga. 276, 637 S.E.2d 645 (2006).

**Merger of the most severe.** — When it is unclear which of two or more felonies is the underlying felony for a felony murder conviction, the trial court must merge only one, the most severe with respect to potential punishment, such that a court's conviction for rape warranted reversal in light of the lesser co-felony of burglary. *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

**Merger of malice murder and aggravated assault.** — When defendant

fired a gun at a person and the bullet grazed that person, went through a wall, and killed another person, the aggravated assault and malice murder convictions did not merge for sentencing purposes. *George v. State*, 276 Ga. 564, 580 S.E.2d 238 (2003).

Trial court erred in sentencing defendant for malice murder and aggravated assault as the victim's death was caused by a combination of blunt force trauma and strangulation and the aggravated assault merged into the malice murder as a matter of fact. *Young v. State*, 280 Ga. 65, 623 S.E.2d 491 (2005).

Because the evidence the state used to prove that the defendant committed aggravated assault was the same that it used to prove that defendant committed malice murder, the aggravated assault offense merged into the malice murder as a matter of fact. Thus, the separate judgment of conviction and sentence for aggravated assault had to be vacated. *Ludy v. State*, 283 Ga. 322, 658 S.E.2d 745 (2008).

Trial court did not err in failing to merge the aggravated assault for which the defendant was sentenced into defendant's malice murder conviction because the two crimes were not established by the same conduct; the defendant's conduct did not establish the commission of both the aggravated assault and the murder because the aggravated assault was established by evidence that the defendant and the codefendant beat and strangled the victim, whereas the murder was established by evidence that they killed the victim by stabbing the victim's body. *Hall v. State*, 286 Ga. 358, 687 S.E.2d 819 (2010).

Separate judgments of conviction and sentences for aggravated assault were vacated because the defendant was convicted of and sentenced for both the malice murders of the two victims and the aggravated assaults of those victims, and although there was no merger of those crimes as a matter of law, the record established that the aggravated assault convictions merged into the malice murder convictions as a matter of fact. *Vergara v. State*, 287 Ga. 194, 695 S.E.2d 215 (2010).

Defendant's conviction and sentence for

**Merger (Cont'd)**

aggravated assault was vacated and the case was remanded to the trial court for resentencing because the aggravated assault conviction merged into the defendant's malice murder conviction as a matter of fact even though there was no merger of those crimes as a matter of law. *Sharpe v. State*, 288 Ga. 565, 707 S.E.2d 338 (2011).

**Felony murder conviction merged with malice murder conviction; however, there was no merger of cruelty to children into malice murder.** When the defendant was convicted of malice murder, felony murder, and cruelty to children, and there was a single victim, it was error to sentence the defendant to multiple life terms on the malice murder and felony murder counts; because the victim's age was an element of the crime of cruelty to children that was not included in malice murder, the underlying cruelty to children conviction did not merge into malice murder as a matter of fact. *Collum v. State*, 281 Ga. 719, 642 S.E.2d 640 (2007).

**Merger of lesser conviction into felony murder conviction.** — When false imprisonment conviction was the underlying felony for defendant's conviction of felony murder, the false imprisonment conviction merged into the felony murder conviction and was vacated on appeal. *Johnson v. State*, 254 Ga. 591, 331 S.E.2d 578 (1985).

When either of the defendant's two felony convictions could have served as the underlying felony for defendant's felony murder conviction, the initial felony, and not both felonies, was vacated as having merged with the felony murder conviction. *Johnson v. State*, 254 Ga. 591, 331 S.E.2d 578 (1985).

Because the evidence that the defendant assaulted the victim with a shotgun was used to prove both an aggravated assault and malice murder, the aggravated assault conviction merged by fact into the malice murder conviction. *Nix v. State*, 280 Ga. 141, 625 S.E.2d 746 (2006).

**No merger with weapons possession convictions.** — Defendant's conviction for possession of a knife during the commission of a felony did not merge into

the defendant's two convictions for malice murder. *Hooks v. State*, 284 Ga. 531, 668 S.E.2d 718 (2008), overruled on other grounds, 287 Ga. 192, 695 S.E.2d 244 (2010).

**Merged counts for sentencing.** — Trial court had to vacate the defendant's conviction and sentence for armed robbery given that armed robbery was charged as the felony underlying the defendant's conviction for felony murder; a separate conviction and sentence for armed robbery was not authorized under such circumstances. *Joyner v. State*, 280 Ga. 37, 622 S.E.2d 319 (2005).

**Merger with armed robbery count.** — When a defendant had been convicted of malice murder, felony murder, armed robbery, and other crimes, the trial court did not err by failing to merge the armed robbery counts into the felony murder count predicated on the underlying felony of armed robbery as the felony murder count was vacated by operation of O.C.G.A. § 16-1-7, and the defendant could be sentenced for the felony conviction so long as the felony was not included in the murder as a matter of fact or law; here, the armed robbery was not included in the malice murder charge as a matter of fact or law; evidence showing the defendant's intent to rob the victim was not used in proving the murder, and evidence that the defendant shot the victim was not used to prove the armed robbery. *Davis v. State*, 281 Ga. 871, 644 S.E.2d 113 (2007).

Although an armed robbery served as the predicate felony for one count of felony murder, there was a separate felony murder count predicated on aggravated assault; hence, when the jury found the defendant guilty of both counts, it was within the trial court's discretion to choose to merge the aggravated assault rather than the armed robbery into the felony murder count for which appellant was sentenced. *Hill v. State*, 281 Ga. 795, 642 S.E.2d 64 (2007).

**Aggravated assault merged with malice murder.** — Convictions against the defendant for both malice murder and aggravated assault were error under O.C.G.A. § 16-1-7(a)(1) as the aggravated assault was included within the malice murder conviction under O.C.G.A.

§ 16-1-6(1) because the same conduct established the commission of both offenses. *Bell v. State*, 284 Ga. 790, 671 S.E.2d 815 (2009).

With regard to a defendant's malice murder conviction arising from the suffocation death of the defendant's newborn daughter, the defendant's conviction and sentence for aggravated assault was vacated inasmuch as the evidence showed that the aggravated assault merged as a matter of fact with the malice murder conviction. *Wright v. State*, 285 Ga. 428, 677 S.E.2d 82 (2009), cert. denied, U.S. , 130 S. Ct. 1076, 175 L. Ed. 2d 903 (2010).

**Malice murder and aggravated assault merged as a matter of fact.** — Defendant's conviction and sentence for aggravated assault was vacated as the malice murder and the aggravated assault charges merged as a matter of fact because the same evidence to prove aggravated assault as indicted, stabbing the victim with a knife, was used to prove malice murder. *Williams v. State*, 279 Ga. 154, 611 S.E.2d 19 (2005).

### Sentence

**Felony murder conviction vacated upon sentence for malice murder.** — Inasmuch as the defendant's felony murder conviction was vacated by operation of law upon entry of the sentence for malice murder, a conviction for felony murder, and the life imprisonment imposed for that conviction, had to be vacated. *Sanders v. State*, 283 Ga. 372, 659 S.E.2d 376 (2008).

**Sentence of life in prison plus years consecutive for convictions of felony murder and armed robbery did not exceed the statutorily authorized maximum** and did not amount to cruel and unusual punishment; the felony murder statute, O.C.G.A. § 16-5-1, authorized a sentence of life in prison on conviction for felony murder, and the armed robbery statute, O.C.G.A. § 16-8-41, authorized a sentence of death or imprisonment for life or by imprisonment for not less than 10 nor more than 20 years. The trial court sentenced the defendant to life in prison for the felony murder conviction plus two 20-year terms, running concurrent to each

other but consecutive to the felony murder sentence, for the two convictions for armed robbery, and thus the statutory maximum was not exceeded. *Washington v. State*, 285 Ga. 541, 678 S.E.2d 900 (2009).

**Trial court erred by sentencing defendant to separate life sentences for malice murder and felony murder** since there was only one victim in the case. Accordingly, the defendant's conviction for felony murder was vacated by operation of law. *Martinez v. State*, 283 Ga. 122, 657 S.E.2d 199 (2008).

**Life sentence for felony-murder conviction based upon "status" offense.** — See *Hall v. State*, 259 Ga. 243, 378 S.E.2d 860 (1989).

**Vacation of felony murder charge required vacation of sentence.** — When the defendant was sentenced to life in prison for malice murder and a concurrent term of life in prison for felony murder, it was error to sentence the defendant for the felony murder inasmuch as it stood vacated by operation of law; accordingly, the judgment of conviction and sentence as to the felony murder count had to be vacated. *Sampson v. State*, 282 Ga. 82, 646 S.E.2d 60 (2007).

**Sentence not excessive.** — Sentence of life in prison plus years consecutive for convictions of felony murder and armed robbery did not exceed the statutorily authorized maximum; the felony murder statute, O.C.G.A. § 16-5-1, authorized a sentence of life in prison on conviction for felony murder, and the armed robbery statute, O.C.G.A. § 16-8-41, authorized a sentence of death or imprisonment for life or by imprisonment for not less than 10 nor more than 20 years. The trial court sentenced defendant to life in prison for the felony murder conviction plus two 20-year terms, running concurrent to each other but consecutive to the felony murder sentence, for the two convictions for armed robbery, and thus the statutory maximum was not exceeded. *Washington v. State*, 285 Ga. 541, 678 S.E.2d 900 (2009).

Trial court did not err in sentencing the defendant to death for murder because the death was not excessive or disproportionate punishment within the meaning of

**Sentence (Cont'd)**

Georgia law and was not unconstitutional, and the evidence presented at the defendant's sentencing trial was clearly sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence, pursuant to O.C.G.A. § 17-10-30(b)(2), of the statutory aggravating circumstances of kidnapping with bodily injury, that the murder was outrageously or wantonly vile, horrible, or inhuman, and that the defendant had a prior record of conviction for a capital felony; the defendant's crimes could be called "premeditated" because the defendant already knew what the defendant was going to do when the defendant took the victim away from home. *Loyd v. State*, 288 Ga. 481, 705 S.E.2d 616 (2011).

**Double life sentence erroneous.** — Because sufficient evidence supported convictions for murder and possession of a knife during the commission of a crime, and the state met its burden in establishing an adequate chain of custody, two life sentences for the murder of one victim was improper, as the conviction for felony murder was simply surplusage; thus, the separate life sentence on the alternative felony murder count had to be vacated. *Paschal v. State*, 280 Ga. 430, 628 S.E.2d 586 (2006).

**Triple life sentence improper.** — While the defendant's act of crashing into the victim's car, and killing the victim, while leading police on a high-speed chase through a residential neighborhood, supported a felony murder conviction, because there was only one victim, the defendant could only be convicted of one count of felony murder, and not three; hence, upon the state's concession, imposition of three life sentences was vacated, and the matter was remanded for resentencing. *Turner v. State*, 281 Ga. 487, 640 S.E.2d 25 (2007).

**Consecutive sentences for two counts of malice murder proper.** — As a defendant was charged with the malice murder of two victims in different counts and was found guilty on each count, the defendant was properly sentenced separately on each count to run consecutively because the killing of different persons

constituted separate crimes. *Hooks v. State*, 284 Ga. 531, 668 S.E.2d 718 (2008), overruled on other grounds, 287 Ga. 192, 695 S.E.2d 244 (2010).

**Life without parole could not be imposed upon conviction of malice murder.** — Because O.C.G.A. § 17-10-7(c) expressly excluded capital felonies from the statute's coverage, and malice murder was a capital felony, a sentence of life imprisonment without parole could not be imposed upon a malice murder conviction. *Miller v. State*, 283 Ga. 412, 658 S.E.2d 765 (2008).

**Two life sentences for murder of single victim.** — Defendant's separate life sentence on an alternative felony murder count was vacated because the defendant was sentenced to life sentences for both malice and felony murder in the death of one victim. *Newsome v. State*, 288 Ga. 647, 706 S.E.2d 436 (2011).

**Application****1. In General**

**Election between felony and malice murder.** — It was not error for the trial court to refuse to require the state to elect between prosecuting defendant for malice murder or felony murder, where the trial court's charge to the jury made clear the fact that while the state was seeking a murder conviction under alternate theories of malice murder and felony murder, the defendant could be convicted of only one count of murder. *Baty v. State*, 257 Ga. 371, 359 S.E.2d 655 (1987).

**Effect of indictment alleging both malice murder and felony murder on guilty verdict.** — When indictment alleged that the defendant committed murder "with malice aforethought ... by means of arson," the count in effect alleged both malice murder and felony murder, rendering the jury's verdict of "guilty of Count 1—murder" ambiguous and requiring the verdict to be construed as one for felony murder. *Walker v. State*, 254 Ga. 149, 327 S.E.2d 475, cert. denied, 474 U.S. 865, 106 S. Ct. 185, 88 L. Ed. 2d 154 (1985).

**Intentional killing of mere trespasser with a deadly weapon** is generally murder and not manslaughter. *Hayes*

v. State, 58 Ga. 35 (1877) (decided under former Code 1873, §§ 4321, 4322).

**Killing officer while the officer is legally arresting defendant** in a legal manner constitutes murder. Brooks v. State, 114 Ga. 6, 39 S.E. 877 (1901) (decided under former Penal Code 1895, §§ 61, 62); Harper v. State, 129 Ga. 770, 59 S.E. 792 (1907) (decided under former Penal Code 1895, §§ 61, 62); Johnson v. State, 130 Ga. 27, 60 S.E. 160 (1908) (decided under former Penal Code 1895, §§ 61, 62).

**Slaying of officer to avoid what defendant believes is a lawful arrest.** — Slaying of officer to avoid being taken into custody, while having reasonable grounds of belief that person is an arresting officer, and that the officer's object is to make a lawful arrest for a felony, constitutes murder. If homicide is committed without reasonable cause to know the officer's official character or purpose and without malice, it is manslaughter. Morton v. State, 190 Ga. 792, 10 S.E.2d 836 (1940) (decided under former Code 1933, §§ 26-1003, 26-1004).

**When infliction of unlawful injury shall be considered proximate cause of death.** — An unlawful injury considered to be the efficient, proximate cause of death whenever it shall be made to appear either that: (1) the injury itself constituted the sole proximate cause of death; that (2) the injury directly and materially contributed to the subsequently accruing immediate cause of death; or that (3) the injury materially accelerated death, although proximately occasioned by a preexisting cause. Ward v. State, 238 Ga. 367, 233 S.E.2d 175 (1977).

When one inflicts an unlawful injury, such injury is the proximate cause of death if it directly and materially contributed to happening of subsequently accruing immediate cause of death. Larkin v. State, 247 Ga. 586, 278 S.E.2d 365 (1981).

Defendant was properly convicted of malice murder and other charges after the defendant shot an automatic weapon at two deputies who appeared at the defendant's house to serve the defendant with an arrest warrant, thus killing one deputy and injuring the other. Al-Amin v. State, 278 Ga. 74, 597 S.E.2d 332, cert. denied,

543 U.S. 992, 125 S. Ct. 509, 160 L. Ed. 2d 380 (2004).

**Circumstantial evidence.** — In prosecution for murder, cause of death may be shown by circumstantial evidence. McAllister v. State, 246 Ga. 246, 271 S.E.2d 159 (1980).

Corpus delicti and cause of death may be proved by circumstantial evidence. West v. State, 251 Ga. 458, 306 S.E.2d 909 (1983).

Despite the defendant's contention that the circumstantial evidence presented by the state was insufficient, both malice murder and kidnapping by bodily injury convictions were upheld on appeal as: (1) the plain error rule did not apply to the identification evidence admitted via the defendant's aggravated assault and armed robbery victim, and evidence of the gun used in that case was relevant in the instant prosecution because it connected the defendant to the identification documents presented to police in close proximity to the victim's body; (2) a due process claim regarding the admission of a purportedly impermissibly suggestive pre-trial identification, followed by an in-court identification, was waived due to failure to object at trial; and (3) trial counsel was not ineffective by failing to seek suppression of the identification evidence or attack the reliability of the evidence. Brooks v. State, 281 Ga. 514, 640 S.E.2d 280 (2007).

**Expert testimony on shell casing.** — Expert testimony that a shell casing at the crime scene came from a pistol found in the defendant's apartment, along with two witnesses' identifications of the defendant, and expert testimony that a bullet extracted from a victim's head possibly came from the defendant's pistol, although it was too damaged to say with complete certainty, sufficiently supported the defendant's convictions for murder, armed robbery, and possession of a firearm during the commission of a felony. Escobar v. State, 279 Ga. 727, 620 S.E.2d 812 (2005).

**Expert's testimony on knife injuries.** — Evidence in support of the state's theory that the defendant killed the victim in an unprovoked aggravated assault, based on expert testimony that the victim

**Application (Cont'd)****1. In General (Cont'd)**

died from a deliberate and forceful strike with a knife, and evidence that discounted any possible accident or lack of intent, was sufficient to support the defendant's conviction for felony murder during the commission of an aggravated assault. Nichols v. State, 281 Ga. 483, 640 S.E.2d 40 (2007).

**Pre-autopsy photographs of victim admissible.** — In a trial for malice murder it was not error to admit in evidence photographs of the victim's body prior to autopsy and of the crime scene which, though gruesome, were relevant and material to show the location of the wounds and to depict the crime scene, including the location of the victim. Sanders v. State, 257 Ga. 239, 357 S.E.2d 66 (1987).

Pre-autopsy photographs which demonstrate the location and nature of the wounds are relevant to the issue of death, and may be introduced in evidence even though the photographs are duplicative of expert testimony relating to the cause of death. Baty v. State, 257 Ga. 371, 359 S.E.2d 655 (1987).

**When proof of armed robbery is essential to the conviction for felony murder,** the armed robbery is a lesser included offense in the felony murder. Sanborn v. State, 251 Ga. 169, 304 S.E.2d 377 (1983).

**Crimes of voluntary manslaughter and malice murder require identical causation** in that both sections speak of causing the death of another human being. Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**Distinction between crimes of voluntary manslaughter and malice murder** is that latter crime requires either express or implied malice, while voluntary manslaughter requires that killer has acted solely from sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**To reduce homicide from murder to voluntary manslaughter, as it relates to doctrine of mutual combat,** it should affirmatively appear that at time of homicide both parties were in position and manifested intention to fight; mere threats on part of one party at time of fatal shot by the other will not suffice. Cornelius v. State, 193 Ga. 25, 17 S.E.2d 156 (1941) (decided under former Code 1933, §§ 26-1003, 26-1004).

To reduce homicide from murder to voluntary manslaughter, on theory of mutual combat, it should affirmatively appear that at time of homicide both parties were in position and manifested an intention to fight. Cone v. State, 193 Ga. 420, 18 S.E.2d 850 (1942) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Killing another with malice pursuant to mutual combat constitutes murder.** — Although there may be mutual intention and agreement to fight, if one of disputants kills the other with malice, it is murder, since in such case killing would not be result of that sudden and violent heat of passion which by reason of its irresistibility would constitute voluntary manslaughter. Rivers v. State, 193 Ga. 133, 17 S.E.2d 726 (1941) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Confession of mentally retarded defendant.** — Introduction of the confession of a mentally retarded defendant who had not knowingly and intelligently waived the defendant's Miranda rights was harmless error as to the defendant's conviction but not as to defendant's death sentence. Smith v. Zant, 887 F.2d 1407 (11th Cir. 1989).

**Former Code 1933, § 26-3201, together with substantive offense of murder,** creates crime of "conspiracy to commit murder." Orkin v. State, 236 Ga. 176, 223 S.E.2d 61 (1976) (see O.C.G.A. § 16-4-8).

**When armed robbery is lesser included offense of malice murder,** see Hoerner v. State, 246 Ga. 374, 271 S.E.2d 458 (1980).

**State does not have a reckless homicide statute;** the state has only voluntary and involuntary manslaughter statutes which create degrees of homicide less

than murder. A history of punishing recklessly caused homicide as murder simply has nothing to do with the deficiencies in the felony-murder scheme because it provides no category of homicide less culpable than murder. *Malone v. State*, 238 Ga. 251, 232 S.E.2d 907 (1977).

**Homicide during attempted robbery caused by unintentional discharge of gun.** — When it is shown by the evidence, and admitted in defendant's statement, that homicide occurred by discharge of gun held by accused and used in attempt to rob deceased, even if discharge of gun was unintentional, the offense is murder; and in no view of such facts does it involve homicide by accident, or involuntary manslaughter. *Ford v. State*, 202 Ga. 599, 44 S.E.2d 263 (1947) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Murder which is probable consequence of conspiracy is imputable.** — When several persons conspire to rob a merchant in the merchant's store, and one of the conspirators remains in an automobile, in order that the others may speedily escape, while others in furtherance of common design to rob, kill the merchant intended to be robbed, such killing is the probable consequence of the unlawful design to rob, and all the conspirators are guilty of murder, including the one in the automobile. *Jenkins v. State*, 190 Ga. 556, 9 S.E.2d 909 (1940) (decided under former Code 1933, §§ 26-1003, 26-1004).

When two people conspire to commit the crime of robbery and in furtherance of the common design, both being present and participating in the commission of a robbery, one of them shoots and kills the person robbed, such killing is the probable consequence of the unlawful design to rob, and both are guilty of murder. *Simmons v. State*, 181 Ga. 761, 184 S.E. 291 (1936) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Murder which is incidental probable consequence of armed robbery is imputable.** — It is not necessary that crime of murder should be part of original design; it is enough if it is an incidental probable consequence of execution of conspirators design, and should appear at the moment to one of the participants to be

expedient for the common purpose. Intent of actual slayer is imputable to coconspirators. *Burke v. State*, 234 Ga. 512, 216 S.E.2d 812 (1975).

**Foreseeable consequence of drug trafficking conspiracy.** — Jury authorized to find that victim's murder was probable and foreseeable consequence of underlying conspiracy to traffic in illegal drugs. *Huffman v. State*, 257 Ga. 390, 359 S.E.2d 910 (1987).

**Co-builder of bomb guilty of felony-murder for builder's death.** — Where defendant and deceased had acquired or constructed an explosive device and were going to detonate that device for the purpose of destroying public property in the course of which the device exploded killing deceased, the defendant was guilty of felony murder under O.C.G.A. § 16-5-1. *Scott v. State*, 252 Ga. 251, 313 S.E.2d 87 (1984).

**Officer's negligence in making arrest is immaterial to defendant's guilt or innocence.** — When defense counsel in murder trial asked about training procedures on proper method of arresting a subject who is deemed armed and dangerous, the trial court properly prohibited this line of questioning in guilt-innocence phase on grounds that negligence of officer in making arrest is not material to the guilt or innocence of the defendant. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

**Homicide resulting solely from resentment of provoking threats.** — Provocation by threats will in no case be sufficient to free defendant from crime of murder, or reduce homicide from murder to manslaughter, when killing is done solely for purpose of resenting provocation thus given. *Moore v. State*, 228 Ga. 662, 187 S.E.2d 277 (1972).

**Evidence of acts carrying forward plan which included murder as supporting inference of malice.** — Even if the defendant did not specifically state

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that the defendant intended to kill the murder victim, the fact that the defendant stated that the defendant had participated in first entry of victim's home as part of plan which included murder, and later, on same day, returned to the victim's house and killed the victim can readily be seen as carrying forward this intent at least to the extent of exhibiting an "abandoned and malignant heart"; similarly, the fact that the defendant carried a deadly weapon for specific, acknowledged purpose of meeting opposition can support inference of malice. *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981), rev'd on other grounds sub nom. *Burger v. Zant*, 718 F.2d 979 (11th Cir. 1983), vacated on other grounds sub nom. *Burger v. Zant*, 467 U.S. 1212, 104 S. Ct. 2652, 81 L. Ed. 2d 360 (1984), cert. denied, 474 U.S. 998, 106 S. Ct. 374, 88 L. Ed. 2d 367 (1985).

**When act of victim in avoiding felonious assault causes victim's death, offense is murder.** — When one commits a felonious assault upon another and the act of the other in avoidance of such felonious assault results in that person's death, the offense is murder, whether or not the act of avoidance was that of a reasonably prudent person under the circumstances. *Patterson v. State*, 181 Ga. 698, 184 S.E. 309 (1936) (decided under former Code 1933, §§ 26-1003, 26-1004).

**For defendant's advances leading to victim's fatal jump from car to render defendant guilty of murder**, it must appear that reaction of deceased was: (1) in avoidance of a violent bodily injury, or in apprehension of immediate violent bodily injury; (2) if in apprehension of immediate bodily injury, it must have been well grounded; (3) steps of avoidance must be such as a reasonably prudent person might take under the circumstances; and (4) result must have been natural and probable consequence of the improper conduct. *Patterson v. State*, 181 Ga. 698, 184 S.E. 309 (1936) (decided under former Code 1933, §§ 26-1003, 26-1004).

**Self-defense based on battered woman syndrome.** — In a trial for mur-

der of her husband, a defendant claiming self-defense based on the battered woman syndrome may, by her own testimony, coupled with that of an expert, make the *prima facie* showing required for the admission of the victim's general character for violence. *Chapman v. State*, 258 Ga. 214, 367 S.E.2d 541 (1988).

**Felony murder conviction held reasonable despite accident contention.** — Evidence that defendant had cocked a gun and pointed it at her husband's head in order to scare him, and that the gun discharged when the victim struck it with his arm, was sufficient to authorize a conviction for felony-murder and the defense of "accident" was inapplicable. *Stiles v. State*, 264 Ga. App. 446, 448 S.E.2d 172 (1994).

**Evidence of murdering parents.** — Evidence adduced at trial was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of murder because: (1) the state introduced testimony that the defendant had said the defendant hated the defendant's parents and wanted to kill them; (2) a witness gave the police a statement to the effect that the defendant deliberately killed the victim, one of the defendant's parents, but refused to testify at trial on the crucial points; and (3) blood spatter evidence and other physical evidence suggested the blows to the victim were struck on the porch, not inside as the defendant claimed. *Fincher v. State*, 276 Ga. 480, 578 S.E.2d 102 (2003).

**Denial of defendant's motions for directed verdict of acquittal not error** when there was evidence from which the jury could determine that defendant, while acting in the heat of passion, shot and killed a woman. *Chancellor v. State*, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

**Testimony of medical examiner.** — Medical examiner should not have been permitted to testify as to the examiner's conclusion or opinion of the manner of death since the examiner's investigation did not lead to that conclusion, the examiner's expertise as a forensic pathologist was not needed or used in reaching that conclusion, and the factors which led the medical examiner to the examiner's conclusion that the victim's death was a ho-

micide are factors well within the knowledge and understanding of the jury. *Maxwell v. State*, 262 Ga. 73, 414 S.E.2d 470 (1992), overruled on other grounds, *Wall v. State*, 269 Ga. 506, 500 S.E.2d 904 (1998), overruled on other grounds, *Smith v. State*, 270 Ga. 123, 508 S.E.2d 173 (1998).

**Medical testimony consistent with murder conviction.** — See *Hampton v. State*, 250 Ga. 805, 301 S.E.2d 274 (1983).

**Defendant's admission sufficient.** — Defendant's recorded admission to a co-worker that the defendant killed the victim with the assistance of a codefendant was sufficient to support convictions for murder and aggravated assault. *Williams v. State*, 280 Ga. 539, 630 S.E.2d 410 (2006).

**Link between tattoos and murder not established.** — In a malice murder prosecution, the defendant did not show that it was error to grant the state's motion in limine regarding the exclusion of evidence of the victim's tattoos as the defendant failed to establish a link between the tattoos and the murder. *Marshall v. State*, 285 Ga. 351, 676 S.E.2d 201 (2009).

**Evidence sufficient for murder conviction.** — See *Board of Comm'r's v. Welch*, 253 Ga. 682, 324 S.E.2d 178 (1985); *Houston v. State*, 253 Ga. 696, 324 S.E.2d 183 (1985); *Moore v. State*, 254 Ga. 525, 330 S.E.2d 717 (1985); *Davis v. State*, 255 Ga. 588, 340 S.E.2d 862, cert. denied, 479 U.S. 871, 107 S. Ct. 243, 93 L. Ed. 2d 168 (1986); *Smith v. State*, 255 Ga. 654, 341 S.E.2d 5 (1986); *Johnson v. State*, 255 Ga. 552, 341 S.E.2d 220 (1986); *Lewis v. State*, 255 Ga. 681, 341 S.E.2d 434 (1986); *Black v. State*, 255 Ga. 668, 341 S.E.2d 436 (1986); *Smith v. State*, 255 Ga. 685, 341 S.E.2d 451 (1986); *Byrd v. State*, 255 Ga. 674, 341 S.E.2d 453 (1986); *Cunningham v. State*, 255 Ga. 727, 342 S.E.2d 299 (1986); *White v. State*, 255 Ga. 731, 342 S.E.2d 304 (1986); *Scott v. State*, 255 Ga. 701, 342 S.E.2d 310 (1986); *Johnson v. State*, 255 Ga. 703, 342 S.E.2d 312 (1986); *Kitchens v. State*, 256 Ga. 1, 342 S.E.2d 320 (1986); *Gilstrap v. State*, 256 Ga. 20, 342 S.E.2d 667 (1986); *Chastain v. State*, 255 Ga. 723, 342 S.E.2d 678 (1986); *Evans v. State*, 256 Ga. 10, 342

S.E.2d 684 (1986); *Hooten v. State*, 256 Ga. 31, 343 S.E.2d 481 (1986); *Clenney v. State*, 256 Ga. 123, 344 S.E.2d 216 (1986); *Edison v. State*, 256 Ga. 67, 344 S.E.2d 231 (1986); *Cochran v. State*, 256 Ga. 113, 344 S.E.2d 402 (1986); *Boddie v. State*, 256 Ga. 84, 344 S.E.2d 643 (1986); *Rogers v. State*, 256 Ga. 139, 344 S.E.2d 644 (1986); *Brantley v. State*, 256 Ga. 136, 345 S.E.2d 329 (1986); *Bryant v. State*, 256 Ga. 273, 347 S.E.2d 567 (1986); *Appleby v. State*, 256 Ga. 304, 348 S.E.2d 630 (1986); *Noggle v. State*, 256 Ga. 383, 349 S.E.2d 175 (1986); *Thornton v. State*, 256 Ga. 333, 349 S.E.2d 186 (1986); *Ford v. State*, 256 Ga. 375, 349 S.E.2d 361 (1986); *Parker v. State*, 256 Ga. 363, 349 S.E.2d 379 (1986); *Raven v. State*, 256 Ga. 366, 349 S.E.2d 383 (1986); *Barnes v. State*, 256 Ga. 370, 349 S.E.2d 387 (1986); *Wansley v. State*, 256 Ga. 624, 352 S.E.2d 368 (1987); *Dixon v. State*, 256 Ga. 658, 352 S.E.2d 572 (1987); *Walter v. State*, 256 Ga. 666, 352 S.E.2d 570 (1987); *Arthur v. State*, 256 Ga. 738, 353 S.E.2d 331 (1987); *Patterson v. State*, 256 Ga. 740, 353 S.E.2d 338 (1987); *Westbrook v. State*, 256 Ga. 776, 353 S.E.2d 504 (1987); *Quick v. State*, 256 Ga. 780, 353 S.E.2d 497 (1987); *Clay v. State*, 256 Ga. 797, 353 S.E.2d 517 (1987); *Hendrick v. State*, 257 Ga. 17, 354 S.E.2d 433 (1987); *Byrd v. State*, 257 Ga. 36, 354 S.E.2d 428 (1987); *Booker v. State*, 257 Ga. 37, 354 S.E.2d 425 (1987); *Slaughter v. State*, 257 Ga. 104, 355 S.E.2d 660 (1987), overruled on other grounds, *Woodard v. State*, 269 Ga. 317, 496 S.E.2d 896 (1998); *Wilcox v. Ford*, 813 F.2d 1140 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987); *McMillan v. State*, 257 Ga. 173, 356 S.E.2d 866 (1987); *Williams v. State*, 257 Ga. 186, 356 S.E.2d 872 (1987); *Welch v. State*, 257 Ga. 197, 357 S.E.2d 70 (1987); *Strickland v. State*, 257 Ga. 230, 357 S.E.2d 85 (1987); *Bowens v. State*, 257 Ga. 347, 359 S.E.2d 636 (1987) (judgment reversed for error in instructions); *McDaniel v. State*, 257 Ga. 345, 359 S.E.2d 642 (1987); *Mosley v. State*, 257 Ga. 382, 359 S.E.2d 653 (1987); *Thompson v. State*, 257 Ga. 386, 359 S.E.2d 664 (1987), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002); *Rhodes v. State*, 257 Ga.

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368, 359 S.E.2d 670 (1987); Harris v. State, 257 Ga. 385, 359 S.E.2d 675 (1987); Carter v. State, 257 Ga. 510, 361 S.E.2d 175 (1987); Chapman v. State, 258 Ga. 214, 367 S.E.2d 541 (1988); Pace v. State, 258 Ga. 225, 367 S.E.2d 827 (1988); Phillips v. State, 258 Ga. 228, 368 S.E.2d 91 (1988); Langley v. State, 258 Ga. 251, 368 S.E.2d 316 (1988); Wade v. State, 258 Ga. 324, 368 S.E.2d 482 (1988), cert. denied, 502 U.S. 1060, 112 S. Ct. 941, 117 L. Ed. 2d 111 (1992); Patillo v. State, 258 Ga. 255, 368 S.E.2d 493, cert. denied, 488 U.S. 948, 109 S. Ct. 378, 102 L. Ed. 2d 367 (1988); Conley v. State, 258 Ga. 339, 368 S.E.2d 502 (1988); Savage v. Flagler Co., 258 Ga. 335, 368 S.E.2d 504 (1988); Mapp v. State, 258 Ga. 273, 368 S.E.2d 511 (1988); Williams v. State, 258 Ga. 281, 368 S.E.2d 742 (1988); Cash v. State, 258 Ga. 460, 368 S.E.2d 756 (1988); Jackson v. State, 258 Ga. 322, 368 S.E.2d 771 (1988); Kinsman v. State, 259 Ga. 89, 376 S.E.2d 845, cert. denied, 493 U.S. 874, 110 S. Ct. 210, 107 L. Ed. 2d 163 (1989); Jewell v. State, 261 Ga. 861, 413 S.E.2d 201 (1992); Brown v. State, 264 Ga. 48, 441 S.E.2d 235 (1994); Palmore v. State, 264 Ga. 108, 441 S.E.2d 405 (1994); Combs v. State, 268 Ga. 398, 500 S.E.2d 328 (1997); Ford v. State, 269 Ga. 139, 498 S.E.2d 58 (1998); Putman v. Turpin, 53 F. Supp. 2d 1285 (M.D. Ga. 1999); Jenkins v. Byrd, 103 F. Supp. 2d 1350 (S.D. Ga. 2000); Chinn v. State, 276 Ga. 387, 578 S.E.2d 856 (2003); Hill v. State, 276 Ga. 220, 576 S.E.2d 886 (2003); Sellers v. State, 277 Ga. 172, 587 S.E.2d 35 (2003); Herring v. State, 277 Ga. 317, 588 S.E.2d 711 (2003); Hewitt v. State, 277 Ga. 327, 588 S.E.2d 722 (2003); Williams v. State, 284 Ga. 849, 672 S.E.2d 619 (2009); Moore v. State, 288 Ga. 187, 702 S.E.2d 176 (2010).

Defendant was properly convicted of felony murder after the codefendant shot and killed the victim because defendant held the victim at gunpoint, threatened to kill the victim, and debated with the co-defendant about whose turn it was to kill someone. Strozier v. State, 277 Ga. 78, 586 S.E.2d 309 (2003).

Evidence of a witness's testimony that

the witness heard defendant and the victim arguing in a hallway of a rooming house and then heard a gunshot and found the victim's body in the hallway, along with testimony that a gun, which an expert testified was the murder weapon, was found under a carpet in defendant's room was sufficient to support the defendant's conviction. Jones v. State, 277 Ga. 36, 586 S.E.2d 224 (2003).

Since the trial court record reflected that defendant and another person demanded that a hotel guest give them the guest's wallet, and upon the guest's resistance and attempt to run the guest was shot, which ultimately resulted in the death of the guest from complications four months later, and further, when the other man had been positively identified and in turn testified that defendant had pulled the trigger, defendant's convictions for felony murder and murder in violation of O.C.G.A. § 16-5-1 were sufficiently supported by the evidence. Woodard v. State, 277 Ga. 49, 586 S.E.2d 330 (2003).

Evidence that defendant was involved in killing the victim, including evidence that defendant shot the victim in the chest and helped load the victim, still alive, into a car for transportation to another location where another man shot the victim to death was sufficient to support defendant's conviction for murder. Conaway v. State, 277 Ga. 422, 589 S.E.2d 108 (2003).

Evidence that the defendant was lying with someone on a couch at the apartment of the love interest of the defendant's sibling, that the defendant started telling people on the day the victim disappeared that the defendant had killed a young person and put the person's body in a closet in an apartment, and that a witness saw the dead person in the apartment and reported the death to police meant that the evidence was legally sufficient to support the defendant's conviction. Cain v. State, 277 Ga. 309, 588 S.E.2d 707 (2003), overruled on other grounds by Dickens v. State, 280 Ga. 320, 627 S.E.2d 587 (2006).

After the defendant admitted that the defendant and the victim smoked crack cocaine, that the defendant bit the victim, tied the victim's wrists to the victim's ankles, stuffed a pillowcase in the victim's mouth, and left the victim in the bathtub,

and that the victim was "near out of air," the evidence was sufficient to enable the jury to find the defendant guilty beyond a reasonable doubt of malice murder. *Pittman v. State*, 277 Ga. 475, 592 S.E.2d 72 (2004).

Malice murder conviction was upheld as evidence provided through the testimony of the medical examiner, the defendant's admissions and confession, and seized items resulting from the execution of a search warrant at the defendant's home were all sufficient to authorize a rational trier of fact to find the defendant guilty; further, the defendant made a voluntary waiver of the defendant's right to a jury trial, and an alleged error regarding the admission of expert testimony by a witness for the state was unpreserved for appellate review. *Brown v. State*, 277 Ga. 573, 592 S.E.2d 666 (2004).

Evidence of the defendant's voluntary and willing participation in the crimes, through providing the use of the defendant's car to transport the other three named in the indictment to and from the scene and waiting in the vehicle while two of them committed aggravated assault, burglary, murder, and aggravated robbery, supported the defendant's convictions for those offenses as a co-conspirator. *Silvers v. State*, 278 Ga. 45, 597 S.E.2d 373 (2004).

Given the defendant's testimony that: (1) the defendant went to the victim's apartment to sell the victim cocaine; (2) after the defendant put the cocaine on the kitchen counter, the victim pulled out a gun and shot the defendant in the arm; (3) the defendant charged the victim to disarm the victim; (4) the defendant tried to push the victim on a sofa and the gun went off; and (5) the defendant did not intentionally pull the trigger and the shooting was an accident, but the contradictory testimony of several police officers that the victim's apartment showed no signs of a struggle, and having reviewed the evidence in the light most favorable to the verdict, a rational trier of fact could have found the defendant guilty of murder beyond a reasonable doubt. *Dyer v. State*, 278 Ga. 656, 604 S.E.2d 756 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 95, 163 L. Ed. 2d 111 (2005).

Evidence was sufficient to support malice murder conviction because: (1) the defendant and the victim were seen together the night before the victim's partially clothed, bloody body was found in a dumpster; (2) the victim was stabbed 20 to 30 times and hit in the head with a hammer; (3) a trail of blood led from the dumpster to the defendant's apartment; (4) when the police came to the defendant's apartment, the defendant was cleaning the apartment, but blood was seen throughout the unit; (5) the defendant had a cut and abrasion on the defendant's hand; (6) the defendant's palm print matched a partial, latent palm print on the dumpster; and (7) initially, the defendant denied knowing the victim but later changed the story several times. *Morris v. State*, 278 Ga. 710, 606 S.E.2d 258 (2004).

Evidence that the defendant approached a car, exchanged words with the victim, produced a rifle, and shot the victim two times at point-blank range, killing the victim as the victim's children watched, was sufficient to support the defendant's murder conviction. *Lewis v. State*, 279 Ga. 69, 608 S.E.2d 602, cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478 (2005).

Evidence was sufficient to support the defendant's conviction of malice murder, felony murder, and aggravated assault because: (1) the defendant was in an altercation with the victim at a dance; (2) eyewitnesses saw the defendant make a stabbing motion at the victim; (3) the victim died of nine stab wounds, including one to the heart; (4) the defendant's burned blue jeans were found in the defendant's love interest's backyard; (5) the defendant provided an investigator with clean clothes the defendant allegedly wore at the dance; and (6) the victim's blood and DNA were found on the defendant's leather jacket and on the shirt the defendant's love interest wore to the dance. *Rakestrau v. State*, 278 Ga. 872, 608 S.E.2d 216 (2005).

When the evidence showed that the defendant went to recover the defendant's automobile rims from the victim, who was unable to produce all of them, and the defendant shot the victim, after which the

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victim ran away, and then found the victim and shot the victim again, after which the victim died of a gunshot wound to the abdomen, the evidence was sufficient to allow a rational trier of fact to find the defendant guilty of malice murder beyond a reasonable doubt. *Morgan v. State*, 279 Ga. 6, 608 S.E.2d 619 (2005).

Evidence supported the defendant's conviction for malice murder and aggravated assault because the victim had defensive wounds on the hand, the victim's blood was found on the defendant's shoe, a mixture of the victim's and the defendant's blood was found on the defendant's shirt, and the victim planned to ask the defendant to leave the apartment. *Williams v. State*, 279 Ga. 154, 611 S.E.2d 19 (2005).

Evidence supported the defendant's conviction for malice murder because: (1) an accomplice testified that the accomplice and the defendant robbed a motel and that the defendant shot a police officer who was working as a security guard; (2) the officer died from the wounds; (3) the accomplice told an ex-spouse on the morning after the crime that the defendant shot a security guard during the robbery; (4) the defendant and the accomplice were seen on the street shortly after the robbery; and (5) a firearms examiner's testimony concerning the location of shell casings and bullets at the crime scene corroborated the accomplice's testimony. *Jackson v. State*, 279 Ga. 449, 614 S.E.2d 781 (2005).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of felony murder since the defendant initially did not claim self-defense and later admitted to stabbing the victim, and the forensic evidence contradicted the defendant's claim of how the victim wielded a knife. *Price v. State*, 280 Ga. 193, 625 S.E.2d 397 (2006), overruled on other grounds, *Patel v. State*, 282 Ga. 412, 651 S.E.2d 55 (2007).

Evidence was sufficient to support a malice murder conviction when witnesses saw the defendant arguing with the victim, go with the victim into an area be-

hind a motel where the victim lived, heard shots from the area behind the motel, and later the victim's body was found in that area; also, the defendant was seen at a house with an item wrapped in cloth, and later, the defendant's gun, the murder weapon, was found in the yard of that house, wrapped in cloth. *Smith v. State*, 280 Ga. 161, 625 S.E.2d 766 (2006).

Evidence that a homicide victim was found in a truck with a cup of coffee between the victim's legs and a pack of cigarettes balanced on the victim's thigh; that the defendant approached the truck armed with a gun and did not see a weapon in the victim's possession; that the defendant claimed the victim was about to drag the defendant down the street with the vehicle; and that, after fatally shooting the victim, the defendant fled and did not report the events, was sufficient for the jury to find beyond a reasonable doubt that the defendant was not reasonably acting in self-defense. *Bell v. State*, 280 Ga. 562, 629 S.E.2d 213 (2006).

Despite the defendant's claim that the gun which the defendant was holding discharged accidentally when the victim attacked the defendant, the defendant's conviction of malice murder was supported by sufficient evidence showing, among other things, that the defendant and the victim had a heated telephone conversation within two days of the shooting, that the night before the shooting, the victim went to a bar where the defendant worked, that when the victim entered the bar, the defendant threw a glass ashtray at the victim, that the defendant expressed no remorse on the day of the shooting, that several months later the defendant boasted that the defendant "blew the bitch away," that the defendant dispassionately said the defendant gleaned a leather jacket from the victim's death, and that, by the testimony of the state's experts, the trigger pull required six pounds of pressure, that the shotgun would not fire accidentally, that the shotgun spray pattern indicated that the victim was shot from a distance of 14 feet, and that the pattern was inconsistent with the defendant's version of events. *Holton v. State*, 280 Ga. 843, 632 S.E.2d 90 (2006).

Evidence supported a defendant's conviction for malice murder as the defendant went to the victim's home and shot the victim in the head; the defendant admitted the defendant had the gun in the defendant's hand when the defendant approached the victim, but claimed that the gun accidentally discharged when the defendant put the defendant's hands up to deflect a tray thrown at the defendant by the victim. *Mayberry v. State*, 281 Ga. 144, 635 S.E.2d 736 (2006).

There was sufficient evidence to convict the defendant of malice murder under O.C.G.A. § 16-5-1, burglary under O.C.G.A. § 16-7-1, and possession of a firearm during the commission of a crime under O.C.G.A. § 16-11-106; the defendant was arrested in the white van seen at the scene of the crime, a person resembling the defendant was seen at the scene, the defendant's brother was tied by DNA evidence to the offense, and the defendant and the defendant's brother were known to commit burglaries together. *Denny v. State*, 281 Ga. 114, 636 S.E.2d 500 (2006).

Evidence supported a defendant's conviction for malice murder as: (1) the defendant stated that the defendant was going to re-park the victim's car and became upset; (2) the defendant changed the defendant's mind, gave the victim the car keys, went back into the apartment, came outside with a .38 caliber revolver, and fatally shot the unarmed victim once in the head; (2) children who witnessed the shooting testified that the defendant and the victim were not "fussing"; (3) the children testified that the defendant fired the weapon from the doorway of the apartment as the victim sat on the porch; and (4) the children testified that the victim had no time to react. *Bradley v. State*, 281 Ga. 173, 637 S.E.2d 19 (2006).

There was sufficient evidence to support a defendant's conviction of malice murder as the jury was authorized to find that the defendant, mistaking the victim for someone who had robbed the defendant, got out of a car and attacked the victim from behind, then forced the victim into the car, drove to a remote location, and shot the victim in the chest; fibers on the victim's body matched the carpeting in the defendant's car, and it was for the jury to

determine the credibility of the witnesses as well as the weight to be accorded the expert's fiber testimony. *Hamilton v. State*, 281 Ga. 501, 640 S.E.2d 28 (2007).

Defendant's malice murder conviction, as a party to the crime, was upheld on appeal, as sufficient evidence was adduced at trial of the defendant's participation in the crime, including eyewitness testimony that the defendant encouraged the shooter to shoot the victim, that the defendant recently threatened to shoot the victim in the head, and testimony that the defendant joined the shooter and the co-defendant in the confrontation and fled with them after the shooting. *Sims v. State*, 281 Ga. 541, 640 S.E.2d 260 (2007).

There was sufficient evidence to support the defendant's convictions of malice murder and aggravated assault; after an argument at the victims' house over money, the defendant returned to the house with a concealed pistol, demanded money from the first victim, pulled out the pistol after the first victim said that the first victim was not afraid of the defendant, and shot the two victims. *Shelton v. State*, 281 Ga. 660, 641 S.E.2d 536 (2007).

Evidence was sufficient to support the defendant's murder conviction where the victim was last seen alive at a bank where the victim received \$10 bills; shortly afterward, a customer who came to the victim's store encountered the defendant, a store employee, who said that the victim was asleep; a dog led police from the crime scene to a nearby wooded area, where weapons were found, and then directly to the defendant's mobile home; the defendant approached police and made inculpatory statements containing details of the crime not known to the public; police then searched the trailer and found a wallet containing 25 \$10 bills; and the defendant subsequently confessed to the crime. *Height v. State*, 281 Ga. 727, 642 S.E.2d 812 (2007).

There was sufficient evidence to show that a defendant was a party under O.C.G.A. § 16-2-20(b)(3) to malice murders since: there was testimony that the defendant had previously acted violently toward the victims and had expressed the desire that the first victim die; that the defendant participated in at least one con-

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versation planning the murders; that the defendant was present at the murder scene; that the defendant washed brown stains off the defendant's shirt after the murders; and that the defendant told two people of the murders before the bodies were discovered. Conway v. State, 281 Ga. 685, 642 S.E.2d 673 (2007).

There was sufficient evidence to show that the defendant was guilty of malice murder; all the matters that the defendant cited simply presented questions regarding conflicts in the evidence or credibility, which were properly for the jury's resolution. Conway v. State, 281 Ga. 685, 642 S.E.2d 673 (2007).

There was sufficient evidence to support the defendant's convictions of malice murder, felony murder, two counts of armed robbery, and aggravated assault when the defendant shot and killed the first victim while the victim was making a night deposit at a bank and robbed the second victim, a bartender, at gunpoint a month later; the defendant and an accomplice fully confessed to both crimes, the confession to the bank crime was corroborated by a bank surveillance tape showing the murder in progress, and a bouncer witnessed the robbery of the bartender and grappled with the defendant at the scene. Simmons v. State, 282 Ga. 183, 646 S.E.2d 55 (2007).

There was sufficient evidence to support the defendant's convictions of malice murder and of felony murder when the defendant, who had been involved romantically with the victim, walked into the victim's apartment, looked around, left, approached the car where the victim and a friend were sitting, put a gun to the friend's head, and then turned the gun on the victim and shot the victim before speeding off; the friend, who had known the defendant for over a year, identified the defendant as the shooter. Sampson v. State, 282 Ga. 82, 646 S.E.2d 60 (2007).

Based on the evidence explaining the circumstances and events leading up to the victim's death, including testimony from the medical examiner as to the cause of death, the weapon found, and the de-

fendant's own statements, the appeals court concluded that overwhelming evidence existed to support the defendant's convictions of malice murder and possession of a firearm during the commission of a crime. Sturgis v. State, 282 Ga. 88, 646 S.E.2d 233 (2007).

There was sufficient evidence to support the defendant's convictions of malice murder, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony; the defendant and the victim lived in the same rooming house where the defendant often intimidated the victim and demanded money from the victim, on the night of the crime the defendant sent the victim to buy crack cocaine and became angry when the victim returned empty-handed, the defendant argued with the victim and shot the victim in the eye, and at the hospital the victim repeatedly declined to say who shot the victim, except to say that a person with a first name other than the defendant's shot the victim accidentally. Jones v. State, 282 Ga. 306, 647 S.E.2d 576 (2007).

There was sufficient evidence to support the defendant's convictions of malice murder, felony murder, aggravated assault, cruelty to children in the first degree, and possession of a firearm in the commission of a felony when the defendant waited for the victim at the victim's house, drove with the victim and the victim's 10-year-old child to a rural road and stopped, displayed a gun and refused to allow the victim to leave, and drove to the home of the defendant's child, where the defendant shot the victim in front of the victim's child. Dalton v. State, 282 Ga. 300, 647 S.E.2d 580 (2007).

Evidence supported the defendant's convictions of malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony; the two surviving victims testified that the defendant began shooting at the victims after arriving at an apartment, and the testimony of the victims, the location of shell casings, and the evidence showing that the deceased victim was shot from a distance of over three feet, significantly refuted the defendant's claim of self-defense. Jackson v. State, 282 Ga. 494, 651 S.E.2d 702 (2007).

Sufficient evidence supported the defendant's convictions of malice murder and first-degree arson since: the defendant, who owed money to the victim for a house and who delayed paying the money, was suppose to meet the victim at a bank to pay the victim on the day the victim's body was discovered in the victim's burned mobile home; a medical examiner testified that the victim died by strangulation; the defendant was seen at the mobile home twice that day and appeared agitated; there was fire-related activity in the defendant's home; the defendant completed firefighting classes for work that included training in delayed-ignition devices constructed from household items; there was similar transaction evidence about a fire in the defendant's home and the defendant's use of the insurance proceeds from that fire to pay debts; and the defendant's claim that the defendant was with the defendant's spouse at the time of the fire could be readily explained by the possibility of the use of a delayed-ignition device. Bryant v. State, 282 Ga. 631, 651 S.E.2d 718 (2007).

There was sufficient evidence to support a defendant's convictions of malice murder, armed robbery, kidnapping, third-degree arson, burglary, and possession of a firearm during the commission of a crime when the evidence showed that the defendant made the defendant's accomplice shoot a convenience store clerk after the defendant forced the clerk at gunpoint into a wooded area, took money from a cash register in the store, and started a fire in the store. The accomplice's testimony was sufficiently corroborated by the defendant's admission that the defendant owned the shotgun that was used in the shooting, the defendant's admission that the defendant gave the shotgun to the accomplice, the testimony of a third person that the accomplice gave the third person the shotgun after the robbery, and the fact that shotgun shells found in the defendant's home matched shells taken from the clerk's body. Judkins v. State, 282 Ga. 580, 652 S.E.2d 537 (2007).

Evidence was sufficient to support the defendant's convictions as a party to malice murder, felony murder, kidnapping

with bodily injury, false imprisonment, and aggravated assault when: the victim, who claimed to have been robbed of money the defendant and a codefendant gave the victim for drugs, had been made to drive around while a codefendant pointed a gun at the victim; the victim was later taken to an apartment where the victim was threatened and pistol-whipped; the victim was taken out of the apartment, forced into some woods, and fatally shot; and following the killing, the defendant and a codefendant moved the victim's car from the apartment complex to a parking lot where the defendant and others had met the victim earlier that evening. John v. State, 282 Ga. 792, 653 S.E.2d 435 (2007).

Evidence was sufficient to support the defendant's convictions of malice murder, felony murder, burglary, aggravated assault, and possession of a firearm during the commission of a felony. Two off-duty police officers who worked as security guards for the apartment building where the victim was shot heard a "pop" and saw two people running from the apartment where the victim was shot; the victim's friend testified that the defendant and the codefendant had been at the apartment in the days before the murder and had asked about a gun the victim had; and a neighbor testified that around the time of the shooting, the defendant and the codefendant had followed the victim to the apartment, then pushed open the door without knocking, and that the defendant had a weapon. Walker v. State, 282 Ga. 703, 653 S.E.2d 468 (2007).

Sufficient evidence existed to support a defendant's convictions of malice murder and possession of a knife during the commission of a felony under O.C.G.A. § 16-11-106(b): there was (1) eyewitness testimony that the defendant stabbed the victim, who was involved in a dispute with a relative of the defendant, in the chest with a knife; (2) evidence supporting a finding that the knife was three inches or longer; (3) the defendant's admission to "sticking" the victim; and (4) testimony that the defendant twice pulled a knife on the victim before. Stanley v. State, 283 Ga. 36, 656 S.E.2d 806 (2008).

Defendant's malice murder conviction was upheld on appeal because: (1) the

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evidence presented by the state in support of the state's malice murder and other charges was sufficient; (2) the defendant's objection to the victims' parent's testimony as irrelevant and inflammatory was entirely too vague and general to present any question for determination by the trial court; (3) the defendant failed to support a requested instruction with the specific language sought to be included therein; (4) a challenged instruction on the murder count did not effectively direct a verdict of guilty on that charge as an inaccuracy was cleared up by the court, and the charge as a whole was not likely to confuse the jury; and (5) an involuntary manslaughter charge was not warranted by the evidence. *Davenport v. State*, 283 Ga. 171, 656 S.E.2d 844 (2008).

Sufficient evidence supported a felony murder conviction because ample evidence, including the defendant's admission, showed more than a mere presence at the crime scene, and that the defendant participated in the felony murder of the victim as a party to the crime while in the commission of an armed robbery. Moreover, the defendant did not have to fire the fatal shot in order to be guilty as a principal because the offense of felony murder was accomplished when a defendant caused the death of another human being while in the commission of the underlying felony. *Curinton v. State*, 283 Ga. 226, 657 S.E.2d 824 (2008).

Evidence supported defendant's convictions of malice murder and two counts of aggravated assault; witnesses testified that a person wearing a red bandana went into a bar, pointed a pistol at one victim, left, and later returned and began shooting, and other witnesses testified that defendant was the shooter and that defendant was wearing a red bandana. *Felton v. State*, 283 Ga. 242, 657 S.E.2d 850 (2008).

Evidence was sufficient to support convictions of malice murder, armed robbery, and aggravated assault when the defendant demanded that the victim "break bread", hit the victim three times with a metal flashlight, and rummaged through the victim's pockets after the victim re-

fused, hit the victim again after the victim refused to turn over a ring, and then took the ring. *Gibson v. State*, 283 Ga. 377, 659 S.E.2d 372 (2008).

Evidence supported a conviction of malice murder. The defendant was identified as one of the persons who fled to a hotel from the car where the victim had been shot; bloody clothes matching those worn by the defendant were found in a hotel room along with the defendant; genetic profiles of both the victim and the defendant were found on a sock in the room; a fingerprint removed from a vent cover in the room was that of the defendant; a bullet removed from the victim's body was fired from a pistol found in the vent; and the person found in the hotel room with the defendant testified that the defendant removed the vent cover and placed the pistol in the ductwork. *Smith v. State*, 284 Ga. 17, 663 S.E.2d 142 (2008).

Defendant's convictions on charges of malice murder, aggravated assault, and obstruction were supported by evidence that showed, *inter alia*, that the defendant was upset because the victim owed the defendant money, that the defendant got into an argument with the victim that culminated in the defendant shooting the victim, that a shell casing from the gun used to shoot the victim was found in the defendant's room, and that when the defendant was arrested, the defendant lied about the defendant's identity. *Williams v. State*, 284 Ga. 94, 663 S.E.2d 179 (2008).

Testimony from two eyewitnesses that the defendant fatally shot the victim with an assault rifle and aimed the rifle at one of the witnesses, and evidence that the defendant then fled and tried to elude authorities was sufficient to convict the defendant of felony murder, aggravated assault with a deadly weapon, aggravated assault, and possession of a firearm during the commission of a felony. *McKenzie v. State*, 284 Ga. 342, 667 S.E.2d 43 (2008).

Evidence supported a defendant's conviction for malice murder and rape. The victim had seminal fluid on her leg and buttocks and in her vagina, a massive wound in the back of the head caused by at least five individual blows that had driven pieces of her skull into her brain,

and ligature marks on her neck; the defendant told a co-worker that he had hit a woman on the back of the head; DNA obtained from the defendant matched that found on the victim; and the defendant told a detective that he had killed the victim. Holmes v. State, 284 Ga. 330, 667 S.E.2d 71 (2008).

Evidence supported convictions of malice murder, concealing a death, and possession of a firearm during the commission of a crime. A codefendant testified that the defendant, who was jealous of one victim, shot the victims in the defendant's home, then put the bodies in the second victim's car, drove the car away, poured gasoline on the car, and set the car on fire; an officer who had known the defendant for years testified that the defendant called the officer twice about surrendering to authorities; police found blood, human tissue, shotgun pellets, part of a shotgun, and ammunition in the defendant's home, a trail of blood leading away from the house, and a shotgun shell casing and a gas can in the defendant's truck; and a cellmate testified that the defendant told the cellmate that the defendant shot two people, that the defendant inquired whether fingerprints could be retrieved from a burned vehicle, and that the defendant said that the defendant had soaked up blood on the defendant's carpet with cat litter. Hendrix v. State, 284 Ga. 420, 667 S.E.2d 597 (2008).

Eyewitnesses testified that the defendant ordered a man to shoot the victim, who was wounded but escaped; later, eyewitnesses saw the defendant and an armed cohort encounter the unarmed victim, who was fatally shot. This evidence was sufficient to support the defendant's convictions for aggravated assault and murder. Wilcox v. State, 284 Ga. 414, 667 S.E.2d 603 (2008).

Evidence supported convictions of malice murder, possessing a firearm during the commission of that murder, and possession of a weapon by a convicted felon. A drug dealer told police that the drug dealer saw the defendant shoot the victim, although the drug dealer said at trial that the drug dealer did not see the shooting; the drug dealer's spouse testified as to a statement by the drug dealer that was

inconsistent with the drug dealer's trial testimony; and another prosecution witness testified that before the shooting, the defendant said that the defendant was "going to get" the victim and that afterward, the defendant said, "I told you I was going to do" the victim. Broner v. State, 284 Ga. 402, 667 S.E.2d 613 (2008).

Evidence was sufficient to support convictions of malice murder and of the possession of a firearm during the commission of a crime. Witnesses testified that after getting into a confrontation with a second person at a nightclub, the defendant threatened to kill the second person, that the defendant retrieved a gun and waited outside the club for the second person, and that after being wrestled to the ground, the defendant fired shots, one of which fatally wounded a bystander. Savior v. State, 284 Ga. 488, 668 S.E.2d 695 (2008).

In a malice murder case, there was no merit to a defendant's argument that the evidence established only the defendant's mere presence at the scene; at the very least, the defendant was a party to the crime under O.C.G.A. § 16-2-20(a). While it was not established that the defendant actually committed the physical act of stabbing the victim, the state presented evidence that the defendant took part in another murder the night before the victim was killed, that the victim threatened to disclose the earlier murder to police, that the victim was killed to silence the victim, and that the defendant assisted the codefendants in removing the victim from the trunk of a car and dragging the body into the woods. Metz v. State, 284 Ga. 614, 669 S.E.2d 121 (2008).

Despite defendant's testimony that the victim and the victim's friend attacked the defendant, that the defendant picked up a knife in self defense, and that the defendant stabbed the victim in self-defense, the testimony of the friend that defendant had been fighting and that the friend heard the victim yell that defendant had stabbed the victim was sufficient to convict defendant of malice murder and felony murder. Hooper v. State, 284 Ga. 824, 672 S.E.2d 638 (2009).

Evidence was sufficient to support the defendant's convictions for malice murder,

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theft by taking an automobile, and possession of a firearm by a convicted felon as the defendant admitted to a cellmate and to a cousin's roommate that the defendant fatally shot the cousin when the cousin told the defendant to move out of a shared apartment; there was also physical evidence, the recovery of the gun used in the incident, and witness testimony that supported the conviction. *Jackson v. State*, 284 Ga. 826, 672 S.E.2d 640 (2009).

Sufficient evidence supported a defendant's murder conviction as the defendant convinced the victim to pick the defendant up in the victim's car and, during an argument, produced a knife; as the two struggled, the defendant stabbed the victim six times. *Cane v. State*, 285 Ga. 19, 673 S.E.2d 218 (2009).

Evidence supported the defendant's conviction of malice murder. The defendant's roommate, who had been summoned by the second victim, found the first victim covered with blood in a bedroom; the defendant was also in the bedroom, holding a knife, and told the roommate that the first victim "had it coming"; police who surrounded the building entered the bedroom and found the first victim and the second victim, who had become separated from the roommate when the roommate ran from the scene; the defendant was found in a neighboring apartment, which the evidence showed that the defendant had entered through a connecting attic; the defendant's blood was found in both apartments; and the defendant's blood, along with the victims' blood, was found on the defendant's clothing, the knife, and numerous other items. *Hurst v. State*, 285 Ga. 294, 676 S.E.2d 165 (2009).

Evidence was sufficient to support the defendant's conviction for malice murder as the defendant forced a former girlfriend to purchase a shotgun, and then had another girlfriend set up the victim under the pretense of having sex with him, whereupon the defendant entered the room and fatally shot the victim in the face; participants in various stages of the criminal conduct testified against the de-

fendant at trial. *Varner v. State*, 285 Ga. 300, 676 S.E.2d 189 (2009).

Following evidence was sufficient to support the defendant's murder conviction: (1) the victim's sibling heard the defendant and the victim arguing in a bedroom; (2) minutes later, the sibling heard a gunshot and found the victim with a gunshot wound to the head and the defendant kneeling on the floor; (3) the defendant made incriminating statements to police; and (4) an expert opined that the bullet taken from the victim had been fired from the gun found at the scene, which defendant had purchased. *Watkins v. State*, 285 Ga. 355, 676 S.E.2d 196 (2009).

Eyewitness testimony that the defendant argued with and later fatally shot the victim twice in the head was sufficient to convict the defendant of malice murder. *Marshall v. State*, 285 Ga. 351, 676 S.E.2d 201 (2009).

There was sufficient evidence to support the defendant's conviction for, *inter alia*, malice murder of the defendant's roommate as the defendant gave conflicting statements to police regarding when the roommate was last seen, the defendant knew that the roommate had been stabbed to death although that information was not disclosed to the police, and blood stains in the defendant's home and on the defendant's furniture matched the roommate's blood. *Carson v. State*, 285 Ga. 337, 676 S.E.2d 207 (2009).

Evidence was sufficient to convict two defendants of malice murder: (1) a week after one defendant fought, and the other threatened, their roommate, the latter died in their house after being beaten with a guitar and stabbed; (2) the next day, a defendant, who had bruises on the defendant's arms, told a neighbor of finding the victim's body at their home; (3) the victim's blood was found on the other defendant's shorts; and (4) the knife handle and pieces of the guitar were found near the crime scene. *Dixon v. State*, 285 Ga. 312, 677 S.E.2d 76 (2009), overruled on other grounds, 287 Ga. 242, 695 S.E.2d 255 (2010).

Convictions of two defendants of, *inter alia*, malice murder and felony murder were supported by sufficient evidence be-

cause eyewitnesses saw the defendants point guns at the victim, shoot, and flee. Daniel v. State, 285 Ga. 406, 677 S.E.2d 120 (2009).

Evidence supported the defendants' convictions of malice murder and possession of a firearm by a convicted felon. The first defendant told a driver to stop a car while the second defendant and the victim got out of another car; the second defendant held the victim at gunpoint with an AK-47; the first defendant jumped out of the car and approached the second car with a .45 caliber handgun; both defendants fired their weapons at the victim as the victim was running; after the victim fell, the second defendant stood over the victim with the rifle and fired several more times; the victim suffered five back-to-front bullet wounds; and shell casings from a .45 caliber handgun as well as an AK-47 were found at the scene. Anderson v. State, 285 Ga. 496, 678 S.E.2d 84 (2009).

Malice murder conviction was supported by sufficient evidence under circumstances in which, among other things, an eyewitness observed the defendant and a companion approach the victim, saw the victim throw the victim's arms above the victim's head and remain in that position for about five seconds, and then turn and run, and then heard a single gunshot; a coworker of the victim heard a gunshot, heard the victim exclaim that the victim had been "hit," and saw evidence of the perpetrator in close proximity to the victim immediately after the shooting. Defendant claimed that the defendant's gun had accidentally discharged, striking the victim. Glover v. State, 285 Ga. 461, 678 S.E.2d 476 (2009).

Convictions of felony murder, O.C.G.A. § 16-5-1, and armed robbery, O.C.G.A. § 16-8-41, were supported by sufficient evidence because, *inter alia*, the defendant acted as a lookout and deterred two potential customers while a codefendant entered the victim's restaurant, shot the victim to death, robbed the cash register, and stole the victim's wallet; after the shooting, the defendant and the codefendant fled the scene together and went to a friend's apartment, where the defendant changed the defendant's shirt to disguise

the defendant's identity. Proof of the defendant's direct commission of the crimes was not required because the jury could infer the defendant's participation from conduct before, during, and after the crimes. Washington v. State, 285 Ga. 541, 678 S.E.2d 900 (2009).

Restaurant was robbed, the manager was fatally shot, and the manager's car was stolen. As the defendant's accomplice, the defendant's cellmate, and an officer testified that the defendant admitted committing the murder, the evidence was sufficient to convict the defendant of malice murder, armed robbery, and theft by taking. Patterson v. State, 285 Ga. 597, 679 S.E.2d 716 (2009), cert. denied, U.S. , 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010).

Sufficient evidence supported the defendant's conviction of malice murder under circumstances in which the victim's father received a call originating from the victim's cell phone, and, when that number was called back, all that could be heard were noises, including gasping, gurgling, and children screaming during the second call, before the line was disconnected; officers later found the victim lying on the kitchen floor with a cell phone in the victim's hand, dead from a single gunshot wound to the head, and a handgun retrieved on the premises was later determined to have fired the bullet that killed the victim. The defendant testified that the defendant and the victim were arguing inside the home, that the argument became physical, that the defendant took the children and a gun out to the defendant's truck, that the defendant returned to the house, and that the defendant did not know what happened after that. Paslay v. State, 285 Ga. 616, 680 S.E.2d 853 (2009).

Sufficient evidence supported the defendant's convictions of murder, felony murder, and aggravated assault; the evidence revealed that the victim and the defendant got into a physical fight at a bar, and that the victim then left the bar and went to an apartment. The defendant then went home, retrieved a handgun, went to the apartment, knocked on the door, and when one of the people inside opened the door, the defendant shot the victim in the

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chest, killing the victim. *Rector v. State*, 285 Ga. 714, 681 S.E.2d 157 (2009), cert. denied, U.S. , 130 S. Ct. 807, 175 L. Ed. 2d 567 (2009).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty of malice murder and felony murder beyond a reasonable doubt because a bloody fingerprint found at the crime scene matched the defendant's fingerprint, bloody boot impressions found at the scene were connected to the defendant's boots, and blood on the defendant's boots matched the victim's blood; a witness testified that the defendant had stated that the defendant attacked the victim in a bathroom, and the crime scene investigator testified that based on blood spatter pattern analysis, the victim's beating began in the bathroom. *Arrington v. State*, 286 Ga. 335, 687 S.E.2d 438 (2009), cert. denied, U.S. , 131 S. Ct. 112, 178 L. Ed. 2d 69 (U.S. 2010).

Evidence was ample for any rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder and possession of a firearm during the commission of a felony because a witness testified at trial that defendant was responsible for the shooting, and in addition to witness testimony implicating defendant, police found bullets of the same caliber used to shoot the victim in a codefendant's vehicle soon after the shooting; the jury was also shown transcripts and video recordings of statements given to the police by two witnesses in which the witnesses implicated defendant. *Hicks v. State*, 287 Ga. 260, 695 S.E.2d 195 (2010).

Evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt of malice murder because the defendant shot the victim with a 9mm handgun after entering the victim's house in order to take the victim's possessions; the defendant's girlfriend testified that the day before the shooting, she saw the defendant with a 9mm handgun. *Fox v. State*, No. S10A1719, 2011 Ga. LEXIS 148 (Feb. 28, 2011).

Evidence presented at trial was sufficient to enable a rational trier of fact to

find the defendant guilty beyond a reasonable doubt of murder, felony murder, armed robbery, and aggravated assault because it was for the jury to determine the credibility of the witnesses, and the jury was authorized to disbelieve the alibi defense the defendant proffered. *Newsome v. State*, 288 Ga. 647, 706 S.E.2d 436 (2011).

Although there was conflicting evidence as to whether the defendant or the codefendant was the shooter, the evidence was more than sufficient to authorize a rational trier of fact to find the defendant guilty of malice murder beyond a reasonable doubt because the defendant confronted several people in a park, told the people that something was about to go down, and warned the people not to tell anyone; the defendant then confronted the victim and argued loudly with the victim, who was fatally shot twice in the head from close range, and while in jail, the defendant admitted to another inmate that the defendant killed somebody. *Johnson v. State*, No. S11A0390, 2011 Ga. LEXIS 286 (Apr. 18, 2011).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder, armed robbery, and aggravated assault beyond a reasonable doubt because although the defendant denied to police that the defendant had any contact with the silver car that was connected to the robbery, the defendant's fingerprints were found on the outside of the car and an eyewitness's physical description of the second gunman from the robbery matched the defendant. *Carter v. State*, No. S10A1999, 2011 Ga. LEXIS 253 (Mar. 18, 2011).

Evidence supported the defendant's convictions for malice murder, felony murder, criminal attempt to commit armed robbery, armed robbery, aggravated assault, and possession of a firearm during the commission of a crime because: (1) the defendant participated in the armed robbery of three people, including the shooting victim, who were sitting in a car on a neighborhood street; (2) during the encounter, the co-indictee fatally shot the victim in the head with a shot gun; (3) one of the two other people in the car testified that, after the shooting, the defendant,

with the defendant's hand in the defendant's pocket simulating that the defendant had a gun, took money and drugs from the witness; (4) the co-indictee also took money from the other person; and (5) the defendant and the co-indictee then fled the scene. Gilyard v. State, 288 Ga. 800, 708 S.E.2d 329 (2011).

**Evidence sufficient for murder conviction in drug cases.** — Evidence was sufficient to support the first defendant and the second defendant's convictions for murder, kidnapping, armed robbery, and burglary, as the evidence showed that the defendants were involved in a scheme to rob a person who they believed to be selling large amounts of marijuana from an apartment, that the defendants burst into the apartment brandishing guns, that one of the defendants fatally shot the victim, and that the other defendant forced two people present to lie on the ground and divulge the location of a safe in the apartment that held money and marijuana. Howard v. State, 279 Ga. 166, 611 S.E.2d 3 (2005).

Evidence was sufficient to support a malice murder conviction after the defendant had approached the victim's car to sell drugs and leaned into the car, when a passenger grabbed the drugs, and the victim sped off, but the car stalled a few blocks down the street, and defendant ran to the car to retrieve the drugs, but discovered that all of the drugs had not been returned, ran back to the disabled car, and shot the victim in the leg and then the head. Collier v. State, 280 Ga. 148, 625 S.E.2d 757 (2006).

**Dying declaration of victim as evidence in murder conviction.** — Evidence was sufficient to enable a rational trier of fact to find a defendant guilty of murder beyond a reasonable doubt as a result of the evidence establishing that the victim identified the defendant as the individual who caused the victim's gunshot wound via a dying declaration made before the victim died, and the defendant had earlier in the day accused the victim of stealing a gun from the defendant, which was a baseless claim. Ventura v. State, 284 Ga. 215, 663 S.E.2d 149 (2008).

**Evidence sufficient for malice murder as party to crime.** — Evidence was

sufficient to support the defendant's conviction for malice murder as a party to the crime under O.C.G.A. § 16-2-20(b)(3) as the defendant accompanied the defendant's son on two occasions to the victim's apartment, the defendant lied to gain entry into the victim's apartment, the defendant was present when the victim was fatally shot, and the defendant fled after the incident. Ashe v. State, 285 Ga. 359, 676 S.E.2d 194 (2009).

**Arguments over volume of stereo and television justifying murder.** — Evidence was sufficient to support the defendant's conviction for, *inter alia*, malice murder as the defendant admitted to fatally shooting the victim in the chest with the victim's rifle after the two argued about the volume of the stereo and television. Jones v. State, 285 Ga. 328, 676 S.E.2d 225 (2009).

**Malice murder conviction following prescription drug use taken for injuries inflicted by defendant.** — There was sufficient evidence to support a defendant's malice murder conviction as the jury was authorized to reject other possibilities of how the victim died as theoretical since the only cause of the victim's death supported by the evidence was that the death was the result of an intracerebral hemorrhage caused by the anticoagulant drug Coumadin, which the victim was taking as a result of being shot by the defendant and becoming paralyzed. Shields v. State, 285 Ga. 372, 677 S.E.2d 100 (2009).

**Similar transaction evidence admissible.** — Because the state adequately showed the connection between the murder of one victim, and the murder charged in the instant proceeding, specifically embedded in the defendant's professed motive that the killing of the victim in the instant proceeding was committed to prevent evidence from being introduced against the defendant in the first killing, the similar transaction evidence was properly allowed; hence, the similar transaction did not amount to improper character evidence. Young v. State, 281 Ga. 750, 642 S.E.2d 806 (2007).

**Spontaneous inculpatory statements used as evidence.** — Defendant's convictions of malice murder, armed rob-

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bery, and possession of a firearm during the commission of a felony were supported by the evidence, which included use of the murder weapon during a later robbery by the defendant's accomplices, a video that provided a corroborating account of the shooting, and the defendant's spontaneous inculpatory statements while being transported from Maryland to Georgia. Stokes v. State, 281 Ga. 825, 642 S.E.2d 82 (2007).

During the defendant's trial for malice murder and drug-related offenses, the trial court did not abuse the court's discretion in admitting as similar transaction evidence testimony regarding the defendant's previous arrest on a charge of possession of cocaine with intent to distribute and a prior shooting incident because a drug sting was similar to the cocaine trafficking in that both involved relatively recent arrangements for appellant to sell cocaine, and the shooting incident was probative of defendant's inclination towards unprovoked gun violence; the similar transactions were offered to prove, *inter alia*, intent and state of mind, the trial court admitted the evidence for those limited purposes only, and the trial court instructed the jury accordingly. Moore v. State, 288 Ga. 187, 702 S.E.2d 176 (2010).

**Evidence insufficient for murder conviction.** — See Johnson v. State, 269 Ga. 840, 506 S.E.2d 374 (1998).

**Evidence sufficient for murder and armed robbery.** — Although defendant was not the triggerman, since there was evidence which authorized findings that defendant was present with the triggerman for over two hours prior to the murder; that defendant drove the triggerman to the victim's house; that defendant was present in the room when the victim was shot; that the victim was shot with a gun of the same model and caliber that defendant owned; and that defendant destroyed evidence, assisted in the disposal of the decedent's body, fled from the jurisdiction where the crimes were committed, reaped benefits from the armed robbery, and at no time made any attempt to be disassociated from the crim-

inal enterprise, a rational trier of fact could have found the defendant guilty of the crimes of murder and armed robbery beyond a reasonable doubt. Tho Van Huynh v. State, 257 Ga. 375, 359 S.E.2d 667 (1987).

Evidence was sufficient to authorize a rational trier of fact to find defendant guilty beyond a reasonable doubt of murder and armed robbery. Cook v. State, 269 Ga. 460, 499 S.E.2d 887 (1998).

Sufficient evidence supported convictions arising from the defendant's participation in a robbery which resulted in the death of a store clerk where, knowing that the cousin was going to commit a robbery, the defendant voluntarily went with the cousin, saw that the cousin had a gun, agreed to "stand over" the scene, and joined the cousin in using the victim's credit cards afterwards; contrary to the defendant's assertions, testimony showed that the defendant was not intimidated by the cousin. Scott v. State, 280 Ga. 466, 629 S.E.2d 211 (2006).

Evidence was sufficient to authorize the jury to find the defendant guilty of armed robbery and malice murder because the victim went missing shortly after coming into a substantial amount of cash, the defendant had access to the victim's home, and the defendant was seen driving around in the victim's two vehicles, selling the victim's property, and with a large amount of cash; the victim died from blunt trauma to the head, a mallet with blood on the mallet was found inside the house, and a witness testified that the defendant confided to the witness that the defendant killed the victim, placed the victim's body in a freezer, and took the victim's money. Cutrer v. State, 287 Ga. 272, 695 S.E.2d 597 (2010).

Because defendant admitted to police that defendant had planned the robbery that led to the victim's death, defendant was a willing participant in the robbery and shooting; consequently, the evidence was sufficient to find defendant guilty of felony murder, armed robbery, and possession of a firearm during the commission of a crime. Branchfield v. State, 287 Ga. 869, 700 S.E.2d 576 (2010).

**Evidence sufficient to support convictions of murder, aggravated assault,**

armed robbery, burglary, and possession of firearm in commission of felony. *Baty v. State*, 257 Ga. 371, 359 S.E.2d 655 (1987).

Rational trier of fact could have found the defendant guilty of murder, aggravated assault and possession of a firearm during the commission of a crime beyond a reasonable doubt. *Walden v. State*, 264 Ga. 92, 441 S.E.2d 247 (1994).

Evidence was sufficient to enable a rational trier of fact to find appellant guilty of malice murder, felony murder, aggravated assault and possession of a firearm by a convicted felon in the shooting deaths of two victims. *Burtts v. State*, 269 Ga. 402, 499 S.E.2d 326 (1998).

Evidence was sufficient to convict defendant of malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a crime against a person because: (1) the codefendant jumped out of the car defendant was driving and told the victim and two other men to empty their pockets as the codefendant was robbing the victims and then the codefendant began shooting; and (2) the victim was shot in the head and later died. *Thomas v. State*, 275 Ga. 882, 572 S.E.2d 537 (2002).

Defendant found guilty of malice murder, aggravated assault, and possession of a firearm by a first offender probationer after the defendant fired a gun at a person, the bullet grazed the person, went through a wall, and killed another person. *George v. State*, 276 Ga. 564, 580 S.E.2d 238 (2003).

Although defendant testified about the victim's aggressive and dangerous tendencies, there was sufficient evidence to convict defendant of felony murder since there was evidence that: (1) defendant stabbed the victim in the back and the chest during the altercation; (2) one or two days before the stabbing, defendant had stated that the victim owed defendant money and would be dead by dark; and (3) the victim was found with only a cigarette lighter for a weapon. *Salyers v. State*, 276 Ga. 568, 580 S.E.2d 240 (2003).

When the evidence revealed that the defendant and others returned to a parking lot with the specific intent of ambushing a group of people who had earlier told the defendant not to speed and had

thrown a beer bottle at the defendant's car, and when the defendant was found to be an accomplice of one who possessed a gun and fatally shot someone, there was sufficient evidence pursuant to the "party to a crime" law under O.C.G.A. § 16-2-20 to convict the defendant of felony murder in violation of O.C.G.A. § 16-5-1 and simple battery in violation of O.C.G.A. § 16-5-23.1. *Smith v. State*, 277 Ga. 95, 586 S.E.2d 629 (2003).

When the evidence established more than defendant's mere presence at the scene of the crimes, the evidence was sufficient to find defendant guilty beyond a reasonable doubt of felony murder and simple assault; although defendant was not indicted for conspiracy, the evidence also supported a conspiracy charge. *Belsar v. State*, 276 Ga. 261, 577 S.E.2d 569 (2003).

Eyewitnesses saw defendant standing by the door of the barber shop shooting repeatedly at the victim, who died from those wounds, and the police recovered the pistol from defendant that shot the victim; thus, the evidence was sufficient to enable a rational trier of fact to find defendant guilty beyond a reasonable doubt of malice murder, felony murder, and aggravated assault with a deadly weapon under O.C.G.A. §§ 16-5-1 and 16-5-21. *Roberts v. State*, 276 Ga. 258, 577 S.E.2d 580 (2003).

Evidence that two defendants who were tried together chased a victim after an argument and that the victim died after one defendant shot the victim five times was sufficient to sustain both defendants' convictions for malice murder and other crimes. *Jackson v. State*, 278 Ga. 235, 599 S.E.2d 129 (2004).

Evidence was sufficient to allow the jury to find the defendant guilty of malice murder and possession of a firearm during the commission of an aggravated assault because: (1) one eye-witness testified to seeing the victim speaking to an occupant of a car, then hearing a shot, seeing the victim try to peddle the bicycle away, and then falling to the ground; (2) another witness testified that on the night of the shooting, the defendant told the witness that the defendant shot a person on a bicycle and that the witness helped the

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defendant dispose of a gun in a lake; (3) a third witness testified that the defendant told the third witness that the defendant had shot and killed a person on a bicycle; and (4) the defendant made a videotaped statement during which the defendant admitted to shooting the victim. Roberts v. State, 278 Ga. 541, 604 S.E.2d 500 (2004).

In addition to the second codefendant's testimony, the state showed that, shortly after the murder, the defendant was in possession of the victim's cab, that the victim's blood was found in the vehicle and on the defendant, and that the defendant made incriminating admissions to others; thus, the evidence was sufficient to authorize a rational trier of fact to find proof beyond a reasonable doubt of the defendant's guilt of malice murder, armed robbery, aggravated assault, hijacking a motor vehicle, and possession of a firearm during the commission of a felony. Wicks v. State, 278 Ga. 550, 604 S.E.2d 768 (2004).

Defendant's convictions for malice murder and possession of a firearm during commission of a felony were supported by sufficient evidence, including identification of the defendant as the shooter by the victim's sibling, who was with the victim at the time of the incident, as well as the testimony of two witnesses who had spoken with the defendant and the codefendant immediately prior to the shooting and who identified the defendant. Hunt v. State, 279 Ga. 3, 608 S.E.2d 616 (2005).

Sufficient evidence supported the defendant's convictions for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony where, inter alia: (1) the shooting victim was the love interest of the defendant's former love interest; (2) the victim had beaten the defendant earlier; (3) witnesses saw defendant at the scene of the killing, in daylight from about two feet away, saw the defendant draw a gun, and then heard shots; (4) a witness saw one perpetrator run from the scene; (5) the witnesses gave the police a description of the shooter, and within hours, independently identified the defendant as the perpetrator from a photo lineup; and

(6) a few days later, the defendant admitted to a former love interest that the defendant was the shooter. Wallace v. State, 279 Ga. 26, 608 S.E.2d 634 (2005).

Evidence was sufficient to support the defendant's convictions of malice murder and concealing the death of another because: (1) the defendant's nephew testified that the defendant asked for help with "a body"; (2) the nephew noticed blood stains, evidence of a struggle, and a smell of bleach at the defendant's home; (3) the victim's body was on a bed in the defendant's home; (4) the nephew helped the defendant roll the body in a rug and take the body to a nearby dumpster where they deposited it; (5) authorities later determined that the victim sustained blunt force trauma to the head and died of ligature strangulation; and (6) a search of the defendant's home revealed the victim's blood stains and evidence of a struggle. Ware v. State, 279 Ga. 17, 608 S.E.2d 643 (2005).

Evidence supported the defendant's conviction for malice murder and robbery by force because the defendant strangled the victim while the defendant and codefendant were riding in the victim's car and put the body in the trunk; the defendant told a friend that there were three people in the car, the codefendant told the friend that the codefendant and the defendant killed the victim, and they showed the friend the body; the codefendant took money from the victim's sock, and the codefendant and the defendant hid the body, retrieved the body, and buried the body, and the defendant was driving the victim's car when the defendant was involved in an accident, which led to the discovery of the body. Shelton v. State, 279 Ga. 161, 611 S.E.2d 11 (2005).

Evidence supported the defendant's conviction of malice murder, possession of a firearm during the commission of a crime, and concealing the death of another; the victim was shot in the back of the head with the defendant's gun in the woods behind the defendant's family's property, the victim's body was found in a landfill two days later, the defendant's friend confided to a friend that the defendant shot the victim and then called the friend to help dispose of the body, the

friend confessed to the friend's role in the concealment and secretly videotaped a conversation with the defendant about the shooting and, on the tape, the defendant bragged about killing the victim and demonstrated how the defendant did it. Bragg v. State, 279 Ga. 156, 611 S.E.2d 17 (2005).

Evidence supported the defendant's conviction for malice murder and possession of a firearm during the commission of a felony because the defendant admitted taking money from the victim, arranging for a meeting with the victim, and not returning the money before shooting the victim. Flanders v. State, 279 Ga. 35, 609 S.E.2d 346 (2005).

Evidence was sufficient to support a conviction for felony murder, voluntary manslaughter, and aggravated assault, as an eyewitness testified that the defendant was the only person to pull out a weapon in a confrontation at a nightclub, that the defendant fired a weapon at the victim, who had previously struck the defendant's love interest, and at two other victims who were attempting to leave. Rodriguez v. State, 274 Ga. App. 549, 618 S.E.2d 177 (2005).

Evidence was sufficient to support the defendant's convictions for malice murder and aggravated assault, in violation of O.C.G.A. §§ 16-5-1 and 16-5-21, respectively, as well as for possession of a firearm during a felony, because the defendant was identified by multiple witnesses as having fatally shot the victim; the defendant and some friends joined the victim's basketball game and when their team lost, the defendant took the bet money, pulled out a gun, and started firing at the victim and the teammates. Agee v. State, 279 Ga. 774, 621 S.E.2d 434 (2005).

Evidence was sufficient to support the defendant's conviction for felony and malice murder, and aggravated assault, in violation of O.C.G.A. §§ 16-5-1 and 16-5-21, as well as possession of a firearm conviction, because the defendant helped a sibling retaliate against the victim, who had previously sold the sibling fake drugs, by going to the victim's place of work, fatally shooting the victim multiple times, and planting fake drugs on the body; the defendant's claim that the defendant was

in another state at the time of the incident was refuted by a copy of the defendant's criminal history which showed that the defendant was out on bail just days before the incident, as well as testimony from the victim's roommate. Copprue v. State, 279 Ga. 771, 621 S.E.2d 457 (2005).

Defendant's convictions for malice murder, burglary, robbery, aggravated assault, and concealing the death of another were supported by sufficient evidence because: (1) the defendant broke into the office where the victim was living; (2) the defendant hit the victim several times on the head and body with a pair of pliers; (3) the defendant choked the victim until the victim was dead; (4) the defendant took the victim's credit card and driver's license; and (5) the defendant disposed of the victim's body. Young v. State, 280 Ga. 65, 623 S.E.2d 491 (2005).

When a bloody jogging suit belonging to the defendant was found at the defendant's love interest's house with the victim's blood on the suit, witnesses described the defendant wearing that same jogging suit after the shooting, and a .380 pistol was found hidden in a cinder block at the defendant's love interest's house that matched the type of gun used to kill the victim, the defendant's convictions for malice murder and other related crimes with regard to the killing of the defendant's love interest's neighbor was upheld on appeal since such circumstantial evidence was sufficient to allow the jury to have found the defendant guilty beyond a reasonable doubt. Hooks v. State, 280 Ga. 164, 626 S.E.2d 114 (2006).

Convictions for kidnapping, aggravated assault, and malice murder, in violation of O.C.G.A. §§ 16-5-40, 16-5-21, and 16-5-1, respectively, were supported by sufficient evidence after the defendant got into a dispute with the victim over a drug deal, the defendant and the codefendants kidnapped the victim, drove the victim to a remote area, and shot the victim several times. Morris v. State, 280 Ga. 179, 626 S.E.2d 123 (2006).

Evidence that three unarmed people went to talk to that defendant about rumors that the defendant wanted to harm them, and that, when one approached the defendant, the defendant fired five shots

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in their direction, killing one of them, was sufficient to support convictions for felony murder and aggravated assault. *Traylor v. State*, 280 Ga. 400, 627 S.E.2d 594 (2006).

**Malice murder and attempted arson convictions** were upheld as: (1) the evidence presented showed that an attempted arson was inextricably linked to the victim's murder, and the jury was authorized to find beyond a reasonable doubt that the defendant was guilty; (2) the admission of two handwritten documents that the defendant had penned was proper as their prejudicial impact did not outweigh their probative value; and (3) the trial court did not abuse the court's discretion in determining that any prejudicial impact of a religious prayer asking for strength, and an expression of uncertainty as to what "makes me tick," did not outweigh the probative value of the evidence. *Fortson v. State*, 280 Ga. 376, 628 S.E.2d 104 (2006).

Convictions of malice murder and possession of a firearm during the commission of a felony were supported by sufficient evidence, including the proper introduction of the pretrial statement of a witness who identified the defendant as the shooter in the murder, and the pretrial statement of a second witness who claimed that the defendant had admitted that the defendant had killed someone five hours after the fatal shooting and that the witness had frequently seen the defendant carrying the sort of pistol that fired the fatal shots. *Cummings v. State*, 280 Ga. 831, 632 S.E.2d 152 (2006).

Convictions of murder, aggravated assault, and possession of a firearm by a convicted felon were supported by sufficient evidence showing that while the victim was in the process of buying drugs from a third party, the defendant approached the driver's side of the victim's car, demanded the victim's money, and shot the victim several times; the seller of the drugs testified that the seller had observed the defendant carrying a gun, and both the codefendant and another witness identified the defendant as the shooter. *Major v. State*, 280 Ga. 746, 632 S.E.2d 661 (2006).

Evidence supported a defendant's conviction for malice murder and aggravated assault as: (1) when a cab driver arrived to pick up a passenger at the defendant's apartment, the defendant was waiting outside and told the cab driver to wait while the defendant returned to the apartment; (2) the cab driver heard several gunshots immediately before the defendant ran to the cab and told the cab driver to "go"; (3) during the ride, the cab driver observed drops of blood on the defendant's clothing and overheard the defendant state in a cell phone call that the defendant "got the guy who owed (the defendant) money"; (4) the police traced the phone call to the defendant's relative; and (5) the defendant later confided to a friend that the defendant shot and killed someone, that the defendant left in a cab, and that the defendant made a phone call with the cab driver's phone. *Puga-Cerantes v. State*, 281 Ga. 78, 635 S.E.2d 118 (2006).

Evidence supported a defendant's convictions for malice murder, felony murder, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony as: (1) the defendant repeatedly followed the victim in and out of a restaurant, and eventually chased the victim from the restaurant, firing at the victim at least nine times; (2) after the shooting, the defendant jumped into a silver truck and sped away; (3) the victim died as a result of the gunshot wounds; and (4) two witnesses identified the defendant from photographic lineups. *Waters v. State*, 281 Ga. 119, 636 S.E.2d 538 (2006).

Evidence supported a defendant's conviction of malice murder and possession of a firearm during the commission of a felony as: (1) believing that the victim was involved in the murder of the defendant's brother five months before the incident, the defendant told a first witness that the defendant intended to kill the victim and offered to pay the first witness for information as to the victim's whereabouts; (2) a second witness saw the defendant and two other men approach the victim, call out the victim's name, and open fire on the victim as the victim ran away; (3) the victim died from gunshot wounds; (4) the second witness had met the defendant and, after the shooting, the second victim

noticed the defendant's gold teeth, and identified the defendant by the defendant's street name from a photographic lineup and in court; and (5) the defendant threatened to kill the second witness if the second witness testified against the defendant. *Woodruff v. State*, 281 Ga. 235, 637 S.E.2d 391 (2006).

Evidence supported a defendant's conviction for malice murder, aggravated assault, and possession of a firearm in the commission of a felony as: (1) during a van ride, the defendant fought with an assault victim, striking the assault victim in the head with a gun, and was told to stop hitting the assault victim; (2) a gunshot was heard and the passengers saw a murder victim lying dead and the defendant holding the gun; (3) the gun was inside the murder victim's mouth when the gun was fired; (4) the assault victim and another passenger fled; and (5) the defendant and an accomplice dumped the body in an industrial area. *Johnson v. State*, 281 Ga. 229, 637 S.E.2d 393 (2006).

Evidence supported a defendant's conviction for malice murder and assault as: (1) the defendant told a first witness that the defendant had killed a man; (2) the defendant had tried to sell the victim's car; (3) the defendant admitted to police that the defendant had the key to the victim's car; and (4) the defendant told a fellow prisoner that the defendant and an accomplice strangled the victim, beat the victim, stabbed the victim, cut the victim's throat, and tore out the victim's fingernails. *Richard v. State*, 281 Ga. 401, 637 S.E.2d 406 (2006).

Defendant's malice murder and aggravated assault convictions were upheld on appeal, as supported by sufficient evidence, including that: (1) the defendant, along with two codefendants, fired numerous shots into a crowd in an attempt to shoot several men with whom they had been feuding; (2) one of the codefendants later told a friend that the three committed the crimes; (3) one of the defendant's friends saw the defendant with a shotgun shortly after the shooting, the shotgun had red shells, and the defendant told the friend that the gun had been used in the shootings; and (4) forensic evidence later confirmed that red shotgun shells were

found at the scene. *Adkins v. State*, 281 Ga. 301, 637 S.E.2d 714 (2006).

Evidence was sufficient to support the convictions of murder, armed robbery, aggravated assault, burglary, and a statutory violation, all in violation of O.C.G.A. §§ 16-5-1, 16-8-41, 16-5-21, 16-7-1, and 16-11-106, respectively, when the defendant and the codefendant went to a club with the intention of robbing someone, met the victim and drove the victim back to the victim's home, beat and fatally stabbed the victim, and upon leaving the victim's apartment, took some of the victim's belongings. *Willoughby v. State*, 280 Ga. 176, 626 S.E.2d 112 (2006).

Sufficient evidence supported convictions of felony murder, armed robbery, aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm in the commission of a felony when, upon pulling into an apartment complex to turn around and ask for directions, the victims were approached by the defendant and another man, defendant pulled out a gun and told the victims to "give it up," when one of the victims hesitated, defendant shot the victim, defendant then stole that victim's money and jewelry, and later, the gunshot victim died; the second victim described defendant, who was wearing a specific jersey at the time of the crimes, and two witnesses who knew defendant testified that defendant robbed and shot the victim while wearing that jersey. *Davis v. State*, 280 Ga. 442, 629 S.E.2d 238 (2006).

Defendant's conviction for malice murder, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon was supported by the evidence as: (1) the defendant told the defendant's love interest that the defendant knew who had taken the defendant's drugs from a motel room and that the defendant was going to get the drugs; (2) the defendant and an accomplice forced someone with something "glossy" on the person's forehead; (3) the defendant told the driver to stop at a secluded area so that the defendant could put the person "somewhere safe"; (4) the defendant threw a gun from a bridge on the return; (5) the defendant instructed the driver to clean blood from the car's

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backseat; and (6) the defendant told the defendant's love interest that the defendant had killed the person who had the defendant's drugs and told a cell mate that the defendant had shot a person. *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Defendant's convictions for malice murder, aggravated battery, burglary, and violation of the Georgia Controlled Substances Act by unlawfully possessing cocaine and marijuana were supported by sufficient evidence; the defendant walked into a neighbor's house with a butcher knife in each hand and stabbed two people, knives found in the woods behind the defendant's apartment matched the descriptions of those used in the stabbings and had deoxyribonucleic acid matching the defendant's, two knives were missing from a knife block in the defendant's apartment, marijuana and cocaine were found in the apartment, the defendant told a friend that the defendant had "hurt some people really bad," and three eyewitnesses identified the defendant as the assailant. *Swanson v. State*, 282 Ga. 39, 644 S.E.2d 845 (2007).

Evidence was sufficient to support the three defendants' convictions of malice murder, aggravated assault, and possession of a firearm during the commission of a felony since: the victims were shot from a gold SUV and the first defendant owned a gold SUV; the first defendant, who had been robbed the day before, stated that the first defendant "wanted to straighten about the money"; the third defendant met the first two defendants at a hotel and transferred weapons into the gold SUV; the first defendant pointed to a person outside the hotel and said "Let him have it"; and the third defendant later wondered if one of the victims was dead. *Stokes v. State*, 281 Ga. 875, 644 S.E.2d 116 (2007).

Evidence supported the defendant's convictions of malice murder, two counts of felony murder, kidnapping with bodily injury, two counts of armed robbery, and aggravated battery after: the defendant

had been seen fleeing the victim's home in a car registered to the defendant; the defendant told the defendant's spouse to discard the defendant's bloody clothing; the defendant sought treatment at a hospital after being shot during the crimes; and the defendant had initiated conversations in which the defendant described the actions of the defendant's companions in discarding guns used in the crimes and offered to reveal the names of the companions in exchange for not being charged with murder. *Davis v. State*, 281 Ga. 871, 644 S.E.2d 113 (2007).

Evidence supported the defendant's convictions of malice murder, felony murder, armed robbery, aggravated assault, and possession of a firearm during the commission of a felony after the defendant went to the victim's laundromat and waited until the victim opened a change machine, pointed a gun at the victim's head and ordered the victim to put the money in a bag, told the victim, "Hell, yeah, I'll kill you," and shot the victim multiple times; eyewitnesses, including two who knew the defendant, identified the defendant as the perpetrator. *Cooper v. State*, 281 Ga. 760, 642 S.E.2d 817 (2007).

Evidence, which included uncontested testimony from an eyewitness who saw a defendant order a store employee into the street shortly before the employee was shot, the testimony of two other eyewitnesses, and the fact that calls had been made from the employee's stolen cellular phone to the defendant's mother was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, armed robbery, and a number of other associated crimes. *Horne v. State*, 281 Ga. 799, 642 S.E.2d 659 (2007).

Evidence sufficient to support convictions of malice murder, felony murder, and possession of a knife during the commission of a felony, based on the defendant's telephone call to a friend admitting to the murder; and expert medical testimony which explained how the killing was committed and how the defendant "worked up the courage" to inflict the deep cut that stretched across the victim's throat, severing the victim's left carotid artery and

right internal jugular vein, causing the victim to bleed to death; further, the defendant had sufficient notice of the specific deadly weapon allegedly used for purposes of the felony murder charge by the language in count three. *Jones v. State*, 282 Ga. 47, 644 S.E.2d 853 (2007).

There was sufficient evidence to support a defendant's convictions of malice murder, felony murder, armed robbery, aggravated assault, attempted burglary, and possession of a firearm by a convicted felon; in addition to testimony by a codefendant and eyewitness testimony by the victim's spouse, the victim's blood was on the defendant's clothes, the defendant had the victim's keys, and the knife used to kill the victim and a pistol were discovered near the site of the defendant's arrest in some woods near the scene of the crime. *Walker v. State*, 282 Ga. 774, 653 S.E.2d 439 (2007), cert. denied, 129 S. Ct. 481, 172 L.Ed.2d 344 (2008); overruled on other grounds, No. S10P1859, 2011 Ga. LEXIS 267 (Ga. 2011).

Because sufficient evidence was presented to support the defendant's aggravated assault and felony murder convictions, and there was plenty of evidence to authorize the jury to find that the defendant lied in order to support a self-defense claim, sufficient evidence was presented to uphold the convictions on appeal. *Bradley v. State*, 283 Ga. 45, 656 S.E.2d 842 (2008).

Defendant's convictions were upheld on appeal because sufficient testimonial, identification, and physical evidence was presented to support the defendant's convictions of malice murder, felony murder, and possession of a firearm during the commission of a crime so that the jury could reject the defendant's self-defense claim. *Rivers v. State*, 283 Ga. 1, 655 S.E.2d 594 (2008).

Evidence supported convictions of malice murder, aggravated assault, burglary, and possession of a firearm during the commission of a crime. The victim had been struck twice in the head with a pistol, strangled, and shot twice in the head; the victim's wallet and keys were missing; and the defendant, who told police where the wallet could be found, admitted shooting the victim and claimed

that the defendant had done so after the victim tried to hug and kiss the defendant and things got "ugly." *Brown v. State*, 283 Ga. 327, 658 S.E.2d 740 (2008).

Evidence supported the defendant's convictions for malice murder, felony murder, aggravated assault, armed robbery, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime. The four victims were found dead in two hotel rooms from gunshot wounds to the back of their heads; identification documents belonging to the four victims were found in the defendant's car; there was expert testimony that the defendant's gun had been used to kill the victims; the defendant's baseball cap contained one victim's deoxyribonucleic acid; there was evidence that the defendant and two friends used three victims' tickets to attend a football game after the victims were murdered; the defendant was identified as being in an elevator with one victim; the defendant was seen leaving the hotel with one victim's cooler; and a duffle bag belonging to one victim was in the defendant's car when the defendant was arrested on weapons charges. *Dawson v. State*, 283 Ga. 315, 658 S.E.2d 755 (2008), cert. denied, 129 S. Ct. 169, 172 L.Ed.2d 122 (2008).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder and possession of a firearm during the commission of a crime because both of the defendant's accomplices placed the defendant at the scene of the crime and provided a detailed account of the murder. *Lawrence v. State*, 286 Ga. 533, 690 S.E.2d 801 (2010).

**Exclusion of victim's prior bad acts.** — Defendant's felony murder and aggravated assault convictions were both upheld on appeal, as evidence of the victim's prior violent acts was properly excluded, given that at the time of the confrontation with the defendant, the victim was no longer the aggressor, and the defendant failed to show prejudice resulting from the admission of a knife that was not used in the altercation, into evidence, and in fact, the knife had been removed from the scene by police before the incident involving the defendant and the victim occurred.

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Milner v. State, 281 Ga. 612, 641 S.E.2d 517 (2007).

**Felony murder based on arson.** — Sufficient evidence was presented to support a finding of felony murder based on arson in the first degree as O.C.G.A. § 16-7-60(a) did not require that a defendant personally set the fire or possess ignitable materials and the defendant knowingly damaged property by adding tires to the fire; additionally, based on the defendant's statements at the scene, the defendant was aware that human life might be endangered under § 16-7-60(a)(5) because the defendant indicated that the defendant knew someone was inside the building. Vega v. State, 285 Ga. 32, 673 S.E.2d 223 (2009).

**Conviction of murder, aggravated assault, and possession of firearm by convicted felon justified.** — See Brooks v. State, 250 Ga. 739, 300 S.E.2d 810 (1983).

Evidence was sufficient to enable a rational trier of fact to find appellant guilty of murder, aggravated assault with a deadly weapon, and possession of a firearm by a convicted felon beyond a reasonable doubt. Hall v. State, 264 Ga. 85, 441 S.E.2d 245 (1994).

**Conviction of murder rather than voluntary manslaughter justified.** — See Bryant v. State, 250 Ga. 874, 301 S.E.2d 881 (1983).

**Evidence sufficient to support conviction for offense of felony murder.** — See Bethaea v. State, 251 Ga. 328, 304 S.E.2d 713 (1983); Middlebrooks v. State, 253 Ga. 707, 324 S.E.2d 192 (1985); Appling v. State, 256 Ga. 36, 343 S.E.2d 684 (1986); Thomas v. State, 256 Ga. 176, 345 S.E.2d 350 (1986); Huston v. State, 256 Ga. 276, 347 S.E.2d 556 (1986); Hunter v. State, 256 Ga. 372, 349 S.E.2d 389 (1986); Jefferson v. State, 256 Ga. 821, 353 S.E.2d 468 (1987), cert. denied, 511 U.S. 1046, 114 S. Ct. 1577, 128 L. Ed. 2d 220 (1994); Shealey v. State, 257 Ga. 437, 360 S.E.2d 266 (1987); Zackery v. State, 257 Ga. 442, 360 S.E.2d 269 (1987); Webber v. State, 257 Ga. 533, 361 S.E.2d 145 (1987); Delay v. State, 258 Ga. 229,

367 S.E.2d 806, cert. denied, 488 U.S. 850, 109 S. Ct. 132, 102 L. Ed. 2d 105 (1988); Jones v. State, 258 Ga. 249, 368 S.E.2d 313 (1988); Anderson v. State, 258 Ga. 278, 368 S.E.2d 508 (1988); Martin v. State, 258 Ga. 300, 368 S.E.2d 515 (1988); Blackwell v. State, 259 Ga. 810, 388 S.E.2d 515 (1990); Stoudemire v. State, 261 Ga. 49, 401 S.E.2d 482 (1991); Griffin v. State, 199 Ga. App. 646, 405 S.E.2d 877 (1991), cert. denied, 199 Ga. App. 906, 405 S.E.2d 877 (1991); Weaver v. State, 262 Ga. 196, 415 S.E.2d 640 (1992); Jackson v. State, 263 Ga. 468, 435 S.E.2d 442 (1993); Lark v. State, 263 Ga. 573, 436 S.E.2d 1 (1993); Smiley v. State, 263 Ga. 716, 438 S.E.2d 75 (1994); Scott v. State, 276 Ga. 195, 576 S.E.2d 860 (2003); Edwards v. State, 282 Ga. 259, 646 S.E.2d 663 (2007); Spiller v. State, 282 Ga. 351, 647 S.E.2d 64 (2007), cert. denied, 552 U.S. 1079, 128 S. Ct. 812, 169 L. Ed. 2d 612 (2007); Curinton v. State, 283 Ga. 226, 657 S.E.2d 824 (2008); Carter v. State, 283 Ga. 76, 656 S.E.2d 524 (2008).

The state's evidence was sufficient to authorize a rational trier of fact to find proof of appellant's guilt of felony murder beyond a reasonable doubt. Leavitt v. State, 264 Ga. 178, 442 S.E.2d 457 (1994).

Evidence was sufficient to enable a rational trier of fact to find each defendant guilty of malice murder, felony murder predicated on aggravated assault, and aggravated assault. Whitaker v. State, 269 Ga. 462, 499 S.E.2d 888 (1998).

Evidence was sufficient to support the defendant's conviction of felony murder of the defendant's spouse, where the record revealed that the spouse had seen the defendant's car at the defendant's paramour's house and let the defendant know that the spouse was aware the defendant was there, that the spouse never carried a gun, that the defendant had repeatedly physically abused the spouse and had pointed a gun at the spouse previously, and that the defendant's explanation that when the defendant entered their home the spouse was pointing a gun at the defendant which accidentally went off was contradicted by the fact that the gun had to be cocked in order to be shot and that the spouse had never owned a gun nor been the aggressor in their disputes.

Jones v. State, 276 Ga. 253, 577 S.E.2d 560 (2003).

Evidence was sufficient to support conviction of malice murder, felony murder, burglary, aggravated assault, kidnapping with bodily injury, and possession of a firearm during the commission of a felony after the defendant: (1) planned the crimes, and armed the defendant with a gun and handcuffs; (2) broke into the defendant's in-laws' house after severing their phone line; (3) shot and killed the defendant's father-in-law and wounded the defendant's mother-in-law while they lay in bed; (4) handcuffed the defendant's bleeding mother-in-law to the mother-in-law's nine-year-old child and left them tethered to a bed rail in a room with the mother-in-law's dead spouse and the defendant's two-year-old child; and (5) abducted the defendant's estranged spouse and the spouse's 17-year-old sibling to a mobile home where the defendant made them take showers while the defendant watched, and then raped them both. *Sallie v. State*, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

Evidence was legally sufficient to support the defendant's felony murder conviction, as it showed that the defendant and an accomplice entered a convenience store, that one of them shot the clerk to death while the other stole cigarettes, that police received a tip leading to the arrest of the defendant and an accomplice, and that the defendant admitted going to the store to rob it and to being present while the accomplice shot the clerk. *Williams v. State*, 276 Ga. 384, 578 S.E.2d 858 (2003).

Evidence was sufficient to convict defendant of causing the victim's death while committing an aggravated battery against the victim, in violation of O.C.G.A. §§ 16-5-1(c) and 16-5-24, because defendant was seen walking toward the residence defendant shared with the victim, after a neighbor had called the police to report a disturbance there, carrying a gas can that appeared to be heavy, and, therefore, not empty, after which the victim was seen on the porch of the residence, in flames, and defendant, who was sitting on the porch, refused the requests of passersby attempting to give the victim assis-

tance by providing a blanket to smother the flames, which caused the victim's death shortly thereafter. *Lowe v. State*, 276 Ga. 538, 579 S.E.2d 728 (2003).

Evidence that showed that a victim died from a gunshot wound to the chest, that police found the victim's property on the defendant when the defendant was arrested, and that witnesses heard the shots and saw the defendant running away from the scene of the shooting was sufficient to sustain the defendant's convictions for malice murder, armed robbery, and possession of a firearm during the commission of a crime, and the trial court did not err when it gave the jury an Allen charge during the defendant's trial or because it did not instruct the jury on involuntary manslaughter as a lesser included offense. *Johnson v. State*, 278 Ga. 136, 598 S.E.2d 502 (2004).

Evidence that the defendant fatally shot the victim during a scuffle in a robbery attempt and told the police that the defendant was shot by a robber was sufficient to support the defendant's conviction for felony murder, aggravated assault, making a false statement to law enforcement officers, and giving a false name to law enforcement officers. *Sampson v. State*, 279 Ga. 8, 608 S.E.2d 621 (2005).

Evidence was sufficient to support the defendant's conviction for malice murder, felony murder during the commission of a kidnapping, and kidnapping because the defendant refused to turn a car around or to stop and let the victim exit the car; after the victim grabbed the steering wheel and fled the car, the defendant fatally shot the victim. *Pruitt v. State*, 279 Ga. 140, 611 S.E.2d 47, cert. denied, 546 U.S. 866, 126 S. Ct. 165, 163 L. Ed. 2d 152 (2005).

There was sufficient evidence to support a conviction of felony murder in violation of O.C.G.A. § 16-5-1, as well as possession of a weapon in the commission of a crime when the defendant purchased the gun three months earlier from a man the defendant did not know, told the man that the defendant should not have been in possession of the firearm because of the defendant's status as a convicted felon, and later fatally shot the victim with the gun. *Shepherd v. State*, 280 Ga. 245, 626 S.E.2d 96 (2006).

**Application (Cont'd)**  
**1. In General (Cont'd)**

Felony murder conviction was supported by sufficient evidence that, after the victim confronted the defendant about a comment made to the victim's wife, the defendant stabbed the victim to death; witnesses saw the defendant fighting with the victim, saw the defendant fold up a knife after the victim fell, and the defendant admitted to stabbing the victim. Williams v. State, 280 Ga. 297, 627 S.E.2d 32 (2006).

Sufficient evidence supported convictions of murder, felony murder, and possession of a firearm during the commission of a crime after the defendant confessed to an officer that the defendant shot and killed the victim and expert testing of blood on one of the defendant's shoes established that the blood matched the victim's DNA; the jury was free to reject the defendant's claim at trial that a third party shot the victim in the course of an unprovoked attack on the defendant. Glover v. State, 280 Ga. 476, 629 S.E.2d 249 (2006).

Defendant's convictions of murder, felony murder, armed robbery, burglary, possession of a firearm during the commission of an armed robbery, and possession of a firearm during the commission of a burglary were supported by sufficient evidence that, the day before the three murder victims were found shot in the head, the defendant borrowed the defendant's sibling's car to visit one of the victims, who owed the defendant money, the defendant admitted going to the victims' home twice on the day of the murders, but stated that the victims were not home during either visit, neighbors heard gunshots around the home at approximately 7:30 P.M., near the last time that the two younger victims were heard from, and again at 10:00 P.M. that evening, when the older victim returned home for the day, a number of items stolen from the victims' home at the time of the murders were subsequently found in a dumpster next to a storage locker the defendant shared with a love interest, the items were contained in plastic bags which had the defendant's fingerprints on them, and the plastic bags came

from a roll of trash bags found in the trunk of the car which the defendant borrowed on the day of the murders. Griffin v. State, 280 Ga. 683, 631 S.E.2d 671 (2006).

Felony murder conviction was upheld on appeal as supported by: (1) the admission of sufficient evidence; (2) a photo of the victim which was not overly gruesome and inflammatory; (3) the trial court's proper denial of evidence of the victim's character; and (4) despite an error in denying admission of provocation evidence that error was deemed harmless and did not contribute to the verdict. McWilliams v. State, 280 Ga. 724, 632 S.E.2d 127 (2006).

Convictions of felony murder, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon were supported by sufficient evidence showing that, during an argument involving the defendant and the two victims, the defendant told one of the victims to go get the victim's guns, adding that the defendant had guns, the victim went to the victim's vehicle and retrieved two handguns, approached with arms crossed and a gun in each hand, and the defendant took a gun out of the waistband of the defendant's pants and started shooting, wounding one victim and killing the other victim. McKee v. State, 280 Ga. 755, 632 S.E.2d 636 (2006).

Defendant's conviction for felony murder was affirmed as the evidence supported the conviction since: (1) the victim was fatally shot in the eye during an argument with the defendant; (2) the defendant threw the gun into a lake while taking the victim to the hospital; and (3) the defendant initially blamed the victim's injury on a drive-by shooting and then on a family acquaintance, but ultimately, at trial, claimed the shooting was due to an accident that occurred when the defendant was trying to un-jam a handgun. Peterson v. State, 280 Ga. 875, 635 S.E.2d 132 (2006).

Sufficient evidence supported the defendant's convictions of two counts of felony murder under O.C.G.A. § 16-5-1, armed robbery under O.C.G.A. § 16-8-41, aggravated assault under O.C.G.A. § 16-5-21, possession of a firearm during the commission of a felony under O.C.G.A.

§ 16-11-106, and possession of a firearm by a first offender probationer under O.C.G.A. § 16-11-131; two witnesses testified that the defendant had told them that the defendant shot the victim, and one of the witnesses testified that the defendant stated that the shooting occurred during a robbery, the defendant discarded a gun that was later found to be the murder weapon while fleeing police on another crime, and the defendant admitted to police that the murder weapon was the defendant's, that the defendant stole \$100 from the victims, and that the defendant shot the murder victim. *Chenoweth v. State*, 281 Ga. 7, 635 S.E.2d 730 (2006).

Evidence supported a defendant's conviction of felony murder, aggravated assault, and possession of a firearm during the commission of a felony as: (1) the defendant told the victim that the defendant was going to shoot the victim and then the defendant shot the victim in the stomach, argued with the victim some more, and shot the victim again; (2) the victim never admitted cheating on the defendant; (3) after the second shot, the defendant and a friend took the victim to a hospital in a car; (4) while en route, the defendant persisted in the defendant's efforts to get the victim to admit to cheating on the defendant; and (5) the defendant wiped down the revolver and threw it out of the car. *Durham v. State*, 281 Ga. 208, 636 S.E.2d 513 (2006).

Defendant's felony murder conviction was upheld on appeal, given: (1) the sufficiency of the state's testimonial evidence; (2) that trial counsel was not ineffective in failing to properly advise the defendant of a plea offer or by failing to make meritless objections; and (3) the trial court's prompt and pointed curative instruction after an inadvertent placement of the defendant's character into evidence did not warrant a mistrial. *Hunter v. State*, 281 Ga. 526, 640 S.E.2d 271 (2007).

Because a sufficient foundation was presented to support the admission of a witness's voice identification testimony, and "prior difficulties" evidence was properly admitted, the defendant's felony murder and possession of a firearm during the commission of a crime convictions were upheld on appeal. *Withers v. State*, 282 Ga. 656, 653 S.E.2d 40 (2007).

Evidence was sufficient to support the defendant's felony conviction murder under circumstances in which, after an argument between the victim, who was the defendant's brother, and their father, the defendant was called to come to the father's home, the defendant and the victim argued outside the house in the street, the defendant threatened the victim, and then hit the victim, knocking the victim to the ground; the victim next got up and began running away from the defendant towards a stop sign at the end of the street, and the defendant shot the victim as the victim ran away, hitting the victim in the back of the head and killing the victim. *Carter v. State*, 285 Ga. 565, 678 S.E.2d 909 (2009).

**Right to counsel for re-sentencing.** — Defendant's re-sentencing without court-appointed counsel to represent the defendant was affirmed as the trial court was simply instructed to merge the defendant's armed robbery conviction into the defendant's felony murder conviction; as the trial court had no discretion in the matter and its re-sentencing of the defendant was a ministerial act, the re-sentencing was proper. *Robertson v. State*, 280 Ga. 885, 635 S.E.2d 138 (2006).

**Felony murder conviction held reasonable despite self-defense contention.** — After the victim threw the hot contents of a frying pan at the defendant and the defendant then drew a knife from the defendant's blouse and stabbed the victim numerous times, but there were no eyewitnesses to the stabbing other than the victim and defendant, and the defendant testified the defendant stabbed the victim in self-defense in the belief that the victim was reaching into the victim's pocket for a weapon and that, while the defendant had meant to "hurt" the victim, the defendant had not intended to kill the victim, a rational trier of fact could have found the defendant guilty of the crime of felony murder beyond a reasonable doubt by causing the victim's death while committing the felony of aggravated assault. *Henderson v. State*, 256 Ga. 486, 350 S.E.2d 236 (1986).

Though the victim was approaching the defendant when the defendant fatally shot the victim at a distance of three feet, the evidence was sufficient to convict the

**Application (Cont'd)**  
**1. In General (Cont'd)**

defendant of aggravated assault and felony murder despite the defendant's claim of self-defense as the defendant decided to confront the victim and beat the victim up, retrieved a gun from a car, and lied to police about the victim's pulling a knife before the shooting. *McNeil v. State*, 284 Ga. 586, 669 S.E.2d 111 (2008).

**Evidence sufficient for establishing malice.** — Evidence showing that defendant took a perverse and sadistic pleasure in the killing of other human beings was clearly sufficient for finding malice aforesought. *Harper v. State*, 251 Ga. 183, 304 S.E.2d 693 (1983), appeal dismissed, 286 Ga. 216, 686 S.E.2d 786 (2009).

Rational trier of fact could have found defendant guilty of malice murder beyond a reasonable doubt. *Massengale v. State*, 264 Ga. 51, 441 S.E.2d 238 (1994).

Evidence, including money, a weapon and the victim's personal effects and testimony as to defendant's behavior, was sufficient to support defendant's conviction for malice murder. *Jenkins v. State*, 269 Ga. 282, 498 S.E.2d 502 (1998), cert. denied, 525 U.S. 968, 119 S. Ct. 416, 142 L. Ed. 2d 338 (1998).

**Conspirator liability.** — Defendant's conviction of malice murder, O.C.G.A. § 16-5-1, was supported by sufficient evidence; the state did not have to show that the defendant actually shot the victims, as the fact that the defendant and others conspired to commit the crime allowed any of the conspirators to be found guilty of the murders. *Jones v. State*, 279 Ga. 854, 622 S.E.2d 1 (2005).

**Evidence sufficient for conviction of voluntary manslaughter.** — See *Harper v. State*, 182 Ga. App. 760, 357 S.E.2d 117 (1987).

**Double jeopardy did not prohibit retrial of kidnapping.** — Defendant could be retried on a kidnapping charge under O.C.G.A. § 16-5-40(b) after the defendant was acquitted of felony murder under O.C.G.A. § 16-5-1(c) and a mistrial was declared on the underlying felony of kidnapping; the jury could have based its acquittal on the felony murder charge on factors other than the defendant's partic-

ipation in the crimes that preceded the homicide. *State v. Lambert*, 276 Ga. App. 668, 624 S.E.2d 174 (2005).

**Double jeopardy not found when one conviction based on federal charges.** — Fact that the defendant had been convicted in federal court of possession of a firearm under 18 U.S.C. § 922 did not bar a felony murder prosecution in state court on double jeopardy grounds as the state had to prove facts in the felony murder case that were not required to be proved in the federal case. Moreover, the federal offense, which required that a firearm be possessed in and affecting interstate commerce, was not within the concurrent jurisdiction of Georgia and under O.C.G.A. § 16-1-8(c) did not bar a subsequent prosecution for felony murder predicated on the underlying firearm possession charge. *Marshall v. State*, 286 Ga. 446, 689 S.E.2d 283 (2010).

**Subsequent prosecution barred by double jeopardy.** — State's re-prosecution of the defendant for felony murder was barred by double jeopardy after the jury found the defendant guilty of the voluntary manslaughter of the same victim because the jury was given a full opportunity to return a verdict on the felony murder charge, which the jury did; although no judgment of conviction or sentence was entered on the jury's verdict of guilt on the felony murder charge, the defendant was placed in jeopardy of conviction of that charge in the first trial and could not, consistent with the Fifth Amendment's double jeopardy clause, be placed at risk of conviction again. *Williams v. State*, 288 Ga. 7, 700 S.E.2d 564 (2010).

**Evidence sufficient for murder and rape conviction.** — See *Robinson v. State*, 258 Ga. 279, 368 S.E.2d 513 (1988).

**Convictions as aider and abettor proper despite lack of personal involvement.** — Despite the defendant's contention that the crimes against a stabbing victim were solely committed by the codefendant, pursuant to O.C.G.A. § 16-2-20(a) ample evidence existed to conclude that the defendant either committed the crimes or was a party to the crimes, including that both the defendant and the codefendant drove to the stabbing

victim's home, that victim was stabbed to death, and the victim's wallet and checkbook were stolen so that both the defendants could have money to buy more drugs. *Odom v. State*, 279 Ga. 599, 619 S.E.2d 636 (2005).

**Rule against mutually exclusive verdicts did not apply.** — The rule against mutually exclusive verdicts did not apply to the verdicts returned by the jury of guilty on a charge of malice murder, but not guilty by reason of insanity, on a charge of aggravated assault. *Taylor v. State*, 282 Ga. 502, 651 S.E.2d 715 (2007).

**Mutually exclusive convictions cannot stand.** — Defendant's convictions for felony murder based on aggravated assault and involuntary manslaughter could not stand because they were mutually exclusive as the jury illogically found that defendant acted with both criminal intent and criminal negligence in shooting a woman. *Jackson v. State*, 276 Ga. 408, 577 S.E.2d 570 (2003).

Because conspiracy was a continuing crime and because defendant continued the defendant's gang activities after turning 18 years old, 18 U.S.C. § 1963(a) allowed an enhancement to a life sentence due to a jury finding that, when defendant was 16 years old, defendant also committed a murder in connection with the Racketeer Influenced and Corrupt Organizations Act (RICO) violations, even though the murder charge had been dismissed because the Attorney General had not certified the case to be tried in federal court as would have been required under 18 U.S.C. § 5032 of the Juvenile Delinquency Act; under O.C.G.A. § 16-5-1(d), the murder was "racketeering activity" for purposes of 18 U.S.C. 1961(1) and in the context of a RICO conspiracy, because defendant continued the defendant's participation in the activities of the conspiracy past the age of majority, the crimes committed while the defendant was a minor could be considered for both determining guilt and the defendant's sentence. *United States v. Flores*, 572 F.3d 1254 (11th Cir. 2009), cert. denied, U.S. , 130 S. Ct. 1108, 175 L. Ed. 2d 921 (2010).

**Aggravating circumstance found beyond a reasonable doubt.** — Evidence adduced at trial was sufficient to

authorize a rational trier of fact to find beyond a reasonable doubt the existence of statutory aggravating circumstances because the jury found the existence of the following statutory aggravating circumstances beyond a reasonable doubt; the murder was committed while the defendant was engaged in the commission of the capital felony of armed robbery, and the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind: (1) the defendant initially attacked the victim, who was disabled, in the confined area of a bathroom, where the defendant struck the victim multiple times shortly after the victim emerged from the shower; (2) the defendant continued the attack on the victim even as the victim fell to the floor; (3) the evidence showed that the defendant struck the victim in the head with a hammer and a metal stool at least 12 to 14 times; and (4) the defendant acted for the purpose of obtaining money the victim had just received from cashing the victim's disability check. *Arrington v. State*, 286 Ga. 335, 687 S.E.2d 438 (2009), cert. denied, U.S. , 131 S. Ct. 112, 178 L. Ed. 2d 69 (U.S. 2010).

## 2. Children as Victims

**When a child born alive afterward dies** by reason of bruises inflicted on the child, before birth, by the beating of the child's mother, the offense is murder. *Ranger v. State*, 249 Ga. 315, 290 S.E.2d 63 (1982).

**Evidence sufficient for murder of infant child.** — Evidence was sufficient to permit a rational trier of fact to find that a female defendant's infant son was born alive, had a separate and independent existence from the defendant, was murdered by the defendant, and the body subsequently concealed by the defendant, all beyond a reasonable doubt. *Life v. State*, 261 Ga. 709, 410 S.E.2d 421 (1991).

**Sufficient evidence of malice in death of a child.** — Sufficient evidence supported a malice murder conviction arising from the death of an 18-month-old child because: (1) the defendant took the child into a bathroom of a house; (2) a witness testified that the child was fine before the defendant took the child into

**Application (Cont'd)****2. Children as Victims (Cont'd)**

the bathroom; (3) after 10 minutes, the defendant came out and asked the witnesses to call 9-1-1; (4) the child was taken to a hospital and pronounced dead; (5) a paramedic testified, *inter alia*, that the child had large, unusual bruises on the child's abdomen, chest, and back; and (6) a doctor concluded that the child's death was caused by severe internal injuries that could only have been caused by significant blunt force. *McMiller v. State*, 278 Ga. 706, 606 S.E.2d 247 (2004).

**Cruelty to child as underlying felony in felony murder.** — There was sufficient evidence to support a conviction of felony murder, with cruelty to a child in the first degree as the underlying felony. The defendant was the child's sole caregiver from 9:30 a.m. to 3:30 p.m. on October 30, the date that the child's parent came to pick up the child and found the child unresponsive; a neighbor denied the defendant's claim that the neighbor had said that the child's other parent had shaken the child the day before; and a forensic pathologist testified that had the injuries been inflicted before 7:00 a.m. on October 30, the child would not have been acting normally when the child was dropped off at the defendant's home, as testified by the child's relatives. *Bostic v. State*, 284 Ga. 864, 672 S.E.2d 630 (2009).

**Beating child to death.** — Evidence showed the defendant was guilty of felony murder under O.C.G.A. § 16-5-1 and involuntary manslaughter under O.C.G.A. § 16-5-3 after beating the defendant's child to death together with the defendant's love interest where the defendant's child was struck at least 100 times and with such force that the fat beneath the child's skin was emulsified, entered broken capillaries, and clogged the vessels leading to the child's lungs, a process called fat embolization. *Marshall v. State*, 276 Ga. 854, 583 S.E.2d 884 (2003).

**Striking a child resulting in death.** — Sufficient evidence supported a defendant's convictions of felony murder and cruelty to children where the defendant admitted striking the child multiple times on the night in question, causing the child

to bleed, but denied striking the child with sufficient force to cause the injuries the child sustained; the child's parent testified that the bruises the parent found on the child's head and body in the morning had not been present the previous evening. *Sauerwein v. State*, 280 Ga. 438, 629 S.E.2d 235 (2006).

**Post-autopsy photographs of children admitted.** — Defendant's malice murder and cruelty to children convictions were affirmed on appeal as post-autopsy photographs were properly admitted to assist the jury in understanding both the internal injuries and the cause of the victim's death, and sufficient and overwhelming evidence was presented that the victim's injuries were not accidental. *Thomas v. State*, 281 Ga. 550, 640 S.E.2d 255 (2007).

**Evidence sufficient for malice murder, felony murder, and cruelty to children conviction.** — Evidence supported the defendant's convictions of malice murder, felony murder, and cruelty to children since: the victim had not experienced any unusual injuries prior to the time the defendant moved in with the victim's mother; the defendant was alone in the house with the victim and the victim's young brothers prior to the time the victim's head began to swell and at various times on the night the victim died; the defendant told a co-worker that the defendant was beating the victim and the victim's brothers; and the defendant also told an uncle that the defendant could not do anything with the victim and felt like punching the victim in the head as hard as the defendant could. *Collum v. State*, 281 Ga. 719, 642 S.E.2d 640 (2007).

**Death of 15 month old child.** — Evidence supported the defendant's convictions of malice murder, felony murder, and cruelty to children with regard to the death of the defendant's 15-month-old child; although the defendant claimed to have not noticed anything wrong with the child until a codefendant said that the child was having difficulty breathing, the evidence authorized the jury to find that the victim was beaten so severely that the victim's pancreas and duodenum were ruptured, that two to four hours was the maximum time that occurred between the

injuries and the victim's death, that the victim would have begun vomiting immediately after the fatal injuries were inflicted, and that the victim would have been in extreme pain. *Jackson v. State*, 281 Ga. 705, 642 S.E.2d 656 (2007).

**Guilty of felony murder but not guilty of cruelty to children.** — In a trial for the murder of a five-year-old child, the felony murder conviction need not be set aside because a finding of not guilty of cruelty to children is allegedly inconsistent with a finding of guilty of felony murder when the underlying felony is cruelty to children, where there is no doubt that the evidence showed the elements of the underlying felony, cruelty to a child, and that the jury was authorized to find the defendant guilty of a felony murder. *Robinson v. State*, 257 Ga. 194, 357 S.E.2d 74 (1987).

**Death of 3 year old child resulting from arson.** — Evidence was sufficient to support defendant's conviction for arson, felony murder, and aggravated assault, resulting from a fire set at a residence occupied by the defendant's sister-in-law, the sister-in-law's four children, and the sister-in-law's 12-year-old sibling where: (1) the defendant confronted the defendant's sister-in-law at the sister-in-law's home, alleging that the sister-in-law had stolen items from the defendant's mobile home; (2) a physical altercation ensued between the defendant and the sister-in-law; (3) the defendant retrieved a gasoline can from the defendant's car, poured gasoline onto the back door of the sister-in-law's home, and ignited it; and (4) the sister-in-law's three-year-old child died from the injuries sustained in the fire. *Tarvin v. State*, 277 Ga. 509, 591 S.E.2d 777 (2004).

### 3. The Elderly as Victims

**Victim 74 years old.** — Malice murder conviction was supported by sufficient evidence that on the day of the crime, the defendant left work at 10:34 A.M., that the victim, who was a 74-year-old dental technician, was found beaten to death by police who responded to a 9-1-1 call placed by the defendant at 4:53 P.M., that, based on sightings of the victim and telephone calls made to victim, the jury was autho-

rized to find that the victim was murdered between 1:10 P.M. and 2 P.M., that the defendant was seen in the area wearing work clothes around noon and seen after 2 P.M. wearing shorts and sneakers, that the defendant was also seen carrying a trash bag that appeared to contain clothing, that a pair of work boots, spattered with the victim's blood, was discovered in the restroom at the plumbing company where the defendant worked, that, based on the testimony of two employees, the boots belonged to the defendant, and that the victim had been agitated because the defendant had failed to pay for dental plates the victim had made for the defendant. *Kell v. State*, 280 Ga. 669, 631 S.E.2d 679 (2006).

**Evidence sufficient for killing elderly victim.** — Sufficient evidence supported convictions of malice murder and armed robbery when during an argument with the 79-year-old victim, the defendant struck the victim in the head several times with the victim's cane, causing the cane to break and an edge of the cane to cut the victim's neck, after which the defendant took the victim's wallet and car and drove to Atlanta. *Harvey v. State*, 284 Ga. 8, 660 S.E.2d 528 (2008).

### 4. Spouses or Lovers as Victims

**Evidence sufficient for murder of lover/spouse.** — Denial of a motion for a directed verdict was not error since there was evidence which would authorize a rational trier of fact to find beyond a reasonable doubt that defendant, angered by the fact that defendant's lover was leaving, maliciously shot the lover in the back, thereby committing malice murder. *Sanders v. State*, 257 Ga. 239, 357 S.E.2d 66 (1987).

Evidence was legally sufficient to sustain defendant's conviction for malice murder as the evidence showed that defendant, who was romantically involved with the victim, was seen with the victim on the day of the murder, that defendant was seen by a neighbor running from the victim's home at a time when the neighbor smelled smoke, that the victim had been shot twice in the head at close range, that a gun defendant possessed on the day of the murder was the murder weapon, that

**Application (Cont'd)**  
**4. Spouses or Lovers as Victims (Cont'd)**

defendant had asked a witness to hide or sell the gun, and that defendant admitted shooting someone and burning the person's house down. Parker v. State, 277 Ga. 439, 588 S.E.2d 683 (2003).

**Hired to kill spouse.** — Evidence that a defendant was hired by a spouse to kill the other spouse, accepted a payment, acquired a gun, recruited a shooter, and drove the shooter to the victim's workplace, where the shooter shot the victim to death, was sufficient to support a jury verdict convicting the defendant of malice murder; the other participants in the plot pled guilty to charges arising from their roles and testified against the defendant at the trial. Green v. State, 281 Ga. 322, 638 S.E.2d 288 (2006).

Evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of malice murder because the jury was authorized to find that the defendant met with the victim's husband and other codefendants on at least two occasions to discuss the murder of the victim, that the defendant accepted money from the husband prior to the murder, that the defendant instructed one of the codefendants on how to kill the victim, that the defendant drove to the victim's home with the husband and another codefendant on the morning of the murder, and that the defendant demanded and accepted money from the husband as compensation for the murder. Owens v. State, 286 Ga. 821, , cert. denied, U.S. , 131 S. Ct. 156, 178 L. Ed. 2d 93 (2010).

**Evidence sufficient for death of lover.** — There was sufficient evidence to support the defendant's conviction of malice murder after the victim, the mother of the defendant's child, was shot in the head while riding in a truck with the defendant and the victim's adult son by another man; the son, who was driving, testified that he heard a loud click and a popping noise, and the victim rested her head on his shoulder and did not speak again, and the son continued to drive until the defendant told him to pull off the road. Lowery

v. State, 282 Ga. 68, 646 S.E.2d 67 (2007), cert. denied, U.S. , 128 S. Ct. 508, 169 L. Ed. 2d 355 (2007).

**Death of spouse and spouse's new lover.** — Defendant's malice murder convictions, resulting from the death of the defendant's estranged wife and the wife's lover, were upheld on appeal as the state presented sufficient evidence as to the history of abuse between the defendant and the wife, the jury was not required to believe the defendant's alibi, and any objection to the state's alleged failure to show the required nexus between the existence of the wife's life insurance policies and a possible motive for the murders was waived. Tolbert v. State, 282 Ga. 254, 647 S.E.2d 555 (2007).

**Self defense claim rejected in death of lover.** — There was sufficient evidence for the jury to find the defendant guilty of felony murder and of aggravated assault and to reject the defendant's self-defense claim; the defendant, who had broken up with the victim, followed the victim as the victim left defendant's apartment, stabbed the victim twice with a nine-inch knife when the victim turned to face defendant without the victim striking the defendant, pulling a weapon, or yelling at the defendant, and the defendant claimed that the defendant had retrieved the knife in self-defense, then followed the victim out of the apartment, down the stairs, and into a parking lot where the defendant stabbed the victim. Ganaway v. State, 282 Ga. 297, 647 S.E.2d 590 (2007).

**Evidence sufficient for malice murder of spouse.** — Evidence supported a defendant's conviction of the malice murder of the defendant's spouse. The defendant admitted shooting the victim and stated that the victim shot at the defendant twice; a pistol found under the bed was too far from the victim for the victim to reach the pistol; there was minimal evidence of a struggle; the defendant showed no emotion when the victim was carried out and displayed other inappropriate behavior; and expert testimony showed that the victim was shot from at least three feet away while the victim was either kneeling or bent over. Muller v. State, 284 Ga. 70, 663 S.E.2d 206 (2008).

**Accusations of an affair.** — Evidence was sufficient to convict the defendant of

murder, felony murder, and possession of a knife during the commission of a crime when the defendant stabbed the victim, the defendant's spouse, in the chest with a butcher knife after the victim accused the defendant of having an affair. Although the defendant claimed at the scene that the defendant did not mean for the knife to go so far into the victim's body and that the stabbing had occurred by accident, the defendant later admitted at trial that the defendant tried to force the victim back with the knife when the defendant felt the knife penetrate the victim's body. *Hudson v. State*, 284 Ga. 595, 669 S.E.2d 94 (2008).

**Shooting of paramour.** — There was sufficient evidence to convict defendant of felony murder after defendant was seen at a paramour's apartment with a gun in a book bag, a witness stated that defendant pointed the gun at the paramour's head and threatened to kill the paramour, the paramour was found shot dead a short time later, and defendant admitted firing the gun but claimed that the shooting was accidental. *Jackson v. State*, 276 Ga. 408, 577 S.E.2d 570 (2003).

**Prostitute as victim.** — Convictions for felony murder and aggravated assault with a deadly weapon, in violation of O.C.G.A. §§ 16-5-1 and 16-5-21, were supported by sufficient evidence, including that the defendant and the codefendant were acting in concert, and the denial of the defendant's motion for a judgment of acquittal pursuant to O.C.G.A. § 17-9-1 was proper; the defendant argued with the victim, a prostitute, and refused to pay for the victim's services, prompting the victim to get a gun and fire a shot into the

air, whereupon the defendant and a codefendant fired their guns back at the victim in a car leaving the area, and a bullet from the codefendant's gun killed the victim. *Stinchcomb v. State*, 280 Ga. 170, 626 S.E.2d 88 (2006).

**Evidence sufficient for malice murder and other crimes in death of spouse.** — Evidence supported a defendant's conviction for malice murder, aggravated battery, and possession of a firearm during the commission of a felony as: (1) the defendant had threatened to kill the victim, who was seeking a divorce from the defendant; (2) the defendant shot the victim eight times with an AK-47 assault rifle, killing the victim; (3) in woods located approximately 10 miles from the crime scene, investigators found the defendant's car, a bag of the defendant's personal items, some of which had the defendant's name written on the items, and the defendant's AK-47 rifle and ammunition; and (4) the defendant admitted to firing this AK-47 many times at the victim's home at what the defendant described as an unknown assailant who shot at the defendant first. *Thomason v. State*, 281 Ga. 429, 637 S.E.2d 639 (2006).

**One is never justified in taking life of an adulterous spouse or illicit lover.** — This is murder, and an instruction on justifiable homicide may not be given. Such homicides stand on same footing as any other homicides. However, the peculiar facts of a given case may suggest "passion" and "provocation" within the meaning of the voluntary manslaughter statute. *Burger v. State*, 238 Ga. 171, 231 S.E.2d 769 (1977); *Phillips v. State*, 255 Ga. 539, 340 S.E.2d 919 (1986).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 40A Am. Jur. 2d, Homicide, §§ 1 et seq., 36 et seq., 63 et seq.

**C.J.S.** — 40 C.J.S., Homicide, § 2 et seq.

**ALR.** — Acquittal on charge as to one as bar to charge as to the other, where one person is killed or assaulted by acts directed at another, 2 ALR 606.

Responsibility of persons participating in jail delivery for homicide committed by one of their number, 15 ALR 456.

Homicide by unlawful act aimed at another, 18 ALR 917.

Homicide by companion of defendant while attempting to escape from scene of crime as murder in first degree, 22 ALR 850; 108 ALR 847.

Homicide as affected by humanitarian motives, 25 ALR 1007.

Death resulting from arson as within contemplation of statute which makes homicide in perpetration of felony murder in

first degree, 87 ALR 414.

Corpus delicti in prosecution for killing of newborn child, 159 ALR 523.

Homicide: causing one, by threats or fright, to leap or fall to his death, 25 ALR2d 1186.

Admissibility on behalf of accused in homicide case of evidence that killing was committed at victim's request, 71 ALR2d 617.

Homicide: what constitutes "lying in wait," 89 ALR2d 1140.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing, 96 ALR2d 1435.

Homicide by automobile as murder, 21 ALR3d 116.

Mental or emotional condition as diminishing responsibility for crime, 22 ALR3d 1228.

Homicide: criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another, 32 ALR3d 589.

Homicide based on killing of unborn child, 40 ALR3d 444; 64 ALR5th 671.

Application of felony-murder doctrine where the felony relied upon is an includable offense with the homicide, 40 ALR3d 1341.

Homicide predicated on improper treatment of disease or injury, 45 ALR3d 114.

Use of set gun, trap, or similar device on defendant's own property, 47 ALR3d 646.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine, 50 ALR3d 397.

What constitutes attempted murder, 54 ALR3d 612.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant, 56 ALR3d 239.

What constitutes termination of felony for purpose of felony-murder rule, 58 ALR3d 851.

Homicide by withholding food, clothing, or shelter, 61 ALR3d 1207.

What constitutes murder by torture, 83 ALR3d 1222.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 ALR3d 925.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

Judicial abrogation of felony-murder doctrine, 13 ALR4th 1226.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense, 15 ALR4th 983.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree, 18 ALR4th 961.

Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter, 19 ALR4th 861.

Validity and construction of statute defining homicide by conduct manifesting "depraved indifference," 25 ALR4th 311.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 ALR4th 660.

Application of felony-murder doctrine where person killed was co-felon, 89 ALR4th 683.

Validity and construction of "extreme indifference" murder statute, 7 ALR5th 758.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 11 ALR5th 497.

Ineffective assistance of counsel: battered spouse syndrome as defense to homicide or other criminal offense, 11 ALR5th 871.

Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse, 24 ALR5th 465.

Homicide: liability where death immediately results from treatment or mistreatment of injury inflicted by defendant, 50 ALR5th 467.

Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense, 58 ALR5th 749.

Propriety of lesser-included-offense charge of voluntary manslaughter to jury in state murder prosecution — Twenty-first century cases, 3 ALR6th 543.

## 16-5-2. Voluntary manslaughter.

(a) A person commits the offense of voluntary manslaughter when he causes the death of another human being under circumstances which would otherwise be murder and if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as murder.

(b) A person who commits the offense of voluntary manslaughter, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 20 years. (Laws 1833, Cobb's 1851 Digest, pp. 783, 784; Ga. L. 1858, p. 99, § 1; Code 1863, §§ 4222, 4223; Code 1868, §§ 4259, 4260; Code 1873, §§ 4325, 4326; Code 1882, §§ 4325, 4326; Penal Code 1895, §§ 65, 66; Penal Code 1910, §§ 65, 66; Code 1933, §§ 26-1007, 26-1008; Code 1933, § 26-1102, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For annual survey of criminal law and procedure, see 35 Mercer L. Rev. 103 (1983).

For note, "Edge v. State: The Modified Merger Rule Comes Up Short," see 44 Mercer L. Rev. 697 (1993).

For comment on Gaines v. Wolcott, 119 Ga. App. 313, 167 S.E.2d 366 (1969), see 21 Mercer L. Rev. 325 (1969).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### UNLAWFULNESS

#### PROVOCATION

#### MUTUAL COMBAT

#### DEFENSES

#### JURY CHARGE

#### APPLICATION

### General Consideration

**Evidence was sufficient to prove charges of aggravated battery and voluntary manslaughter.** — Defendant admitted shooting the gun found at the crime scene, a firearms examiner testified that a bullet fired from that gun was consistent with the one that killed the victim, and the evidence showed that a metal jacket fragment removed from another victim's arm was fired from the same gun. *Pennymon v. State*, 261 Ga.

App. 450, 582 S.E.2d 582 (2003).

**Evidence sufficient to support aggravated assault conviction.** — Because there was testimony that the codefendant struck a 66-year-old victim with a brick, and since the indictment against a defendant properly alleged that the aggravated assault was committed with objects likely to cause serious bodily injury, there was sufficient evidence to convict both defendants of aggravated assault under O.C.G.A. § 16-5-21. *Anthony v. State*, 275

**General Consideration (Cont'd)**

Ga. App. 274, 620 S.E.2d 491 (2005).

**O.C.G.A. § 16-5-2 constitutional.** — Argument that O.C.G.A. § 16-5-2 is unconstitutionally vague is without merit as the words "sudden, violent, and irresistible passion" and "serious provocation" are capable of common understanding. *Logue v. State*, 251 Ga. 602, 308 S.E.2d 189 (1983).

**Constitutional challenge must be raised before guilty verdict.** — Felony murder defendant's constitutional challenge to Georgia's homicide statutes, O.C.G.A. §§ 16-5-1 and 16-5-2, could not be reviewed because the challenge was raised for the first time in the defendant's amended motion for new trial. Such challenges could not be raised after a guilty verdict. *Brown v. State*, 285 Ga. 772, 683 S.E.2d 581 (2009).

**When homicide is neither justifiable nor malicious, it is manslaughter.** *Conley v. State*, 21 Ga. App. 134, 94 S.E. 261 (1917).

**Killing must be unlawful to constitute manslaughter.** *Darby v. State*, 16 Ga. App. 171, 84 S.E. 724 (1915), later appeal, 22 Ga. App. 606, 96 S.E. 707 (1918).

**Distinguishing feature of voluntary manslaughter** is that it must be done in hot blood, without malice or deliberation. *Goldsmith v. State*, 54 Ga. App. 268, 187 S.E. 694 (1936).

**It is absence of malice which differentiates manslaughter from murder.** If at time of killing circumstances are such as to exclude malice, then homicide cannot be murder. *Parker v. State*, 218 Ga. 654, 129 S.E.2d 850 (1963).

**Murder and manslaughter, both voluntary and involuntary, are grades of unlawful homicide.** *Perry v. State*, 78 Ga. App. 273, 50 S.E.2d 709 (1948).

**Verdicts of voluntary manslaughter and felony murder were not mutually exclusive.** *Smith v. State*, 272 Ga. 874, 536 S.E.2d 514 (2000).

**Doctrine of reasonable fears has no application in manslaughter case.** *Jones v. State*, 193 Ga. 449, 18 S.E.2d 844 (1942); *Wilcox v. State*, 77 Ga. App. 786, 50 S.E.2d 29 (1948).

**Act actually committed is judged according to act intended.** — If a person shoots at another under circumstances that, if death had ensued, offense would be reduced from murder to voluntary manslaughter, and by accident the shot hits and kills another person standing by, for whom shot was not intended, offense would be voluntary manslaughter. *McLendon v. State*, 172 Ga. 267, 157 S.E. 475 (1931).

**Substantive elements of voluntary manslaughter** are: (1) intentional killing, which was; (2) unlawful; and (3) prompted solely by sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. *Woods v. Linahan*, 648 F.2d 973 (5th Cir. 1981).

**Homicide which is neither justifiable nor malicious,** constitutes manslaughter, and if intentional, constitutes voluntary manslaughter. *Cochran v. State*, 146 Ga. App. 414, 246 S.E.2d 431 (1978); *Shields v. State*, 147 Ga. App. 96, 248 S.E.2d 171 (1978); *Ward v. State*, 151 Ga. App. 36, 258 S.E.2d 699 (1979); *Tew v. State*, 179 Ga. App. 369, 346 S.E.2d 833 (1986).

**Crimes of voluntary manslaughter and malice murder require identical causation** in that both sections speak of causing the death of another human being. *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**Difference between crimes of voluntary manslaughter and malice murder** is that latter crime requires either express or implied malice, while voluntary manslaughter requires that killer has acted solely from a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**Merger of conviction into felony murder.** — After the defendant was engaged in a shoot-out with another and accidentally struck and killed an innocent third party, the defendant's conviction for voluntary manslaughter could be merged

into a felony-murder conviction. Foster v. State, 264 Ga. 369, 444 S.E.2d 296 (1994).

**Merger of aggravated assault conviction into voluntary manslaughter conviction.** — Trial court erred in entering a judgment of conviction against the defendant for aggravated assault, O.C.G.A. § 16-5-21(a)(2), because that conviction should have been merged into the defendant's conviction for voluntary manslaughter, O.C.G.A. § 16-5-2(a); the defendant was charged in the indictment with voluntary manslaughter and aggravated assault for the stabbing of the victim, and the undisputed evidence at trial showed that the victim was stabbed one time in the chest, causing the victim's death. Muckle v. State, 307 Ga. App. 634, 705 S.E.2d 721 (2011).

**"Hot blood" requirement for voluntary manslaughter is inconsistent with malice.** Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**Distinguishing characteristic between voluntary manslaughter and justifiable homicide** is whether accused was so influenced and excited that the accused reacted passionately or whether defendant acted simply in self defense. Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), aff'd, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Syms v. State, 175 Ga. App. 179, 332 S.E.2d 689 (1985).

Evidentiary circumstances necessary to show voluntary manslaughter, as opposed to circumstances showing justifiable homicide, relate to a situation which arouses sudden passion in person killing so that, rather than defending self, the person willfully kills the attacker, albeit without malice aforesought, when it was not necessary for the person to do so in order to protect self. Williams v. State, 232 Ga. 203, 206 S.E.2d 37 (1974), overruled on other grounds, Jackson v. State, 239 Ga. 40, 235 S.E.2d 477 (1977).

**Voluntary manslaughter by definition denotes one acting out of anger or passion; self-defense denotes one acting with a motive to prevent injury.** Murff v. State, 251 Ga. 478, 306 S.E.2d 267 (1983).

**Murder distinguished.** — Intent to kill is an essential element of both murder and voluntary manslaughter; provocation, or the lack thereof, is what distinguishes the two offenses. Parks v. State, 254 Ga. 403, 330 S.E.2d 686 (1985).

**Intent need not be directed toward person actually killed.** — Offenses of murder, voluntary manslaughter, and aggravated assault do not require that the necessary element of intent, to kill or injure as the case may be, must have been directed toward the person who actually was killed or injured. Cook v. State, 255 Ga. 565, 340 S.E.2d 843, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

**This state does not have a reckless homicide statute;** it has only voluntary and involuntary manslaughter statutes which create degrees of homicide less than murder. A history of punishing recklessly caused homicide as murder has nothing to do with deficiencies in felony murder scheme because it provides no category of homicide less culpable than murder. Malone v. State, 238 Ga. 251, 232 S.E.2d 907 (1977).

**To sustain voluntary manslaughter conviction, state must prove every element of offense beyond reasonable doubt.** Woods v. Linahan, 648 F.2d 973 (5th Cir. 1981).

**State has burden of proof on issue of unlawfulness or absence of self-defense** when raised by evidence. Woods v. Linahan, 648 F.2d 973 (5th Cir. 1981).

**Sentence imposed under plea agreement upheld.** — Trial court properly denied the defendant's petition to correct a void sentence, which alleged that said sentence was illegal because the crime of armed robbery merged with the crime of voluntary manslaughter, as the sentence was imposed pursuant to a plea agreement with the state in which the defendant waived any objection to the sentence by entering a guilty plea to the charges and specifically agreeing to separate, concurrent sentences for each charge, in exchange for the dismissal of five other charges; hence, the defendant waived any complaint on appeal that the sentence was void or illegal. Carr v. State,

**General Consideration (Cont'd)**

282 Ga. App. 134, 637 S.E.2d 835 (2006).

**Modified merger rule applies.** — When the evidence would support a conviction for either felony murder or voluntary manslaughter, and the jury finds the defendant guilty of each offense, the modified merger rule applies if the underlying felony is directed against the homicide victim and is not independent, but rather is an integral part of the killing; under such rule, the defendant cannot be convicted and sentenced for felony murder because the voluntary manslaughter verdict indicates that the underlying felony is mitigated by provocation and passion. *Sanders v. State*, 281 Ga. 36, 635 S.E.2d 772 (2006).

Cited in *Gaines v. Wolcott*, 119 Ga. App. 313, 167 S.E.2d 366 (1969); *Henderson v. State*, 227 Ga. 68, 179 S.E.2d 76 (1970); *Kemp v. State*, 227 Ga. 251, 179 S.E.2d 920 (1971); *Brooks v. State*, 227 Ga. 339, 180 S.E.2d 721 (1971); *Nolen v. State*, 124 Ga. App. 593, 184 S.E.2d 674 (1971); *Witt v. State*, 124 Ga. App. 535, 184 S.E.2d 517 (1971); *Butts v. State*, 126 Ga. App. 512, 191 S.E.2d 329 (1972); *Green v. State*, 230 Ga. 756, 199 S.E.2d 199 (1973); *Cornog v. State*, 130 Ga. App. 46, 202 S.E.2d 257 (1973); *Powell v. State*, 130 Ga. App. 588, 203 S.E.2d 893 (1974); *Reynolds v. State*, 131 Ga. App. 247, 205 S.E.2d 536 (1974); *Young v. State*, 232 Ga. 285, 206 S.E.2d 439 (1974); *Davis v. State*, 233 Ga. 638, 212 S.E.2d 814 (1975); *Beckman v. State*, 134 Ga. App. 118, 213 S.E.2d 527 (1975); *Barker v. State*, 233 Ga. 781, 213 S.E.2d 624 (1975); *Cook v. State*, 134 Ga. App. 357, 214 S.E.2d 423 (1975); *Hobbs v. State*, 134 Ga. App. 850, 216 S.E.2d 674 (1975); *Lindsey v. State*, 135 Ga. 122, 218 S.E.2d 30 (1975); *Carrindine v. Ricketts*, 236 Ga. 283, 223 S.E.2d 627 (1976); *Baker v. State*, 236 Ga. 754, 225 S.E.2d 269 (1976); *Gillespie v. State*, 236 Ga. 845, 225 S.E.2d 296 (1976); *Colson v. State*, 138 Ga. App. 366, 226 S.E.2d 154 (1976); *Strickland v. State*, 138 Ga. App. 842, 227 S.E.2d 396 (1976); *Murray v. State*, 138 Ga. App. 776, 227 S.E.2d 428 (1976); *Anderson v. State*, 138 Ga. App. 871, 227 S.E.2d 783 (1976); *Copeland v. State*, 139 Ga. App. 55, 227 S.E.2d 850 (1976); *Brown*

v. *State*, 139 Ga. App. 846, 229 S.E.2d 798 (1976); *Ramey v. State*, 238 Ga. 111, 230 S.E.2d 891 (1976); *Curtis v. State*, 141 Ga. App. 36, 232 S.E.2d 382 (1977); *Bailey v. State*, 240 Ga. 112, 239 S.E.2d 521 (1977); *Gaines v. Hopper*, 430 F. Supp. 1173 (M.D. Ga. 1977); *Bouttry v. State*, 242 Ga. 60, 247 S.E.2d 859 (1978); *Conley v. State*, 146 Ga. App. 739, 247 S.E.2d 562 (1978); *King v. State*, 148 Ga. App. 310, 251 S.E.2d 161 (1978); *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978); *Curtis v. State*, 243 Ga. 50, 252 S.E.2d 614 (1979); *Godfrey v. State*, 243 Ga. 302, 253 S.E.2d 710 (1979); *Newsome v. State*, 149 Ga. App. 415, 254 S.E.2d 381 (1979); *Ballard v. State*, 150 Ga. App. 704, 258 S.E.2d 331 (1979); *Driggers v. State*, 244 Ga. 160, 259 S.E.2d 133 (1979); *Crawford v. State*, 245 Ga. 89, 263 S.E.2d 131 (1980); *Hardy v. State*, 245 Ga. 272, 264 S.E.2d 209 (1980); *Arnett v. State*, 245 Ga. 470, 265 S.E.2d 771 (1980); *Jones v. State*, 245 Ga. 592, 266 S.E.2d 201 (1980); *Lane v. State*, 153 Ga. App. 622, 266 S.E.2d 298 (1980); *Jones v. State*, 246 Ga. 109, 269 S.E.2d 6 (1980); *Jones v. State*, 247 Ga. 268, 275 S.E.2d 67 (1981); *Comer v. State*, 247 Ga. 167, 275 S.E.2d 309 (1981); *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650 (1981); *McCorquodale v. Balkcom*, 525 F. Supp. 408 (N.D. Ga. 1981); *Krier v. State*, 249 Ga. 80, 287 S.E.2d 531 (1982); *Clay v. State*, 162 Ga. App. 346, 291 S.E.2d 432 (1982); *Miller v. State*, 162 Ga. App. 759, 292 S.E.2d 481 (1982); *Brooks v. State*, 249 Ga. 583, 292 S.E.2d 694 (1982); *Johnson v. State*, 249 Ga. 621, 292 S.E.2d 696 (1982); *Washington v. State*, 249 Ga. 728, 292 S.E.2d 836 (1982); *Perez v. State*, 249 Ga. 767, 294 S.E.2d 498 (1982); *Smith v. State*, 249 Ga. 801, 294 S.E.2d 525 (1982); *Byrd v. State*, 163 Ga. App. 718, 294 S.E.2d 686 (1982); *Anderson v. State*, 163 Ga. App. 571, 295 S.E.2d 748 (1982); *Goins v. State*, 164 Ga. App. 37, 296 S.E.2d 229 (1982); *Young v. Zant*, 677 F.2d 792 (11th Cir. 1982); *Hearn v. James*, 677 F.2d 841 (11th Cir. 1982); *Maynor v. Green*, 547 F. Supp. 264 (S.D. Ga. 1982); *McClain v. State*, 165 Ga. App. 264, 299 S.E.2d 55 (1983); *Howe v. State*, 250 Ga. 811, 301 S.E.2d 280 (1983); *Bryant v. State*, 250 Ga. 874, 301 S.E.2d 881 (1983); *Wesley v. State*, 166 Ga. App. 28, 303 S.E.2d 124

(1983); Harper v. State, 251 Ga. 183, 304 S.E.2d 693 (1983); Heath v. McGuire, 167 Ga. App. 489, 306 S.E.2d 741 (1983); Dollar v. State, 168 Ga. App. 726, 310 S.E.2d 236 (1983); Wright v. State, 253 Ga. 1, 316 S.E.2d 445 (1984); Denson v. State, 253 Ga. 93, 316 S.E.2d 469 (1984); Brooks v. State, 170 Ga. App. 171, 316 S.E.2d 815 (1984); Childs v. State, 171 Ga. App. 398, 319 S.E.2d 549 (1984); Brennon v. State, 253 Ga. 240, 319 S.E.2d 841 (1984); Ross v. State, 255 Ga. 1, 334 S.E.2d 300 (1985); Swint v. State, 173 Ga. App. 762, 328 S.E.2d 373 (1985); White v. State, 179 Ga. App. 276, 346 S.E.2d 91 (1986); Huston v. State, 256 Ga. 276, 347 S.E.2d 556 (1986); Partridge v. State, 256 Ga. 602, 351 S.E.2d 635 (1987); McDonald v. State, 182 Ga. App. 509, 356 S.E.2d 264 (1987); Harris v. State, 183 Ga. App. 219, 358 S.E.2d 634 (1987); Brown v. State, 258 Ga. 152, 366 S.E.2d 668 (1988); Wadley v. State, 258 Ga. 465, 369 S.E.2d 734 (1988); Smith v. Zant, 855 F.2d 712 (11th Cir. 1988); Griffin v. State, 199 Ga. App. 646, 405 S.E.2d 877 (1991); Scott v. State, 261 Ga. 611, 409 S.E.2d 511 (1991); Borders v. State, 201 Ga. App. 754, 412 S.E.2d 284 (1991); Barron v. State, 261 Ga. 814, 411 S.E.2d 494 (1992); Polley v. State, 203 Ga. App. 825, 418 S.E.2d 107 (1992); Nelson v. State, 262 Ga. 763, 426 S.E.2d 357 (1993); Duquette v. State, 265 Ga. 152, 454 S.E.2d 500 (1995); Willingham v. State, 268 Ga. 64, 485 S.E.2d 735 (1997); Hall v. State, 235 Ga. App. 44, 508 S.E.2d 703 (1998); Hodo v. State, 272 Ga. 272, 528 S.E.2d 250 (2000); Blackford v. State, 251 Ga. App. 324, 554 S.E.2d 290 (2001); Wigfall v. State, 274 Ga. 672, 558 S.E.2d 389 (2002); Anderson v. State, 274 Ga. 871, 560 S.E.2d 659 (2002); Ford v. Schofield, 488 F. Supp. 2d 1258 (N.D. Ga. 2007); Wells v. State, 294 Ga. App. 277, 668 S.E.2d 881 (2008); Bradshaw v. State, 284 Ga. 675, 671 S.E.2d 485 (2008).

### Unlawfulness

**Phrase “under circumstances which would otherwise be murder”** imports requirement of unlawfulness from definition of murder into definition of manslaughter. Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451

U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**Crime of voluntary manslaughter includes as an essential element the ingredient of unlawfulness.** Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**Unlawfulness, in sense of absence of excuse or justification, is an essential element of voluntary manslaughter.** Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981).

**Unlawfulness as absence of self-defense.** — Element of unlawfulness has been construed to mean absence of self-defense where self-defense is raised by evidence. Woods v. Linahan, 648 F.2d 973 (5th Cir. 1981).

**Unlawfulness, including absence of self-defense,** is an essential element of offense of voluntary manslaughter and state bears burden of persuasion in seeking to negate presence of self-defense. Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**State must prove unlawfulness in voluntary manslaughter prosecution.** — If state includes unlawfulness within its murder and manslaughter laws as an element of those crimes, while at the same time state courts require the defendant to prove lawfulness by virtue of self-defense, such construction makes the statutes’ operation run contrary to Constitution in violation of due process. Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981).

**Unlawfulness requirement does not refer to acts that are unlawful under some other criminal statute,** since O.C.G.A. §§ 16-5-1(c) and 16-5-3(a) deal with deaths caused during commission of felonies and other unlawful acts. Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**Lawfulness is proved by establishing self-defense.** Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981).

### Provocation

**An essential element of voluntary manslaughter is passion** on part of slayer. Rentfrow v. State, 123 Ga. 539, 51

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S.E. 596 (1905); Battle v. State, 133 Ga. 182, 65 S.E. 382 (1909); Deal v. State, 145 Ga. 33, 88 S.E. 573 (1916); Frazier v. State, 194 Ga. 657, 22 S.E.2d 404 (1942); Green v. State, 195 Ga. 759, 25 S.E.2d 502 (1943).

Defendant, who shot the victim in the abdomen, should not have been convicted of both voluntary manslaughter in violation of O.C.G.A. § 16-5-2 and felony murder while in the commission of an aggravated assault in violation of O.C.G.A. § 16-5-1(c); there was one assault, and the jury found that the fatal assault was mitigated by provocation and passion, so only the voluntary manslaughter conviction was proper. Lawson v. State, 280 Ga. 881, 635 S.E.2d 134 (2006).

**Provocation as element.** — Provocation is relevant, among other things, as an element of voluntary manslaughter. Anderson v. State, 262 Ga. 331, 418 S.E.2d 39 (1992).

**Mental state of accused, not that of deceased,** is relevant in determining whether homicide is manslaughter. Rentfrow v. State, 123 Ga. 539, 51 S.E. 596 (1905).

**Passion is not same as ill will.** Brown v. State, 144 Ga. 216, 87 S.E. 4 (1915).

**If killing was the result of passion, it is immaterial who provoked the difficulty or how justifiably passion may have been aroused on conviction of manslaughter.** Anderson v. State, 14 Ga. App. 607, 81 S.E. 802 (1914).

**Death caused by felony cannot constitute manslaughter unless done with passion.** — No death caused by a felony can possibly fall within either branch of involuntary manslaughter, and can only fall within voluntary manslaughter if done with passion. Baker v. State, 236 Ga. 754, 225 S.E.2d 269 (1976).

**Provocation must be such as to excite violent passion in a reasonable person.** — To warrant a charge on voluntary manslaughter, evidence must not only show an act of violent passion, but also some serious provocation sufficient to excite such passion in a reasonable person. Swett v. State, 242 Ga. 228, 248 S.E.2d 629 (1978); Isaac v. State, 263 Ga. 872, 440 S.E.2d 175 (1994).

When the evidence raises the offense of voluntary manslaughter, the question is whether defendant acted out of passion resulting from provocation sufficient to excite such passion in a reasonable person, and it is of no moment whether the provocation was sufficient to raise the deadly passion in the particular defendant. Lewandowski v. State, 267 Ga. 831, 483 S.E.2d 582 (1997).

With regard to defendant's conviction for voluntary manslaughter, the evidence was sufficient to authorize the jury to find beyond a reasonable doubt that defendant caused the death of defendant's romantic friend by striking the friend with a brick as the result of a sudden, violent, and irresistible passion arising from defendant having seen the friend engaged in sexual contact with another. Gilstrap v. State, 291 Ga. App. 647, 662 S.E.2d 755 (2008).

**"Passion" referred to in O.C.G.A. § 16-5-2(a) is not sexual desire.** Hardeman v. State, 252 Ga. 286, 313 S.E.2d 95 (1984).

**Sudden, violent and irresistible passion.** — Evidence was sufficient to show beyond a reasonable doubt that defendant was guilty of voluntary manslaughter when defendant shot and killed the victim out of "a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person." Brown v. State, 242 Ga. App. 106, 528 S.E.2d 868 (2000).

**Doctrine of reasonable fears may be relevant as regards provocation of accused.** — Doctrine of reasonable fears, as related to assault upon accused may be applicable in determining whether homicide was voluntary manslaughter. However, it has no connection with defense of voluntary manslaughter which would authorize acquittal of defendant. Gresham v. State, 70 Ga. App. 80, 27 S.E.2d 463 (1943).

**Serious provocation includes fears of reasonable man of being in danger of offense less than felony.** White v. State, 129 Ga. App. 353, 199 S.E.2d 624 (1973).

**"Fear of danger" prompting attack as not requiring self-defense finding.** — Fear raised in assailant's mind by vic-

tim's menacing words, physical aggression by pushing, and gesturing toward assailant with a pistol did not, under the circumstances, require a finding that the assailant acted out of self-defense, since the fear of some danger can be sufficient provocation to excite the passion necessary for voluntary manslaughter. *Syms v. State*, 175 Ga. App. 179, 332 S.E.2d 689 (1985).

Victim's conduct in beating defendant, engaging the defendant in a dangerous road race, threatening to kill the defendant, demanding that defendant get out of defendant's truck while forcibly striking the window two or three times, and taunting defendant to shoot the victim, supplied sufficient provocation for a finding of voluntary manslaughter under O.C.G.A. § 16-5-2. The jury was free to reject defendant's argument that the defendant acted in self-defense against the unarmed victim. *Crane v. State*, 300 Ga. App. 450, 685 S.E.2d 314 (2009).

**Provocation by words is inadequate to reduce murder to manslaughter.** *Aguilar v. State*, 240 Ga. 830, 242 S.E.2d 620 (1978).

Trial court did not err when it declined to charge the jury on voluntary manslaughter, despite the defendant's claim of provocation by the victim's backtalk and lying; words alone were not as a matter of law sufficient provocation to reduce the crime from murder to manslaughter. *Paul v. State*, 274 Ga. 601, 555 S.E.2d 716 (2001), cert. denied, 537 U.S. 828, 123 S. Ct. 123, 154 L. Ed. 2d 41 (2002).

**Words alone, regardless of degree of their insulting nature**, will not in any case justify excitement of passion so as to reduce crime from murder to manslaughter where killing is done solely on account of the indignation aroused by use of opprobrious words. *Brooks v. State*, 249 Ga. 583, 292 S.E.2d 694 (1982).

**Testimony that defendant and another "had words" insufficient provocation.** — Defendant's testimony that defendant was backing up and trying to leave when defendant's friend was pushed into the defendant and that the friend tried to catch oneself by grabbing the defendant's arm, which caused the gun to discharge, killing the friend, did not au-

thorize a charge on voluntary manslaughter under O.C.G.A. § 16-5-2 because the evidence did not show that the defendant was impassioned when the killing occurred. Although there was testimony that the defendant and another at the scene "had words," this was insufficient to establish that the defendant was seriously provoked. *Finley v. State*, 286 Ga. 47, 685 S.E.2d 258 (2009).

**Profane language not sufficient provocation.** — Where the defendant showed no provocative conduct on behalf of the intended victim of the defendant's shot except for a salvo of curse words directed at the appellant, this does not constitute provocation sufficient to demand a charge on voluntary manslaughter. *Hunter v. State*, 256 Ga. 372, 349 S.E.2d 389 (1986).

**Homicide resulting solely from resentment of provoking threats constitutes murder.** — Provocation by threats will in no case be sufficient to free defendant from crime of murder, or reduce homicide from murder to manslaughter, when killing is done solely for purpose of resenting provocation thus given. *Moore v. State*, 228 Ga. 662, 187 S.E.2d 277 (1972).

**In cases of provocation by threats, motive with which slayer acted is for jury determination**, and if it be claimed that homicide was committed, not in a spirit of revenge, but under fears of a reasonable man, it is for jury to decide whether or not circumstances were sufficient to justify existence of such fear. *Moore v. State*, 228 Ga. 662, 187 S.E.2d 277 (1972).

**Threat plus threatening movements.** — When the defendant said the victim told the defendant that the victim was "going to get [the defendant]," and then reached into the defendant's car and grabbed the defendant by the wrist, the statement by the victim, when connected to the victim's movement toward, and close proximity to, the defendant's car, could be sufficient provocation. *Tew v. State*, 179 Ga. App. 369, 346 S.E.2d 833 (1986).

**Existence of passion is a jury question.** *Mattox v. State*, 9 Ga. App. 292, 70 S.E. 1120 (1911).

**Issue of cooling time between provocation and homicide** is for jury deter-

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mination. Ross v. State, 59 Ga. 248 (1877); White v. State, 118 Ga. 787, 45 S.E. 595 (1903); Robinson v. State, 128 Ga. 254, 57 S.E. 315 (1907); Barney v. State, 5 Ga. App. 301, 63 S.E. 28 (1908); Hightower v. State, 14 Ga. App. 246, 80 S.E. 684 (1914); Booker v. State, 16 Ga. App. 280, 85 S.E. 255 (1915); Burke v. State, 196 Ga. 702, 27 S.E.2d 313 (1943).

**Cooling time and circumstances construed.** — What is said in section regarding cooling time is also reasonably referable to cooling circumstances, because one necessarily involves the other. Cooling time, in the very nature of things, must vary and be governed by circumstances in each case. Therefore it is proper in murder prosecution for jury to consider all conduct of defendant from time of first difficulty until fatal encounter, and construe that conduct in light of all attendant circumstances and conditions, with a view of ascertaining what impulses, motives or passions influenced defendant. Hamby v. State, 71 Ga. App. 817, 32 S.E.2d 546 (1944).

**Sufficiency of provocation and question of cooling time are in all cases for jury.** Ward v. State, 151 Ga. App. 36, 258 S.E.2d 699 (1979).

**Beating one month earlier not provocation.** — Trial court properly refused to charge the jury on voluntary manslaughter when the defendant shot the victim to death, but claimed provocation by a beating administered to the defendant by the victim, and others, one month earlier; the fact that the defendant had not seen the victim in the month since the beating was irrelevant. Harris v. State, 280 Ga. 372, 627 S.E.2d 562 (2006).

**When evidence insufficient to raise question for jury.** — Although the jury is the judge of whether there was an interval between the provocation and killing sufficient for the voice of reason and humanity to be heard, it is a question of law for the courts to determine whether there is slight evidence that the defendant acted as the result of sudden, violent, and irresistible passion resulting from serious provocation. The court could conclude as a matter of law that the incident did not

constitute even slight evidence of provocation because of the three and a half day cooling off period between the incident and the killing. Aldridge v. State, 258 Ga. 75, 365 S.E.2d 111 (1988).

**Beating and kicking is sufficient provocation** to bring one's actions within the ambit of the definition of voluntary manslaughter. Ellis v. State, 168 Ga. App. 757, 309 S.E.2d 924 (1983).

**"Boxing" or fighting prior to the homicide** does not constitute the kind of provocation which would warrant a charge of voluntary manslaughter in a trial for murder. Byrd v. State, 257 Ga. 36, 354 S.E.2d 428 (1987).

**Adulterous conduct deemed sufficient provocation.** — Fact that in their last conversation, the victim, defendant's wife, recounted her adulterous history in a nonprovocative manner is not determinative of the issue of whether there was sufficient provocation to require a charge of voluntary manslaughter. Her adulterous conduct, and the relating of it to the defendant under these circumstances, clearly authorized the trial court's implicit determination that sufficient provocation existed to warrant a charge on voluntary manslaughter. Strickland v. State, 257 Ga. 230, 357 S.E.2d 85 (1987).

Adulterous conduct can serve as sufficient provocation authorizing a charge on voluntary manslaughter even though the parties to the relationship are not married to each other. Murray v. State, 247 Ga. App. 139, 543 S.E.2d 428 (2000).

**Finding old girlfriend and her new boyfriend on sofa.** — Merely finding old girlfriend and her new boyfriend together on sofa is not evidence of anything approaching sufficient passion or provocation to warrant a charge on the law of voluntary manslaughter. Parks v. State, 234 Ga. 579, 216 S.E.2d 804 (1975).

**Victim's alleged statement that she was out with another man** was not sufficient to excite sudden, violent, and irresistible passion in a reasonable person. Mayweather v. State, 254 Ga. 660, 333 S.E.2d 597 (1985).

**Victim's stated intention to attend a party at which victim expected to use illegal drugs** was not sufficient provocation to reduce stepfather's murder count

to voluntary manslaughter. Cole v. State, 254 Ga. 286, 329 S.E.2d 146 (1985).

**Evidence of defendant's intoxication and determination to end it.** —

Evidence that the defendant was intoxicated, agitated, and determined to "put a stop to it" (her husband's inebriation) is insufficient to support finding of sudden, violent and irresistible passion. Clay v. State, 160 Ga. App. 178, 286 S.E.2d 476 (1981), rev'd on other grounds, 249 Ga. 250, 290 S.E.2d 84 (1982).

**Evidence of victim's cocaine use.** —

Despite the fact that the defendant produced proper evidence of a causal connection between the presence of cocaine and alcohol in the victim's body and the victim's potential behavior, as that connection was relevant to the issue of provocation and should have been admitted, any error by the trial court was deemed harmless, given that the error did not contribute to the verdict. McWilliams v. State, 280 Ga. 724, 632 S.E.2d 127 (2006).

**Victim's tossing cup toward defendant insufficient.** — In a prosecution for malice murder, there was no evidence to authorize a charge on voluntary manslaughter, and the fact that the victim may have tossed a soft drink cup in the direction of the defendant was insufficient to create a serious provocation. Burgess v. State, 264 Ga. 777, 450 S.E.2d 680 (1994), cert. denied, 515 U.S. 1133, 115 S. Ct. 2559, 132 L. Ed. 2d 813 (1995).

**Serious act of provocation not shown.** — In a conviction based on the shooting death of a taxi driver, defendant was not entitled to a voluntary manslaughter charge because there was no evidence that the taxi driver, while unarmed and driving the cab, committed a serious act of provocation warranting such a charge. Keita v. State, 285 Ga. 767, 684 S.E.2d 233 (2009).

**No evidence of fit of passion.** — Habeas court erred in granting relief to a petitioner on a malice murder conviction on the basis of ineffective assistance of counsel because counsel's defense theory of innocence was not unsupported by the evidence, and there was no evidence of sudden passion supporting a proposed theory of voluntary manslaughter under O.C.G.A. § 16-5-2(a). Petitioner's intox-

cation and alleged mental retardation did not support a theory of voluntary manslaughter. Hall v. Lewis, 286 Ga. 767, 692 S.E.2d 580 (2010).

**Five to 15 minutes not sufficient "cooling off" as matter of law.** — Five to 15 minute period for "cooling off" does not render act of killing murder rather than voluntary manslaughter as a matter of law. Davis v. State, 140 Ga. App. 890, 232 S.E.2d 164 (1977).

### Mutual Combat

**Voluntary manslaughter includes killing in course of mutual combat.** Cooper v. State, 212 Ga. 367, 92 S.E.2d 864 (1956).

**Homicide pursuant to mutual combat generally constitutes manslaughter.** — When homicide is committed during mutual combat, since the defendant willingly engaged in an affray, the defendant is in equal fault with the deceased, and, under such circumstances, it is not justifiable for the defendant to slay adversary without more. Accordingly, a killing under such circumstances is voluntary manslaughter. Cribb v. State, 71 Ga. App. 539, 31 S.E.2d 248 (1944).

**To reduce homicide from murder to voluntary manslaughter, on theory of mutual combat,** it should affirmatively appear that at time of homicide both parties were in position and manifested intention to fight. Cornelius v. State, 193 Ga. 25, 17 S.E.2d 156 (1941); Cone v. State, 193 Ga. 420, 18 S.E.2d 850 (1942); Joyner v. State, 208 Ga. 435, 67 S.E.2d 221 (1951).

Essential ingredient, mutual intent, in order to constitute mutual combat, must be a willingness, a readiness, and intention upon part of both parties to fight. Mathis v. State, 196 Ga. 288, 26 S.E.2d 606 (1943); McDaniel v. State, 197 Ga. 757, 30 S.E.2d 612 (1944).

**Mutual combat exists where there is a fight and both parties are willing to fight.** Harris v. State, 184 Ga. 382, 191 S.E. 439 (1937).

**It does not matter who strikes first blow in mutual combat.** — If upon a sudden quarrel, parties fight upon spot, or presently agree and fetch their weapons and fight, and one of them is killed, such

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killing constitutes voluntary manslaughter, no matter who strikes first blow. Cotton v. State, 201 Ga. 285, 39 S.E.2d 530 (1946); Joyner v. State, 208 Ga. 435, 67 S.E.2d 221 (1951).

**Principles of mutual combat, applied to voluntary manslaughter,** do not require that both strike blows. Watson v. State, 66 Ga. App. 242, 17 S.E.2d 559 (1941).

There need not be mutual blows in order to constitute mutual combat; but when there exists intention on part of both parties to fight, mutual combat exists, although first blow kills or disables one of the parties. Mathis v. State, 196 Ga. 288, 26 S.E.2d 606 (1943).

**Waiver on appeal when defendant requested charge.** — Because the defendant requested a jury charge on mutual combat, the defendant waived the right to appeal on this point. Gonzales v. State, 261 Ga. App. 366, 582 S.E.2d 524 (2003).

**Theory of mutual combat inapplicable where victim had no desire to fight.** — Aggressor will not be allowed to mitigate crime on theory of mutual combat when it appears that the victim had no desire to fight, and intended to fight only to the extent that a defense of the victim's person against an unprovoked attack was necessary. Mathis v. State, 196 Ga. 288, 26 S.E.2d 606 (1943); Joyner v. State, 208 Ga. 435, 67 S.E.2d 221 (1951).

**Mutual intent to fight, where malice present.** — Although there is mutual intention to fight, if one disputant kills other with malice, it is murder, since in such case killing would not be result of sudden and violent heat of passion which by reason of its irresistibility would constitute voluntary manslaughter. Rivers v. State, 193 Ga. 133, 17 S.E.2d 726 (1941).

**Words, threats, menaces, or contemptuous gestures.** — Unlawful killing of one who has given slayer no provocation other than use of words, threats, menaces, or contemptuous gestures cannot be graded to voluntary manslaughter, under doctrine of mutual combat. Cone v. State, 193 Ga. 420, 18 S.E.2d 850 (1942); Green v. State, 195 Ga. 759, 25 S.E.2d 502 (1943); Joyner v. State, 208 Ga. 435, 67 S.E.2d 221 (1951).

Mere threats by one party to other prior to killing do not establish mutual combat. Cornelius v. State, 193 Ga. 25, 17 S.E.2d 156 (1941).

**Defenses**

**Defense of justification.** — When relying on the defense of justification in a homicide case, in order to introduce evidence of the violent nature of the deceased victim, the defendant must make a *prima facie* showing that the victim was the aggressor, was assailing the defendant, and the defendant was honestly seeking to defend self. Hagans v. State, 187 Ga. App. 216, 369 S.E.2d 536 (1988).

**Self-defense distinguished.** — Provocation necessary to support a charge of voluntary manslaughter is markedly different from that which will support a self-defense claim; the distinguishing characteristic between the two claims is whether the accused was so influenced and excited that the accused reacted passionately rather than simply in an attempt at self defense. Worthem v. State, 270 Ga. 469, 509 S.E.2d 922 (1999).

**Defenses of self-defense and accident are inconsistent.** Wilkerson v. State, 183 Ga. App. 26, 357 S.E.2d 814, cert. denied, 183 Ga. App. 907, 357 S.E.2d 814 (1987).

**Self-defense.** — When the defendant testified that the victim was shot because the defendant feared the victim was about to attack the defendant, the trial court properly charged the jury regarding self-defense; there was no evidence that the defendant shot the victim as the result of passion arising from a serious provocation, nor was there any evidence that the defendant was so influenced and excited that the defendant reacted passionately rather than simply in an attempt at self-defense. Morgan v. State, 276 Ga. 72, 575 S.E.2d 468 (2003).

Evidence was sufficient to find that the defendant shot the victim as a result of sudden, violent, and irresistible passion resulting from serious provocation for the voluntary manslaughter conviction. The evidence did not establish self-defense as the victim was significantly smaller than the defendant and the victim was eating a hamburger when the defendant shot the

victim. *Stanley v. State*, 267 Ga. App. 656, 601 S.E.2d 141 (2004).

While the defendant contended that the act of repeatedly striking the victim with a piece of wood was done in self-defense, the jury could have found either that the defendant's actions were not justified because the defendant used excessive force or that the defendant did not act in self-defense after the first blow in light of testimony that the defendant continued to strike the victim after the victim had fallen to the ground and was no longer a threat. *Linzy v. State*, 277 Ga. App. 673, 627 S.E.2d 411 (2006).

Defendant was not entitled to a directed verdict of acquittal on a voluntary manslaughter count predicated on the defendant's claim of self-defense, O.C.G.A. § 16-3-21(a), because the evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of voluntary manslaughter in violation of O.C.G.A. § 16-5-2(a) and to enable a rational trier of fact to find that the defendant's stabbing of the victim was not justified as an act of self-defense; under O.C.G.A. § 24-4-8, a neighbor's eyewitness testimony, standing alone, was sufficient to support a finding that the defendant was the aggressor, continued to use force after any imminent danger posed by the victim had passed, or used excessive force, and the jury also was entitled to rely upon evidence that the defendant lied to the police about the stabbing and hid the knife. *Muckle v. State*, 307 Ga. App. 634, 705 S.E.2d 721 (2011).

**Validity of defense a jury question.** — When the jury was authorized to conclude that the defendant intentionally shot the victim after the victim's actions earlier in the day provoked the defendant, and to reject the defendant's theory that the defendant feared being shot, the defendant's voluntary manslaughter conviction was affirmed. *Gonzales v. State*, 261 Ga. App. 366, 582 S.E.2d 524 (2003).

Sufficient evidence supported the defendant's conviction of voluntary manslaughter in violation of O.C.G.A. § 16-5-2; there was conflicting evidence as to whether the defendant acted in self-defense in shooting the victim, and it was for the jury to

resolve the dispute between the defendant and the state's witnesses, who contradicted the defendant's testimony that the defendant had acted in self-defense. *Parks v. State*, 281 Ga. App. 679, 637 S.E.2d 46 (2006).

Evidence was sufficient to support a jury's determination that the defendant's fatal shooting of a victim following the parties' altercation and the victim's subsequent punch in the defendant's face constituted voluntary manslaughter, in violation of O.C.G.A. § 16-5-2(a), as there was no evidence that the victim had a gun at the time of the shooting incident and the defendant gave conflicting versions of the incident; the jury acted within the jury's province in rejecting the defendant's claim of self-defense pursuant to O.C.G.A. § 16-3-21(a). *Thomas v. State*, 296 Ga. App. 231, 674 S.E.2d 96 (2009).

### Jury Charge

**Charge based on 1933 law.** — Trial court did not err in instructing the jury that "in all cases of voluntary manslaughter there must be some actual assault upon the person killing or an attempt by the person killed to commit a serious personal injury on the person killing or other equivalent circumstances to justify the excitement of passion and to exclude all idea of deliberation or malice either express or implied," although the requirements concerning an actual assault upon the defendant, or an attempt on the part of the victim to commit a serious personal injury on the defendant, that were contained in § 26-1102 of the 1933 Code of Georgia were not adopted in the enactment of the Criminal Code of Georgia of 1968, as currently codified at O.C.G.A. § 16-5-2. *Cash v. State*, 258 Ga. 460, 368 S.E.2d 756 (1988).

**Charge placing burden of persuasion of self-defense on defendant violates due process.** — When absence of self-defense is an essential element of the crime of voluntary manslaughter, and the trial court's charge operates to place the burden of persuasion on the defendant on this issue, defendant's conviction violated the defendant's due process rights under the United States Constitution. *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980),

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cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

**An instruction which tracked the language of O.C.G.A. § 16-5-2(a)** was not unconstitutionally burden-shifting in that it required the jury to find defendant guilty of murder if it determined that a sufficient cooling-off period intervened between the provocation and the homicide. *Parents Against Realignment v. Georgia High School Association*, 271 Ga. 114, 515 S.E.2d 528 (1999).

**Court should charge voluntary manslaughter whenever requested by defendant.** — Better practice on the part of trial courts would be to charge voluntary manslaughter in all instances when requested by the defendant. Such a charge, on request, cannot be reversible error, and, if routinely given, would vastly reduce the expense and delay involved on appeal of the sometimes difficult questions of whether there is sufficient evidence to support such a charge as a matter of law. *Gooch v. State*, 259 Ga. 301, 379 S.E.2d 522 (1989).

**When there is doubt whether manslaughter is involved, trial judge must submit question to jury.** *Todd v. State*, 75 Ga. App. 711, 44 S.E.2d 275 (1947).

**Court should charge regarding both murder and manslaughter when doubt exists.** If there exists any evidence to create doubt, however slight, as to whether offense is murder or voluntary manslaughter, instructions as to law of both of these offenses should be given. *Thomas v. State*, 47 Ga. App. 237, 170 S.E. 303 (1933); *Thomas v. State*, 51 Ga. App. 455, 180 S.E. 760 (1935); *Hayes v. State*, 51 Ga. App. 462, 180 S.E. 762 (1935); *Dickey v. State*, 60 Ga. App. 199, 3 S.E.2d 238 (1939); *Harris v. State*, 77 Ga. App. 842, 50 S.E.2d 152 (1948); *McDaniel v. State*, 91 Ga. App. 196, 85 S.E.2d 490 (1954).

When evidence, or defendant's statement, or portions of evidence and portions of statement combined, raise doubt, however slight, as to whether homicide was murder or voluntary manslaughter, it is not error for court to instruct jury upon

law of voluntary manslaughter. *Tucker v. State*, 61 Ga. App. 661, 7 S.E.2d 193 (1940).

When there is evidence sufficient to raise doubt, however slight, upon point, whether crime is murder or manslaughter, voluntary or involuntary, court should instruct jury upon these grades of manslaughter as well as murder. *Freeman v. State*, 158 Ga. 369, 123 S.E. 126 (1924); *Goldsmith v. State*, 54 Ga. App. 268, 187 S.E. 694 (1936).

Law of voluntary manslaughter may properly be given in charge to jury on trial of one indicted for murder, where, from evidence or from defendant's statement at trial, there is anything deducible which would tend to show that defendant was guilty of voluntary manslaughter, or which would be sufficient to raise a doubt as to which of these grades of homicide was committed. *Sumner v. State*, 109 Ga. 142, 34 S.E. 293 (1899); *Futch v. State*, 137 Ga. 75, 72 S.E. 911 (1911); *Reeves v. State*, 22 Ga. App. 628, 97 S.E. 115 (1918); *Amerson v. State*, 26 Ga. App. 628, 105 S.E. 378 (1920); *Green v. State*, 52 Ga. App. 290, 183 S.E. 204 (1935); *Dickey v. State*, 60 Ga. App. 199, 3 S.E.2d 238 (1939); *Hamby v. State*, 71 Ga. App. 817, 32 S.E.2d 546 (1944); *Goings v. State*, 91 Ga. App. 146, 85 S.E.2d 98 (1954).

**When applicable, law of voluntary manslaughter should be charged, even absent request.** — When under one phase of evidence, law of voluntary manslaughter is involved in case, judge errs when the judge omits to charge upon that subject and this charge is required even without any request. *Parker v. State*, 218 Ga. 654, 129 S.E.2d 850 (1963).

When testimony as to voluntary manslaughter is sufficient, it is duty of court to charge thereon, whether or not request to charge thereon was made. *Bell v. State*, 130 Ga. 865, 61 S.E. 996 (1908); *Andrews v. State*, 134 Ga. 71, 67 S.E. 422 (1910); *Hill v. State*, 147 Ga. 650, 95 S.E. 213 (1918); *Booker v. State*, 153 Ga. 117, 111 S.E. 418 (1922).

Even in the face of an objection by the defendant, the court properly charged the jury with respect to voluntary manslaughter in a prosecution for murder where the evidence showed adulterous conduct of

the defendant's wife with the victim. Boone v. State, 234 Ga. App. 373, 506 S.E.2d 884 (1998).

**Absent request, failure to charge on manslaughter not error** when raised only by defendant's statement. Taylor v. State, 199 Ga. 512, 34 S.E.2d 701 (1945).

Defense counsel was entitled to rely on defendant's claim that defendant was not present when a victim was killed, counsel acted reasonably when counsel decided to defend charges of malice murder and felony murder by attacking the credibility of defendant's co-conspirators and when counsel decided not to ask that the jury be instructed on voluntary manslaughter as a lesser included offense of murder, and the trial court did not err because it did not give the jury an instruction on voluntary manslaughter, *sua sponte*. Sparks v. State, 277 Ga. 72, 586 S.E.2d 645 (2003).

**At least some evidence must support charge of voluntary manslaughter** before the charge is required. Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), aff'd, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Victim's suspected involvement in the death of a defendant's brother did not constitute even slight evidence of provocation to support a voluntary manslaughter jury charge since five months had passed between the brother's murder and the murder of the victim. Woodruff v. State, 281 Ga. 235, 637 S.E.2d 391 (2006).

Because the evidence presented showed that the defendant acted in a rational and calculating fashion in retrieving a car jack, breaking out the exterior light to darken the scene, and then quietly snuck into and through the victim's house in search of the victim, and did not show that the defendant's actions were the result of a sudden, violent, and irresistible passion, the defendant was not entitled to a charge on voluntary manslaughter, and a malice murder conviction was upheld on appeal. Taylor v. State, 282 Ga. 502, 651 S.E.2d 715 (2007).

**Whether charge warranted is question of law.** — It is a question of law for courts to determine whether there is slight evidence that defendant acted as result of sudden, violent and irresistible passion resulting from serious provoca-

tion. Henderson v. State, 234 Ga. 827, 218 S.E.2d 612 (1975).

**Absent evidence of requisite provocation,** it is not error to refuse charge on voluntary manslaughter. Bowen v. State, 241 Ga. 492, 246 S.E.2d 322 (1978).

**Exchange of gunfire.** — While being fired upon may be "serious provocation," it does not follow that a charge of voluntary manslaughter will be warranted in every case involving an exchange of gunfire. Worthem v. State, 270 Ga. 469, 509 S.E.2d 922 (1999).

**Instruction that words alone did not constitute sufficient provocation** to reduce murder to voluntary manslaughter was not error since there was no evidence to support a finding that the victim had taunted defendant with the victim's extra-marital sexual exploits. Mack v. State, 272 Ga. 415, 529 S.E.2d 132 (2000).

**Nonthreatening words combined with harmless physical contact** did not support a charge on voluntary manslaughter. Veal v. State, 250 Ga. 384, 297 S.E.2d 485 (1982).

**Evidence held sufficient to authorize a charge on voluntary manslaughter.** — See Dyer v. State, 167 Ga. App. 310, 306 S.E.2d 313 (1983); Washington v. State, 228 Ga. App. 490, 491 S.E.2d 925 (1997).

Trial court did not err in giving the state's requested charge on voluntary manslaughter in the defendant's trial, based on the defendant's fatal drive-by shooting into an occupied car, when there was some slight evidence to support such a charge; the fact that a defendant in a murder trial relied on self-defense did not preclude such instructions, and based on the fact that the defendant was goaded by the victim's sibling earlier in the day, as well as shot at by the victim's sibling, giving the instruction fit within the circumstances of the defendant then firing shots in the car as the victim drove by, based on the defendant's alleged belief that the defendant was going to be fired on by the car occupants. Mullins v. State, 270 Ga. App. 271, 605 S.E.2d 913 (2004).

Voluntary manslaughter instruction was supported by evidence of sufficient provocation as there was evidence that

**Jury Charge (Cont'd)**

the victim assaulted the defendant, but turned away to leave the scene; after the victim turned away, the defendant shot the victim in the back from two-and-one-half feet away. Nelloms v. State, 273 Ga. App. 448, 615 S.E.2d 153 (2005).

**Failure to instruct on voluntary manslaughter not error.** — See Kitchens v. State, 251 Ga. 36, 302 S.E.2d 569 (1983); Elliott v. State, 253 Ga. 417, 320 S.E.2d 361 (1984).

Where there was no evidence beyond, perhaps, mere words, of provocation or of a mutual intent to fight, as a matter of law these facts did not present the necessary evidence of sufficient provocation to excite the passions of a reasonable person which would have entitled the defendant to a charge on voluntary manslaughter. Pace v. State, 258 Ga. 225, 367 S.E.2d 827 (1988).

Voluntary manslaughter charge is not warranted when the only alleged evidence of provocation is the victim resisting an armed robbery. Nance v. State, 272 Ga. 217, 526 S.E.2d 560, cert. denied, 531 U.S. 950, 121 S. Ct. 353, 148 L. Ed. 2d 284 (2000); Chapman v. State, 275 Ga. 314, 565 S.E.2d 442 (2002).

Court in a murder prosecution did not err in refusing to charge voluntary manslaughter since there was no evidence of provocation or passion since the defendant did not testify that the defendant was angry when the defendant shot the victim but that the defendant was trying to calm the victim down by demonstrating that the defendant's gun would not fire, that the defendant pointed the gun at the windshield and pulled the trigger, thinking the gun would not fire until the trigger was pulled a second time, and that the victim jerked the defendant's hand toward the victim as the gun fired. Alexis v. State, 273 Ga. 423, 541 S.E.2d 636 (2001).

Trial court did not err by failing to give a jury charge on voluntary manslaughter as the evidence showed that the defendant initiated the conflict by aggressively assaulting the victims with deadly force, and that one victim only threw a radio at the defendant in an effort to protect the

victim's nephew from threatened deadly harm. Johnson v. State, 275 Ga. 630, 570 S.E.2d 309 (2002).

Trial court did not err in refusing to charge the jury on voluntary manslaughter in a case in which the defendant was dating someone who decided to end their relationship and date someone else, the murder victim, as the defendant did not show that the murder victim seriously provoked the defendant and that the defendant reacted passionately when the murder victim tried to escort the defendant from the apartment after the defendant went there after the breakup, and the defendant suddenly stabbed the murder victim to death. Daniels v. State, 276 Ga. 632, 580 S.E.2d 221 (2003).

When, in a murder prosecution, the trial court did not charge the jury on voluntary manslaughter, this was not error because there was no evidence to show that the defendant acted solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. Morgan v. State, 279 Ga. 6, 608 S.E.2d 619 (2005).

In a murder prosecution, a defendant was not entitled to an instruction on voluntary manslaughter because testimony that the defendant shot the victim because the defendant panicked and was frightened showed, at best, that the defendant was attempting to repel an attack, not that there was sufficient anger to invoke passion. Bell v. State, 280 Ga. 562, 629 S.E.2d 213 (2006).

In a murder prosecution, a jury charge on voluntary manslaughter, as a lesser-included offense, was unwarranted, as the evidence showed that the defendant had the chance to walk away from a heated argument with the victim, but instead calmly retrieved a knife, concealed it, and deliberately re-initiated the argument before plunging the knife into the victim's abdomen. Ballard v. State, 281 Ga. 232, 637 S.E.2d 401 (2006).

Trial court did not err by failing to give a defendant's requested jury instruction on voluntary manslaughter, and by rejecting the defendant's claim that the jury could have inferred that the defendant "snapped" emotionally and killed the vic-

tim in the heat of passion; the defendant testified that the shooting was an accident. *Thomason v. State*, 281 Ga. 429, 637 S.E.2d 639 (2006).

Trial court's refusal to charge the jury on voluntary manslaughter as a lesser included offense of murder was not erroneous when evidence of a sudden, violent, and irresistible passion resulting from serious provocation was lacking. *Walker v. State*, 281 Ga. 521, 640 S.E.2d 274 (2007).

Since there existed no evidence that, at the time the fatal shots were fired into a victim, the defendant was acting with the sort of anger or passion which would support the requested charge on the lesser included offense of voluntary manslaughter to malice murder, the trial court did not err when the court denied the defendant's request for the charge on the lesser included offense. *Hunter v. State*, 281 Ga. 693, 642 S.E.2d 668 (2007).

Since the state's evidence did not show a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person, and since the defendant's evidence that the defendant was not present when the victim was killed did not show a killing arising from such passion, a trial court did not err in refusing to give a requested charge on the offense of voluntary manslaughter. *Culmer v. State*, 282 Ga. 330, 647 S.E.2d 30 (2007).

In a murder prosecution, the trial court properly refused to give jury instructions on voluntary manslaughter, involuntary manslaughter, pointing a pistol at another, and accident as no evidence of provocation was presented and the evidence showed that the victim was killed during the defendant's effort to rob the victim at gunpoint. *Roberts v. State*, 282 Ga. 548, 651 S.E.2d 689 (2007).

In a murder trial, the trial court did not err in not giving an instruction on voluntary manslaughter; the state's evidence did not warrant such a charge, and the defendant's testimony that the defendant shot the victim in self-defense at best showed that the defendant was attempting to repel an attack, not that the defendant reacted passionately. *Jackson v. State*, 282 Ga. 494, 651 S.E.2d 702 (2007).

With regard to a defendant's conviction

for felony murder arising out of the stabbing death of the love interest of the defendant's spouse, the trial court properly refused the defendant's request for a jury instruction on adulterous conduct as provocation for voluntary manslaughter because the evidence in the case did not warrant the instruction in as much as there was no evidence that the defendant acted solely as the result of a serious provocation, adultery, or otherwise, that excited the defendant in a sudden, violent, and irresistible passion, so as to authorize a finding of voluntary manslaughter. In fact, the defendant testified that the defendant was angry with the victim because the victim owed the defendant money and that the defendant went to see the victim in order to reach an agreement about the money. *Velazquez v. State*, 282 Ga. 871, 655 S.E.2d 806 (2008).

In a malice murder prosecution, as the evidence did not show the defendant was provoked seriously enough to cause a reasonable person to fatally stab the victim, the defendant was not entitled to a voluntary manslaughter instruction under O.C.G.A. § 16-5-2(a). *Boyd v. State*, 284 Ga. 46, 663 S.E.2d 218 (2008).

In defendant's prosecution for malice murder, the defendant was not entitled to a jury instruction on voluntary manslaughter as no sudden, violent, and irresistible passion under O.C.G.A. § 16-5-2(a) was shown because the divorce from the defendant's spouse, who was the victim, had been pending for over a year and the murder was the result of a carefully planned hit. *Sullivan v. State*, 284 Ga. 358, 667 S.E.2d 32 (2008).

Evidence was insufficient to establish a reasonable probability that the jury would have found defendant guilty of voluntary manslaughter and thus trial counsel was not ineffective in requesting this instruction since the evidence demonstrated that the victim and defendant were in rival gangs; that the victim and others drove into an apartment complex to pick up a friend; that an occupant in the victim's vehicle poked a gun out of a window; and that defendant and the defendant's codefendant shot at the vehicle, killing the victim and wounding others. *Hung v. State*, 284 Ga. 796, 671 S.E.2d 811 (2009).

**Jury Charge (Cont'd)**

Trial court did not err in refusing to give a jury instruction on voluntary manslaughter in the defendant's criminal trial on a charge of, *inter alia*, malice murder as the evidence did not reflect that the defendant's use of a gun to fatally shoot the victim amounted to reckless conduct or another misdemeanor. *Jones v. State*, 285 Ga. 328, 676 S.E.2d 225 (2009).

Trial court did not err by refusing to give the defendant's request for a jury instruction on voluntary manslaughter because the record failed to reveal any evidence that would support a voluntary manslaughter charge; the evidence and testimony at trial revealed that although a gun was in the victim's car at the time of the murder, the victim did not say or do anything before the defendant shot the victim, let alone do anything that would constitute the "serious provocation" necessary to warrant a charge on voluntary manslaughter. *Lawrence v. State*, 286 Ga. 533, 690 S.E.2d 801 (2010).

Trial court did not err in refusing to instruct the jury on voluntary manslaughter as a lesser included crime of malice murder because a charge on voluntary manslaughter was precluded by the evidence when there was no evidence to illustrate the existence of provocation before the fatal shots were fired; the defendant assaulted the victim with a deadly weapon and then fired the fatal shots into the victim's back, and there was no evidence that the defendant had any type of relationship with the friend who was arguing with the victim that would explain an impassioned attack. *Hicks v. State*, 287 Ga. 260, 695 S.E.2d 195 (2010).

Trial court did not err in ruling that because the court was instructing the jury on self-defense, the court would not give the defendant's requested charge on voluntary manslaughter since any evidence showing that the defendant was fearful that the victim or the defendant's friend had a gun and was about to draw the gun without more, did not show the serious provocation and the sudden, violent, and irresistible passion required to warrant an instruction on voluntary manslaughter. *White v. State*, 287 Ga. 208, 695 S.E.2d 222 (2010).

Trial court did not err in refusing to charge a jury on voluntary manslaughter as a lesser included offense of malice murder because, as a matter of law, the defendant's former girlfriend's statement that she was out with another man was not sufficient to excite sudden, violent, and irresistible passion in a reasonable person pursuant to O.C.G.A. § 16-5-2. *Foster v. State*, 288 Ga. 98, 701 S.E.2d 189 (2010).

Trial court did not err by failing to give the defendant's requested charges on voluntary manslaughter because there was not even slight evidence of the passion or provocation needed to authorize a charge on voluntary manslaughter since the victim was not intoxicated, and the victim's behavior was not belligerent or provocative; the victim was shot from a considerable distance as the victim was peacefully leaving a party. *Allen v. State*, 288 Ga. 263, 702 S.E.2d 869 (2010).

After the defendant killed the male victim during an altercation but then killed the male victim's female companion without provocation, the trial court did not err in refusing to instruct the jury on the lesser offense of voluntary manslaughter regarding the murder of the female victim because there was no showing that the female victim was involved in the argument or the struggle between the male combatants; thus, the second murder could not be said to have resulted from a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite passion in a reasonable person. *Bryant v. State*, 288 Ga. 876, 708 S.E.2d 362 (2011).

In defendant's trial on charges of malice murder, three counts of aggravated battery, aggravated sodomy, kidnapping with bodily injury, and aggravated assault after the defendant grabbed a woman who was riding a bike, dragged her to a concealed area, and sexually assaulted, beat, and killed her, the trial court did not err in refusing to instruct the jury on voluntary manslaughter as a lesser-included offense of malice murder because there was not even slight evidence to suggest that the victim was killed for any reason other than she bit defendant's penis after he forced it into her mouth in an attempt to commit aggravated sodomy against her,

facts that could not form the basis of a charge on voluntary manslaughter. *Ledford v. State*, No. S10P1859, 2011 Ga. LEXIS 267 (Mar. 25, 2011).

During the defendant's trial for murder, the trial court did not err by refusing the defendant's request to charge the jury on voluntary manslaughter because in the absence of any evidence of a romantic relationship between the defendant and the teenaged victim, there could be no serious provocation created by the victim's call to her ex-boyfriend that could have aroused passion in a reasonable person pursuant to O.C.G.A. § 16-5-2(a). *Crawford v. State*, 288 Ga. 425, 704 S.E.2d 772 (2011).

Trial court did not err in failing to give the codefendant's requested charge on voluntary manslaughter because the threat against the defendant did not rise to the level of a serious provocation of the codefendant sufficient to excite sudden, violent, and irresistible passion in a reasonable person that would require a charge on voluntary manslaughter; although more than mere words were used against the defendant, the codefendant was not present during the alleged provocation, but instead, the evidence showed, at most, that the incident was subsequently communicated to the codefendant and, thus, objectively, the codefendant's response to the provoking incident was unreasonable. *Howard v. State*, 288 Ga. 741, 707 S.E.2d 80 (2011).

Trial court did not err in refusing to give a voluntary manslaughter charge because the evidence was insufficient to show that the defendant acted solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person pursuant to O.C.G.A. § 16-5-2(a); the defendant testified that the defendant and the victim were having an argument about money, the defendant was getting agitated and angry, the victim stated "remember what happened to your ass the last time and I will do it again," and the defendant snapped. *Gresham v. State*, No. S11A0382, 2011 Ga. LEXIS 291 (Apr. 18, 2011).

**Trial court need not charge on involuntary manslaughter in course of**

**lawful act**, where the defense is based upon self-defense, which is fully charged to the jury. *King v. State*, 177 Ga. App. 788, 341 S.E.2d 307 (1986).

**Instruction on involuntary manslaughter unwarranted.** — In a trial for voluntary manslaughter, aggravated assault, and battery, it was not error to refuse to charge on the lesser included offense of involuntary manslaughter under O.C.G.A. § 16-5-3(a). Such a charge required an unlawful act that was not a felony, and the only such act supported by the evidence was the striking of the victim with a gun, which constituted the felony of aggravated assault under O.C.G.A. § 16-5-21. *Moon v. State*, 291 Ga. App. 499, 662 S.E.2d 283 (2008).

**Instruction on voluntary manslaughter unwarranted.** — Defendant, convicted of felony murder in the beating death of defendant's girlfriend's 17-month-old daughter, was not entitled to a jury charge on voluntary manslaughter under O.C.G.A. § 16-5-2(a) because the defendant denied inflicting any injury on the child, much less the fatal harm. *Bowie v. State*, 286 Ga. 880, 692 S.E.2d 371 (2010).

**When killing is either murder or justifiable homicide**, voluntary manslaughter should not be charged. *McDaniel v. State*, 209 Ga. 827, 76 S.E.2d 500 (1953).

When evidence of state would demand finding that homicide constituted murder, and evidence of defendant would demand finding that it constituted justifiable homicide, it is error for trial court to charge on subject of voluntary manslaughter. *Landers v. State*, 87 Ga. App. 446, 74 S.E.2d 383 (1953).

Trial court properly granted the state's requested charge on revenge for a past wrong based on the contention that defendant was motivated to shoot the victim as a result of the earlier altercations with the victim, and that such a shooting would lack justification and constitute murder; no harm resulted from the charge since the jury found defendant guilty of the lesser included offense of voluntary manslaughter, not murder. *Gonzales v. State*, 261 Ga. App. 366, 582 S.E.2d 524 (2003).

**Justifiable homicide need not be charged in immediate connection**

**Jury Charge (Cont'd)**

**with voluntary manslaughter.** — When law of voluntary manslaughter and law of justifiable homicide is involved, and instructions are given as to these legal rules, it is not error to fail to charge law of justifiable homicide in immediate connection with charge on general law of voluntary manslaughter. *Fann v. State*, 195 Ga. 368, 23 S.E.2d 399 (1942).

**Failure to charge jury on justification and duty to retreat.** — Defendant's convictions for voluntary manslaughter, aggravated assault, and two related counts of possession of a firearm in the commission of a crime required reversal because the trial court erred by not charging the jury on the principle of no duty to retreat since the defense of justification was raised by the evidence, via defendant's testimony that the victim tried to stab defendant, and the state placed the issue of retreat before the jury. As a result of defendant making out a *prima facie* case of justification, the trial court erred by concluding otherwise. *Lewis v. State*, 292 Ga. App. 257, 663 S.E.2d 721 (2008), cert. denied, No. S08C1869, 2008 Ga. LEXIS 885 (Ga. 2008).

**Cooling off period.** — In defendant's trial for felony murder in relation to the stabbing death of the victim during an altercation, the trial court adequately instructed the jury on "cooling time" in connection with its charge on voluntary manslaughter where it instructed the jury that the killing could be attributed to murder if there was an interval between the provocation and the killing "sufficient for the voice of reason and humanity to be heard"; the trial court was not required to charge the precise language of defendant's request as long as the charge that was given adequately covered the legal principle in question. *Salyers v. State*, 276 Ga. 568, 580 S.E.2d 240 (2003).

**Conviction of voluntary manslaughter constitutes acquittal of murder.** — When one is charged with murder, in which malice must exist express or implied, but is convicted of voluntary manslaughter, in which malice is not an element, an erroneous charge on the question of malice is *prima facie* harmless

to the accused and a new trial will not be granted therefor unless it is plainly shown that the erroneous charge wrongfully led to or influenced the verdict rendered. *Jones v. State*, 52 Ga. App. 83, 182 S.E. 527 (1935).

Refusal to charge upon principle of law which is solely applicable to crime of murder cannot be ground for reversing judgment where conviction is of voluntary manslaughter, which is tantamount to an acquittal of charge of murder. *Goldsmit v. State*, 54 Ga. App. 268, 187 S.E. 694 (1936).

Having been indicted for murder and convicted of voluntary manslaughter, verdict was an acquittal of charge of murder and defendant cannot complain of alleged errors in court's instructions upon law of murder. *Cook v. State*, 56 Ga. App. 375, 192 S.E. 631 (1937).

**Lack of proper jury instruction resulted in improper conviction.** — When the original indictment charged the defendant with murder and with possessing a firearm during the commission of that murder, but the jury found defendant guilty of the lesser included offense of voluntary manslaughter, defendant was improperly convicted of possession of a firearm during the commission of a crime, as there was no instruction identifying voluntary manslaughter as a felony. *Prather v. State*, 259 Ga. App. 441, 576 S.E.2d 904 (2003).

**It is not error to charge entire section** even though part of the section may be inapplicable. *Morrison v. State*, 147 Ga. App. 410, 249 S.E.2d 131 (1978).

**Evidence of good character alone** does not require charge on voluntary manslaughter in murder case, although good character may of itself constitute a defense in behalf of an accused so as to generate reasonable doubt of guilt. *Swett v. State*, 242 Ga. 228, 248 S.E.2d 629 (1978).

**Unwarranted charge on manslaughter not ground for new trial unless evidence authorizes acquittal.** *Linder v. State*, 132 Ga. App. 624, 208 S.E.2d 630 (1974), overruled on other grounds, *Woodard v. State*, 234 Ga. 901, 218 S.E.2d 629 (1975).

**New trial cannot be for offense greater than convicted offense.** — If,

in trial for murder, evidence does not involve voluntary manslaughter, but trial judge instructs on voluntary manslaughter and jury convicts on voluntary manslaughter, it is not cause for new trial if evidence demanded verdict of murder. If there is evidence, however, which would authorize acquittal, defendant is entitled to a new trial but only for offense of degree or lesser than that for which defendant stands convicted. *Varnum v. State*, 125 Ga. App. 57, 186 S.E.2d 485 (1971).

**Voluntary manslaughter instruction unwarranted.** — When there is no evidence of appellant being in heat of passion, and there is evidence of self-defense which would authorize acquittal, it is reversible error to instruct jury in murder trial on law of voluntary manslaughter. *Parham v. State*, 135 Ga. App. 315, 217 S.E.2d 493 (1975).

**Court should charge regarding both murder and voluntary manslaughter where doubt exists.** — On trial of murder case, if there is any evidence, however slight as to whether offense is murder or voluntary manslaughter, instruction as to law of both offenses should be given to jury. *Henderson v. State*, 234 Ga. 827, 218 S.E.2d 612 (1975); *Birdsong v. State*, 140 Ga. App. 719, 231 S.E.2d 813 (1976); *Cochran v. State*, 146 Ga. App. 414, 246 S.E.2d 431 (1978); *Swett v. State*, 242 Ga. 228, 248 S.E.2d 629 (1978); *Powell v. State*, 154 Ga. App. 674, 270 S.E.2d 6 (1980); *Raines v. State*, 247 Ga. 504, 277 S.E.2d 47 (1981); *Tew v. State*, 179 Ga. App. 369, 346 S.E.2d 833 (1986); *Coleman v. State*, 256 Ga. 306, 348 S.E.2d 632 (1986); *Wright v. State*, 182 Ga. App. 570, 356 S.E.2d 531 (1987).

**Charging both murder and manslaughter.** — Since the defendant was convicted of voluntary manslaughter, error in charge of an essential element of murder was harmless. *Reid v. Green*, 549 F. Supp. 418 (N.D. Ga. 1982).

Jury was properly charged that the jury could not find the defendant guilty of felony murder if the jury concluded the underlying felony of aggravated assault was the result of passion and provocation, but it would be authorized to find the defendant guilty of voluntary manslaughter. *Williams v. State*, 279 Ga. 154, 611 S.E.2d 19 (2005).

**Charging that provocation by words alone will not excuse a person from the crime of murder** did not confuse jury and was not improper, since the crime of murder is by statute part of the explanation of what constitutes voluntary manslaughter, where the court clearly explained that defendant was not charged with murder and gave a separate instruction on self-defense. *Syms v. State*, 175 Ga. App. 179, 332 S.E.2d 689 (1985).

**Charging that homicidal act was "uncivilized" and constituted "murder."** — Jury charge on murder which incorporated language of a judicial decision to the effect that killing to prevent adultery "is uncivilized—this is murder" would have been harmful error only had jury been led thereby to believe that adultery could not be a factor in reducing the offense to voluntary manslaughter, which was the eventual verdict. *Gibbs v. State*, 174 Ga. App. 19, 329 S.E.2d 224 (1985).

**Charge on physical disparity of defendant and victim properly refused.** — Trial court did not err in refusing to charge, as requested, on the physical disparity between the victim and the defendant as physical disparity would not generally be relevant when a defendant relies upon a defense of accident, and when self-defense was not placed in issue. *Tew v. State*, 179 Ga. App. 369, 346 S.E.2d 833 (1986).

**Battered person syndrome.** — Because evidence established that defendant suffered from battered person syndrome, she was entitled to a requested instruction to explain to the jury the relevancy of such evidence as it related to the reasonableness of her belief that the use of deadly force was immediately necessary to defend herself against her husband's imminent use of unlawful force, and failure to give the instruction was reversible error. *Smith v. State*, 268 Ga. 196, 486 S.E.2d 819 (1997), reversing *Smith v. State*, 222 Ga. App. 412, 474 S.E.2d 291 (1996).

**Erroneous charge on murder is harmless where jury does not find murder.** — Even if it was error to explain "murder" for jury's better understanding when defendant was indicted only for voluntary manslaughter, it was harmless,

**Jury Charge (Cont'd)**

since jury did not find murder. McMillan v. State, 157 Ga. App. 694, 278 S.E.2d 478 (1981).

**Instructions as to malice murder and felony murder.** — It is permissible for the court to instruct the jury that it might consider voluntary manslaughter if it did not believe that the defendant was guilty of malice murder and if it did not believe that defendant was guilty of felony murder. This is not a "sequential" charge of the type disallowed by the holding in Edge v. State, 261 Ga. 865, 414 S.E.2d 463 (1992). Shaw v. State, 263 Ga. 88, 428 S.E.2d 566 (1993).

In a prosecution for malice murder, felony murder, and aggravated assault, although no error resulted from the trial court's issuance of a sequential jury charge, because the jury found in the defendant's favor on the defense of justification as to the malice murder count, the finding also applied to the felony murder charge. Thus, the trial court erred in finding the defendant guilty of both felony murder and the underlying felony of aggravated assault. Turner v. State, 283 Ga. 17, 655 S.E.2d 589 (2008).

**Defendant could not challenge murder conviction where jury charge also included voluntary manslaughter.** — When the defendant requested a charge on voluntary manslaughter and when any rational trier of fact could have found the defendant guilty of murder beyond a reasonable doubt, the defendant could not successfully contend that evidence did not support the defendant's conviction, inasmuch as the defendant affirmatively offered the alternative theory of voluntary manslaughter to the jury. Speights v. State, 163 Ga. App. 738, 294 S.E.2d 650 (1982).

**Spouse's confession of adultery is insufficient to authorize charge on voluntary manslaughter.** — When the wife had been suspected by her husband of infidelity, and stated to him she had been guilty of adultery, and expressed an intention to see her paramour again, and if thereupon her husband seized a gun and killed her, such facts are not sufficient to authorize submission to jury of theory

of voluntary manslaughter, though charge on that subject was requested. Humphreys v. State, 175 Ga. 705, 165 S.E. 733 (1932).

**Commission of homicide to prevent nonfelonious assault upon self.** — Facts and circumstances surrounding accused at time of homicide such as would excite fears of a reasonable man that some bodily harm, less than a felony, was imminent and impending, do not establish defense to voluntary manslaughter; but, on contrary, tend to establish fact that offense committed was voluntary manslaughter. Gresham v. State, 70 Ga. App. 80, 27 S.E.2d 463 (1943).

**Harmless error.** — Defendant's conviction of voluntary manslaughter in violation of O.C.G.A. § 16-5-2 was proper; although the trial court erred in instructing the jury that it could infer the intent to kill from the use of a deadly weapon, the evidence of malice in the instant case was not weak and it was highly probable that the error the trial judge committed in charging the jury did not contribute to the judgment, and therefore the error was harmless. Shirley v. State, 259 Ga. App. 503, 578 S.E.2d 163 (2003).

Since the defendant was convicted of malice murder, any error in charging the jury to consider voluntary manslaughter only after finding a reasonable doubt as to the existence of malice murder was harmless. Williams v. State, 279 Ga. 154, 611 S.E.2d 19 (2005).

**Sequential charge held reversible error.** — Because trial court's recharge improperly emphasized malice murder and felony murder, preventing the jury from giving full consideration to voluntary manslaughter, this amounted to reversible error; thus, defendant's felony murder conviction had to be reversed. Lewis v. State, 283 Ga. 191, 657 S.E.2d 854 (2008).

**Application of forcible felony instruction.** — On appeal from a conviction for voluntary manslaughter as a lesser-included offense of malice murder, the appeals court found that no error or prejudice resulted from the trial court's denial of the defendant's request for an aggravated battery charge as a forcible felony in support of the defendant's justification claim, and affirmed the trial

court's choice to charge on aggravated assault and rape, as the defendant failed to present evidence of any reasonable belief that the use of force was necessary to prevent the commission of an aggravated battery. Wicker v. State, 285 Ga. App. 294, 645 S.E.2d 712 (2007).

**Charge should cover mutual combat where supported by any facts or circumstances.** Harris v. State, 184 Ga. 382, 191 S.E. 439 (1937).

**Failure to charge regarding mutual combat where warranted by testimony.** — When there is testimony as to facts and circumstances tending to show mutual combat, or mutual intention to fight, the court should charge law of voluntary manslaughter as related to mutual combat. A failure so to charge will require the grant of the new trial. Cotton v. State, 201 Ga. 285, 39 S.E.2d 530 (1946).

**Defendant's claim of error in mutual combat charge was rejected,** as the charge redounded to the defendant's advantage as the charge enabled the jury to find a criminal defendant guilty of voluntary manslaughter in lieu of murder. Hall v. State, 273 Ga. App. 203, 614 S.E.2d 844 (2005).

**Charge on mutual combat improper when sole defense was self-defense.** — When evidence supports defense that accused shot in self-defense, under fears of a reasonable man, but does not support theory of voluntary manslaughter as related to mutual combat, and defense is based largely, if not exclusively, upon principle of killing under fears of a reasonable man, charge on law of mutual combat would be reversible error. Dudley v. State, 67 Ga. App. 256, 19 S.E.2d 833 (1942).

**Distinction between mutual combat and self-defense.** — Essential ingredient, mutual intent, in order to constitute mutual combat, must be a willingness, readiness, and intention upon part of both parties to fight. Reluctance, or fighting to repel unprovoked attack, is self-defense, and is authorized by law, and should not be confused with mutual combat. Odom v. State, 106 Ga. App. 60, 126 S.E.2d 472 (1962).

**No error in failing to charge on mutual combat.** — When a murder defendant specifically requested the trial court not to charge the jury on voluntary manslaughter, the defendant could not be heard to complain on appeal that the trial court erred by failing to charge on mutual combat. Savior v. State, 284 Ga. 488, 668 S.E.2d 695 (2008).

**Charge requested by defendant properly given.** — When a defendant was charged with felony murder, the trial court properly gave a charge on voluntary manslaughter under O.C.G.A. § 16-5-2(a); the defendant had requested the charge, and the evidence supported the charge in that the evidence supported a finding that the defendant shot the victim in a fit of jealousy stemming from the defendant's romantic relationship with the victim's friend. Hayles v. State, 287 Ga. App. 601, 651 S.E.2d 860 (2007).

**Failure to charge jury on accident.** — Defendant's convictions for voluntary manslaughter, aggravated assault, and possession of a knife during the commission of a felony were reversed because the trial court erred in failing to charge the jury on the defense of accident as requested when that defense was raised by the evidence, and the Court of Appeals could not find that it was highly probable that the failure to give the requested charge did not contribute to the verdict; at least slight evidence supported the theory that the defendant armed oneself with a knife in order to fend off the victim's attack with a pipe wrench and that although the defendant was prepared to intentionally stab the victim in self-defense, the defendant did not do so, but the victim lunged at the defendant and impaled oneself on the knife. Hill v. State, 300 Ga. App. 210, 684 S.E.2d 356 (2009).

**Failure to sua sponte charge self-defense and justification not error.** — Failure to sua sponte charge self-defense and justification was not error because the evidence established that the defendant shot the victim repeatedly after initially wounding the victim and while the victim begged for the victim's life. Cantera v. State, 304 Ga. App. 289,

**Jury Charge (Cont'd)**

696 S.E.2d 354 (2010).

**Application**

**Mere words, however vile, will not justify taking of human life.** Vun Cannon v. State, 208 Ga. 608, 68 S.E.2d 586 (1952).

**Mere words will not authorize use of deadly weapon, nor reduce murder to voluntary manslaughter.** Brown v. State, 175 Ga. 329, 165 S.E. 252 (1932).

Words, threats, menaces or contemptuous gestures of themselves will not reduce homicide from murder to manslaughter. Hawkins v. State, 25 Ga. 207, 71 Am. Dec. 166 (1858); Ross v. State, 59 Ga. 248 (1877); Robinson v. State, 118 Ga. 198, 44 S.E. 985 (1903); Bird v. State, 128 Ga. 253, 57 S.E. 320 (1907); Slocumb v. State, 157 Ga. 131, 121 S.E. 116 (1923); Cotton v. State, 201 Ga. 285, 39 S.E.2d 530 (1946); Yearwood v. State, 201 Ga. 247, 39 S.E.2d 684 (1946); Vun Cannon v. State, 208 Ga. 608, 68 S.E.2d 586 (1952).

**That killing is done in passion is not sufficient to make offense voluntary manslaughter; existence of passion must be justified.** Allen v. State, 187 Ga. 178, 200 S.E. 109 (1938).

When the killing was not the result of sudden and irresistible passion, but rather was attributable to a deliberate act of aggression committed after a sufficient "cooling off" period, the jury was authorized to convict defendant of murder. Walden v. State, 268 Ga. 440, 491 S.E.2d 64 (1997).

**Simply proving that accused was drunk, and killed another in passion, cannot reduce murder to manslaughter.** Allen v. State, 187 Ga. 178, 200 S.E. 109 (1938).

**Passion enough for voluntary manslaughter.** — To be entitled to a charge on voluntary manslaughter under O.C.G.A. § 16-5-2 the evidence had to support the jury's finding that defendant was so influenced and excited that defendant reacted passionately in killing the victim. Oliver v. State, 274 Ga. 539, 554 S.E.2d 474 (2001).

**Whether homicide was done with or without malice depends upon**

**weapon used.** Smith v. State, 73 Ga. 31 (1884).

**Intent to kill presumed where defendant stabbed deceased in neck with pocketknife.** — While there can be neither murder nor voluntary manslaughter without intent to kill, where weapon used was a pocketknife, and defendant stabbed deceased in neck with it, intent to kill may be presumed. Wims v. State, 60 Ga. App. 551, 4 S.E.2d 418 (1939).

**Under indictment for murder, jury may find prisoner guilty of lesser offense of manslaughter, either voluntary or involuntary, and verdict will be legal, although there is no count for manslaughter in indictment.** Perry v. State, 78 Ga. App. 273, 50 S.E.2d 709 (1948).

**Commission of homicide to avoid unlawful arrest constitutes manslaughter.** — Generally, to slay a person who without authority of law seeks to make an arrest for a misdemeanor, when motive of slayer is merely to avoid arrest, constitutes manslaughter and not murder. Plemmons v. State, 43 Ga. App. 344, 158 S.E. 630 (1931).

An illegal arrest is in law an assault by arresting officer upon person arrested, and constitutes legal justification for employment by person arrested of force sufficient in amount to avoid arrest and repel assault. If force employed in resisting such illegal arrest is in excess of that necessary, accused is accountable under the law for the excess; and if death results therefrom, the accused is guilty of manslaughter, unless there was an interval between officer's assault and application of excessive force which caused death sufficient for voice of reason and humanity to be heard, of which jury in all cases shall be the judges, in which latter case the killing shall be attributed to deliberate revenge, and be punished as murder. Napier v. State, 200 Ga. 626, 38 S.E.2d 269 (1946).

**Commission of homicide to prevent nonfelonious assault upon self.** — If circumstances were such as to excite fear of a reasonable man that a nonfelonious assault was being made on that person, offense would be manslaughter. Johnson v. State, 72 Ga. 679 (1884).

Facts and circumstances surrounding accused at time of homicide such as would

excite fears of a reasonable man that some bodily harm, less than a felony, was imminent and impending, do not establish defense to voluntary manslaughter; but, on contrary, tend to establish fact that offense committed was voluntary manslaughter. *Gresham v. State*, 70 Ga. App. 80, 27 S.E.2d 463 (1943).

If facts and circumstances at time accused killed deceased were such only as would excite fears of a reasonable man that some bodily harm, less than a felony, was imminent and impending, offense would be voluntary manslaughter. *Henry v. State*, 76 Ga. App. 139, 45 S.E.2d 230 (1947).

If one kills another under fears of reasonable man that deceased was manifestly intending to commit personal injury upon that person, amounting to felony, killing is justifiable homicide; if prisoner is under similar fears of some injury less than a felony, offense is manslaughter, and not murder. *McDaniel v. State*, 209 Ga. 827, 76 S.E.2d 500 (1953).

**Admission of adultery coupled with conduct**, or conduct alone may reduce homicide to manslaughter. *Campbell v. State*, 204 Ga. 399, 49 S.E.2d 867 (1948).

**Admission of adulterous conduct, without more**, will not reduce homicide to manslaughter. *Campbell v. State*, 204 Ga. 399, 49 S.E.2d 867 (1948).

**Admission of prejudicial hearsay testimony held harmless error.** — Because the trial court's admission of prejudicial hearsay testimony regarding the victim's ministry ordination certificates was harmless error, given the overwhelming evidence of the defendant's guilt, a voluntary manslaughter conviction, as a lesser-included offense of murder, was upheld on appeal. *Smith v. State*, 283 Ga. App. 722, 642 S.E.2d 399 (2007).

**Refusal to give charge on provocation caused by the victim's adulterous conduct** was not error because defendant and the victim were not married and, in order to prove adultery, a marriage must be shown. *Somchith v. State*, 272 Ga. 261, 527 S.E.2d 546 (2000).

**Circumstantial evidence.** — When the testimony was that the defendant fired the fatal shot after an argument with the man with whom the defendant was

living, even assuming that the verdict of guilty of voluntary manslaughter was based solely on circumstantial evidence, the jury was authorized by the evidence presented to exclude other possible hypotheses as unreasonable. *Johnson v. State*, 236 Ga. App. 61, 510 S.E.2d 918 (1999), overruled on other grounds by *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

**Jury entitled to consider facts tending to establish voluntary manslaughter.** — In prosecution for murder it is the right of the jury to consider all of facts and circumstances, including those brought out solely in defendant's statement, in determining whether there would have been sufficient justification for excitement of passion as to reduce crime to voluntary manslaughter. *Jackson v. State*, 192 Ga. 373, 15 S.E.2d 484 (1941).

**Questions of witness credibility are for the jury to decide.** — Whether defendant shot the victim with malice aforethought, out of passion, or out of justification in self-defense depended heavily on the credibility of the witnesses and decisions regarding credibility are exclusively for the jury. *Lee v. State*, 202 Ga. App. 708, 415 S.E.2d 290, cert. denied, 202 Ga. App. 906, 415 S.E.2d 290 (1992).

**Verdict of voluntary manslaughter authorized if supported.** — Whenever in trial of one charged with murder there is any evidence, or anything in defendant's statement to jury, tending to show that homicide is voluntary manslaughter, a verdict finding defendant guilty of that offense is authorized. *Plemons v. State*, 43 Ga. App. 344, 158 S.E. 630 (1931).

On trial of one indicted for murder, verdict finding accused guilty of voluntary manslaughter is authorized where, from evidence or from defendant's statement to jury, there is anything deducible which would tend to show that defendant was guilty of voluntary manslaughter, or which would be sufficient to raise doubt as to whether homicide was murder or voluntary manslaughter. *Cobb v. State*, 60 Ga. App. 194, 3 S.E.2d 212 (1939); *Jones v. State*, 71 Ga. App. 56, 30 S.E.2d 284 (1944); *Culverson v. State*, 73 Ga. App. 93, 35 S.E.2d 583 (1945).

Testimony of a witness that the defen-

**Application (Cont'd)**

dant picked up a cinder block and threw it at the victim who was talking, but not fighting, with the defendant's parent, along with evidence that the victim died as a result of the block hitting the victim in the head was sufficient to support conviction of voluntary manslaughter. Smith v. State, 261 Ga. App. 781, 584 S.E.2d 29 (2003).

There was sufficient credible evidence to support a jury's verdict finding the defendant guilty of committing voluntary manslaughter and aggravated assault in violation of O.C.G.A. §§ 16-5-2 and 16-5-21, respectively, because there was testimony from three surviving witnesses that the defendant shot at their car as they drove by, killing one of the occupants; there was further testimony that the parties had a history of disputes between themselves, that the victim's sibling had fired a shot at the defendant earlier in the day, and the defendant's claim that the defendant thought that as the car drove by, the victim was reaching for a gun, was not found credible. Mullins v. State, 270 Ga. App. 271, 605 S.E.2d 913 (2004).

Evidence supported the defendant's conviction for aggravated assault and voluntary manslaughter because: (1) the defendant and the victim had threatened to kill each other; (2) the victim died from a gunshot wound inflicted when the victim "stepped in" to a fight between the defendant and another person; (3) the victim did not have a gun or own a gun; and (4) the fatal head wound was inflicted from at least two-and-a-half to three feet away and rendered the victim unconscious. Hall v. State, 273 Ga. App. 203, 614 S.E.2d 844 (2005).

Evidence supported a defendant's conviction for voluntary manslaughter as: (1) the defendant, who was worried that the victim might cause trouble, got out a gun and set the gun in the bathroom stall; (2) when the victim returned, the defendant told the victim to leave; (3) eventually, the defendant told the victim to go away or the defendant would shoot the victim; (4) the defendant then got the gun, and when the victim opened the door and began to enter, the defendant shot the victim in the

stomach; and (5) the victim fell to the ground, and the defendant shot the victim two more times; the jury was free to reject the defendant's claim that the defendant was merely protecting the defendant from the victim and that the use of deadly force was authorized. Lott v. State, 281 Ga. App. 373, 636 S.E.2d 102 (2006).

**Voluntary manslaughter conviction valid despite jurors knowledge that victim was minister.** — Defendant's conviction of the lesser charge of voluntary manslaughter, rather than murder and felony murder, strongly supported the appellate court's conclusion that the jury was not unduly prejudiced by knowledge that the victim was a minister. Smith v. State, 283 Ga. App. 722, 642 S.E.2d 399 (2007).

**Verdict of guilty of manslaughter means voluntary manslaughter.** — When upon trial on indictment for offense of murder, jury returns verdict of manslaughter, legal effect of such verdict is to find defendant guilty of highest grade of manslaughter, *to-wit*: voluntary manslaughter. Welch v. State, 50 Ga. 128, 15 Am. R. 690 (1873).

**Verdict of voluntary manslaughter in murder trial is tantamount to acquittal of charge of murder.** Cribb v. State, 71 Ga. App. 539, 31 S.E.2d 248 (1944).

**Mutual combat.** — When participants engage with mutual intention to fight, offense may be voluntary manslaughter as related to mutual combat. If evidence authorizes inference that killing occurred in such circumstances, it is the duty of the judge, even without request, to give in charge the law of voluntary manslaughter as related to mutual combat. Hewitt v. State, 127 Ga. App. 180, 193 S.E.2d 47 (1972).

The "sudden, violent and irresistible passion" referred to in statute is often discussed as a theory of mutual combat in situations involving physical confrontations between defendant and deceased. The essential ingredient, mutual intent, in order to constitute mutual combat, must be a willingness, readiness, and intention by both parties to fight. Williams v. State, 232 Ga. 203, 206 S.E.2d 37 (1974), overruled on other grounds, Jack-

son v. State, 239 Ga. 40, 235 S.E.2d 477 (1977).

**Killing adulterous spouse or illicit lover.** — Spouse is never justified in taking life of adulterous spouse or illicit lover. This is murder and an instruction on justifiable homicide may not be given. Such homicides stand on the same footing as any other homicides. However, peculiar facts of given case may suggest passion and provocation within meaning of the voluntary manslaughter statute. Burger v. State, 238 Ga. 171, 231 S.E.2d 769 (1977); Gibbs v. State, 174 Ga. App. 19, 329 S.E.2d 224 (1985).

**Intentionally shooting towards another.** — Notion that when one intentionally fires a gun at another and kills the other, defendant's contention that defendant did not aim at victim and did not intend to kill, or to shoot the victim, makes killing involuntary manslaughter is rejected. McMillan v. State, 157 Ga. App. 694, 278 S.E.2d 478 (1981).

**Defendant's assertion that defendant did not appreciate or remember what defendant did.** — Defendant's contention that defendant did not appreciate what defendant was doing and does not remember doing it does not exonerate the act when evidence shows the defendant intentionally fired a gun at or towards defendant's spouse. McMillan v. State, 157 Ga. App. 694, 278 S.E.2d 478 (1981).

**When the entire thrust of defendant's defense was that of accident** and defendant testified that defendant did not want to fight, defendant's claim that defendant was engaged in mutual combat was rejected. Gladson v. State, 253 Ga. 489, 322 S.E.2d 45 (1984).

**Manslaughter does not invoke felony-murder rule.** — Voluntary manslaughter, and felony of involuntary manslaughter where it applies, are not themselves felonies which will invoke felony murder rule as to death of main victim. Therefore, if a jury finds felonious manslaughter, they should not go on to reason that this offense, being itself a felony, turns the killing into a felony murder. The jury should be instructed in accordance with this principle. Malone v. State, 238 Ga. 251, 232 S.E.2d 907 (1977).

**Voluntary manslaughter is lesser included offense of felony murder.** Young v. State, 141 Ga. App. 261, 233 S.E.2d 221 (1977).

With respect to jury instructions, voluntary manslaughter is a lesser included offense of felony murder under former Code 1933, §§ 26-1101 and 26-505 because an act done in passion involves a less culpable mental state than the state of real or imputed malice which is the foundation of the felony murder rule. Therefore, where facts warrant it, a charge on voluntary manslaughter may indeed be given in a felony-murder trial. Malone v. State, 238 Ga. 251, 232 S.E.2d 907 (1977) (see O.C.G.A. §§ 16-1-6 and 16-5-1(c)).

Defendant's conviction of voluntary manslaughter under O.C.G.A. § 16-5-2 was improper as the defendant was also convicted of felony murder under O.C.G.A. § 16-5-1(c) for the same transaction, and this would have subjected the defendant to multiple convictions and punishments for one crime, which would have placed the defendant in double jeopardy in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XVIII and U.S. Const., amend. 5. Lawson v. State, 280 Ga. 881, 635 S.E.2d 134 (2006).

Defendant's conviction of voluntary manslaughter under O.C.G.A. § 16-5-2 did not require reversal of the defendant's conviction of felony murder under O.C.G.A. § 16-5-1(c) when the underlying felony was possession of a firearm by a convicted felon, as those offenses did not merge. Lawson v. State, 280 Ga. 881, 635 S.E.2d 134 (2006).

**Burglary and voluntary manslaughter are not included within each other** within the meaning of the former Code 1933, § 26-1601. Oglesby v. State, 243 Ga. 690, 256 S.E.2d 371 (1979) (see O.C.G.A. § 16-1-7(a)(1)).

**Finding defendant guilty of manslaughter has legal effect** of finding accused guilty of voluntary manslaughter. Demps v. State, 140 Ga. App. 90, 230 S.E.2d 97 (1976).

**Denial of defendant's motion for directed verdict of acquittal not error** where there was evidence from which the jury could determine that defendant,

**Application (Cont'd)**

while acting in the heat of passion, shot and killed a woman. *Chancellor v. State*, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

**Evidence sufficient for voluntary manslaughter conviction.** — See *Miller v. State*, 166 Ga. App. 639, 305 S.E.2d 172 (1983); *Rogers v. State*, 251 Ga. 408, 306 S.E.2d 652 (1983); *Shackelford v. State*, 172 Ga. App. 577, 323 S.E.2d 874 (1984); *King v. State*, 177 Ga. App. 788, 341 S.E.2d 307 (1986); *Luther v. State*, 255 Ga. 706, 342 S.E.2d 316 (1986); *Trenor v. State*, 178 Ga. App. 351, 343 S.E.2d 408 (1986); *Tew v. State*, 179 Ga. App. 369, 346 S.E.2d 833 (1986); *Mims v. State*, 180 Ga. App. 3, 348 S.E.2d 498 (1986); *Thompkins v. State*, 180 Ga. App. 473, 349 S.E.2d 768 (1986); *Hardeman v. State*, 180 Ga. App. 632, 349 S.E.2d 839 (1986); *Wright v. State*, 182 Ga. App. 580, 356 S.E.2d 681 (1987); *Yarborough v. State*, 183 Ga. App. 198, 358 S.E.2d 484 (1987); *Beal v. State*, 186 Ga. App. 806, 368 S.E.2d 567 (1988); *Jackson v. State*, 186 Ga. App. 847, 368 S.E.2d 771 (1988); *Swailes v. State*, 188 Ga. App. 553, 373 S.E.2d 825 (1988); *Gerald v. State*, 189 Ga. App. 155, 375 S.E.2d 134 (1988); *Thomas v. State*, 189 Ga. App. 774, 377 S.E.2d 539 (1989); *Watkins v. State*, 191 Ga. App. 325, 382 S.E.2d 107, cert. denied, 191 Ga. App. 923, 382 S.E.2d 107 (1989); *Nelson v. State*, 213 Ga. App. 641, 445 S.E.2d 543 (1994); *Miller v. State*, 223 Ga. App. 311, 477 S.E.2d 430 (1996); *Brown v. State*, 225 Ga. App. 218, 483 S.E.2d 633 (1997); *Young v. State*, 229 Ga. App. 497, 494 S.E.2d 226 (1997); *Johnson v. State*, 229 Ga. App. 586, 494 S.E.2d 382 (1997); *Smith v. State*, 231 Ga. App. 677, 499 S.E.2d 663 (1998); *Goforth v. State*, 271 Ga. 700, 523 S.E.2d 868 (1999); *McGuire v. State*, 243 Ga. App. 899, 534 S.E.2d 549 (2000); *Williams v. State*, 245 Ga. App. 670, 538 S.E.2d 544 (2000); *Leggon v. State*, 249 Ga. App. 467, 549 S.E.2d 137 (2001).

Evidence was sufficient to warrant a charge on voluntary manslaughter where eyewitness testimony showed that deceased had beaten defendant to the point where defendant twice begged for defendant's life. In addition, although the fatal shooting occurred after deceased had re-

treated, it nonetheless occurred within seconds of the fight and was sufficiently within the nexus of the altercation that it cannot be concluded a reasonable "cooling off" period had occurred. *Woody v. State*, 262 Ga. 327, 418 S.E.2d 35 (1992).

Evidence that armed defendant stood ground to engage in mutual combat supported defendant's conviction for voluntary manslaughter as a party to the crime where the actual homicide resulted when a shot fired by someone other than defendant strayed and killed a bystander. *Coker v. State*, 209 Ga. App. 142, 433 S.E.2d 637 (1993).

Evidence that defendant argued with the victim and followed the victim from the bar, that the victim's body was found near the bar, that defendant owned knives whose dimensions were consistent with the fatal stab wound, and that the victim's blood was found on defendant's clothes was sufficient to convict defendant of voluntary manslaughter. *Barrera-Palamin v. State*, 250 Ga. App. 580, 551 S.E.2d 76 (2001).

Evidence was sufficient to support defendant's conviction for voluntary manslaughter, a violation of O.C.G.A. § 16-5-2(a), where defendant and the victim argued, the victim moved toward defendant and motioned as if the victim was going to throw a can of ravioli, and defendant then shot the victim in the neck; the jury was not required to believe defendant's self-serving testimony that the gun discharged accidentally. *Gibbs v. State*, 257 Ga. App. 38, 570 S.E.2d 360 (2002).

Evidence was sufficient to support voluntary manslaughter conviction after four witnesses testified: (1) defendant became angry when his brother approached him about mud defendant splattered on a truck his brother was going to drive; (2) defendant threatened his brother; and defendant shot his brother. Also the medical examiner testified that two gunshot wounds caused the brother's death, and that the bullets recovered from the body were of .22 to .25 caliber, defendant admitted firing his .22 caliber semi-automatic rifle while his brother was in the vicinity, defendant's rifle was not recovered after he admittedly disposed of it in the woods near his residence, and one of the wit-

nesses denied having fired first at defendant. *Lamar v. State*, 256 Ga. App. 567, 568 S.E.2d 837 (2002).

Evidence that the defendant loaded the defendant's gun, approached the victim as the defendant arrived home, and shot the victim after stating "bye, bye" was sufficient to sustain the defendant's conviction for voluntary manslaughter. *Carter v. State*, 265 Ga. App. 44, 593 S.E.2d 69 (2004).

Evidence supported the defendant's conviction for voluntary manslaughter as: (1) the victim assaulted the defendant, but turned away to leave the scene; (2) after the victim turned away, the defendant shot the victim in the back from two and one-half feet away; (3) the jury could reject the defendant's justification defense; (4) the defendant was identified as the assailant on the night of the shooting; and (5) the defendant admitted firing a gun at the victim. *Nelloms v. State*, 273 Ga. App. 448, 615 S.E.2d 153 (2005).

Sufficient evidence supported the defendant's conviction for voluntary manslaughter; evidence that the victim's love interest pointed a rifle toward the defendant's vehicle, as well as that the victim earlier acted aggressively toward the co-defendants, could be considered sufficient provocation to excite the passion necessary for voluntary manslaughter. *Morris v. State*, 276 Ga. App. 775, 624 S.E.2d 281 (2005).

Evidence was sufficient to support a conviction for felony murder, voluntary manslaughter, and aggravated assault, as an eyewitness testified that the defendant was the only person to pull out a weapon in a confrontation at a nightclub, that the defendant fired a weapon at the victim, who had previously struck the defendant's love interest, and at two other victims who were attempting to leave. *Rodriguez v. State*, 274 Ga. App. 549, 618 S.E.2d 177 (2005).

Defendant's voluntary manslaughter conviction, as a lesser included offense of malice murder, was upheld on appeal, as: (1) the evidence presented supported an instruction on voluntary manslaughter; (2) the defendant waived any objection to the expert's testimony, and no inquiry into the number of jurisdictions recognizing

the scientific principles on which such testimony was based was required; (3) by denying the defendant a new trial, the trial court implicitly concluded that no agreement existed with the defendant's cell mate; (4) the alleged hearsay challenged was not hearsay because it did not rely mainly on the veracity and competency of other persons; (5) any issue as to the erroneous admission of the victim's bones into evidence was waived on appeal; and (6) the trial court properly instructed the jury as to venue, and the jury was authorized to find, that if it could not determine where the crime was committed, proper venue was Jones County, Georgia, because the evidence showed that the crime might have been committed there. *Glidewell v. State*, 279 Ga. App. 114, 630 S.E.2d 621 (2006), overruled on other grounds, *Reynolds v. State*, 285 Ga. 70, 673 S.E.2d 854 (2009).

Evidence was sufficient to find the defendant guilty of voluntary manslaughter in violation of O.C.G.A. § 16-5-2, felony murder predicated on possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-5-1, two counts of aggravated assault in violation of O.C.G.A. § 16-5-21, possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-11-131, and possession of a firearm during the commission of a felony murder in violation of O.C.G.A. § 16-11-106, as the defendant was angered by the victim's presence in the residence, the defendant assaulted the victim with a baseball bat and threatened to kill the victim if the victim did not leave the residence, and when the victim returned to the residence, the defendant fatally shot the victim in the stomach. *Lawson v. State*, 280 Ga. 881, 635 S.E.2d 134 (2006).

Because sufficient evidence was presented that the defendant was provoked by an attack on a sibling, and that the defendant had a history of abusive relationships with several men, the defendant's voluntary manslaughter conviction of the male victim was supported by the evidence; moreover, the jury was entitled to reject the defendant's self-defense claim given evidence that the defendant chased and stabbed the victim after the victim fell. *Breland v. State*, 285 Ga. App. 251, 648 S.E.2d 389 (2007).

**Application (Cont'd)**

When the defendant engaged in a five-minute gun battle in an occupied apartment complex, resulting in the victim's death after a bullet passed through a wall and struck the victim, the defendant was properly convicted of voluntary manslaughter as a lesser included offense of felony murder; the battle was clearly dangerous and life-threatening and connected to the homicide, and because Georgia has abolished the inconsistent verdict rule, the defendant's acquittal of aggravated assault charges did not require reversal. *Smith v. State*, 284 Ga. App. 845, 644 S.E.2d 913 (2007).

Evidence supported a conviction of voluntary manslaughter. The defendant received a call from defendant's cousin's friend, who said that the victim had sexually harassed the friend and stolen clothing and other items; the defendant shot the victim after seeing the victim wearing some of the friend's clothing and confronting the victim; an eyewitness identified the shooter as "Dee," the defendant's street name; the friend identified defendant as the shooter; a bullet found in the defendant's apartment matched the bullet removed from the victim's body; and that type of bullet had not been made since 1998 and was no longer available for purchase. *Smith v. State*, 291 Ga. App. 725, 662 S.E.2d 817 (2008).

Testimony of a defendant's child that the child saw the defendant stab the child's step-parent in the chest with a knife was sufficient to support the defendant's voluntary manslaughter conviction. *McKenzie v. State*, 294 Ga. App. 376, 670 S.E.2d 158 (2008).

Evidence did not support a conviction for involuntary manslaughter as opposed to voluntary manslaughter under O.C.G.A. § 16-5-2(a) because whether the defendant intended to kill the victim was a question for the jury and the evidence was sufficient to support a verdict of voluntary manslaughter based on the defendant's agitation when the victim would not return the defendant's money. *Hamilton v. State*, 297 Ga. App. 47, 676 S.E.2d 773 (2009).

Voluntary manslaughter conviction was

supported by sufficient evidence under circumstances in which the defendant shot the victim seven times; among other things, there was evidence of the defendant's threats, and a witness testified that the victim walked away from the defendant and sat down in a car, and that the defendant shot into the car. Based on the location of the bullet holes in the car and the shell casings in the street, a police sergeant testified that the investigation revealed that the shooter was either standing at the window firing down or that the driver's door was open when the shooting occurred. *Harris v. State*, 298 Ga. App. 708, 680 S.E.2d 693 (2009).

Evidence was sufficient to support the defendant's conviction of voluntary manslaughter as a lesser included offense of murder. After the defendant and the victim got into a fight, the victim assaulted the defendant and stole the defendant's watch; the defendant left the scene and returned with a hidden screwdriver; and when the victim hit the defendant with a stick and a rake, the defendant stabbed the victim with the screwdriver in the neck, then chased the victim until the victim collapsed and died. *Branford v. State*, 299 Ga. App. 890, 685 S.E.2d 731 (2009).

Rational trier of fact could have found beyond a reasonable doubt that the defendant committed voluntary manslaughter, O.C.G.A. § 16-5-2, possession of a firearm during the commission of a crime (voluntary manslaughter), O.C.G.A. § 16-11-106, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime (aggravated assault), O.C.G.A. § 16-11-106, because the defendant's explanation of the killing was inconsistent with and not explanatory of the other direct and circumstantial evidence, and, therefore, the jury was permitted to reject such explanation and convict on the remaining evidence; the defendant's son testified on direct that the defendant told the son that the defendant shot the victim once, that the victim ran, that the defendant pursued, and that although the victim begged for the victim's life, the defendant shot the victim again, and there also was forensic evidence indicating that the

defendant fired three more rounds into the victim's body. *Cantera v. State*, 304 Ga. App. 289, 696 S.E.2d 354 (2010).

**Adequate factual basis for guilty plea.** — Evidence that a defendant and the defendant's spouse had a violent relationship; that shortly before the spouse's death, the defendant told a witness the defendant was going to kill the spouse; that the defendant admitted being in the spouse's home on the day of the spouse's death; and that the defendant fled the state after the slaying, supported a finding under Ga. Unif. Super. Ct. R. 33.9 of an adequate factual basis for the defendant's Alford plea to the offense of voluntary manslaughter. *Tomlin v. State*, 295 Ga. App. 369, 671 S.E.2d 865 (2008).

**Sentence vacated and resentencing ordered** when the trial court erred by increasing a juvenile defendant's voluntary manslaughter sentence after the defendant had already begun serving the same, because the original sentence was final at the time it was imposed, and the defendant had no reason to believe otherwise; hence, the trial court's increased sentence constituted double jeopardy and could not stand. *Williams v. State*, 273 Ga. App. 42, 614 S.E.2d 146 (2005).

While the evidence presented at trial was sufficient to find the defendant guilty of the three felony murder counts, the same act resulted in commission of all three of the underlying felonies and caused the victim's death, and the same evidence used to prove those felonies was also used to prove voluntary manslaughter; hence, because each underlying felony was integral to the killing and, indeed, could be merged into the voluntary manslaughter, the felony murder convictions had to be reversed, and the case remanded for resentencing on the voluntary man-

slaughter count. *Sanders v. State*, 281 Ga. 36, 635 S.E.2d 772 (2006).

**Evidence sufficient for malice murder, not voluntary manslaughter.** — Despite the defendant's contention that a voluntary manslaughter verdict should have been returned, given that the victim invited a violent confrontation, eyewitness testimony which established that the defendant was driving recklessly before confronting the victim with a knife, which led to the fatal stabbing, supported a malice murder conviction. *Lonergan v. State*, 281 Ga. 637, 641 S.E.2d 792 (2007).

Sufficient evidence existed to support the defendant's conviction for malice murder as the jury was instructed on malice murder, felony murder, and voluntary manslaughter and the evidence was sufficient to enable a rational trier of fact to find that the defendant retrieved a pistol from the defendant's car and secreted the gun under the defendant's shirt; when the gun was pointed at the victim, the victim retreated, but the defendant shot the victim anyway; and when the victim was lying on the ground, the defendant walked to the victim and shot the victim until the pistol was empty. *Taylor v. State*, 282 Ga. 693, 653 S.E.2d 477 (2007).

Sufficient evidence supported the defendant's malice murder conviction. The jury was free to reject the defendant's claim that one of the victims fired the first shot, and evidence of a struggle between the defendant and one victim over control of a handgun did not require that there be a finding of voluntary manslaughter. As for intent, malice murder could be shown by evidence that the defendant acted when no considerable provocation appeared and when all the circumstances of the killing showed an abandoned and malignant heart. *Allen v. State*, 284 Ga. 310, 667 S.E.2d 54 (2008).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 40A Am. Jur. 2d, Homicide, § 48 et seq.

**C.J.S.** — 40 C.J.S., Homicide, § 108 et seq.

**ALR.** — Acquittal on charge as to one as bar to charge as to the other, where one

person is killed or assaulted by acts directed at another, 2 ALR 606.

Homicide by wanton or reckless use of firearm without express intent to inflict injury, 5 ALR 603; 23 ALR 1554.

Drunkenness as affecting existence of

elements essential to murder in second degree, 8 ALR 1052.

Homicide by unlawful act aimed at another, 18 ALR 917.

Homicide as affected by humanitarian motives, 25 ALR 1007.

Absence of evidence supporting charge of lesser degree of homicide as affecting duty of court to instruct as to, or right of jury to convict of, lesser degree, 102 ALR 1019.

Corpus delicti in prosecution for killing of newborn child, 159 ALR 523.

Test or criterion of term "culpable negligence," "criminal negligence," or "gross negligence," appearing in statute defining or governing manslaughter, 161 ALR 10.

Homicide: causing one, by threats or fright, to leap or fall to his death, 25 ALR2d 1186.

Who other than actor is liable for manslaughter, 95 ALR2d 175.

Homicide based on killing of unborn child, 40 ALR3d 444; 64 ALR5th 671.

Homicide predicated on improper treatment of disease or injury, 45 ALR3d 114.

Homicide by withholding food, clothing, or shelter, 61 ALR3d 1207.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 ALR3d 925.

Judicial abrogation of felony-murder doctrine, 13 ALR4th 1226.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense, 15 ALR4th 983.

Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter, 19 ALR4th 861.

Propriety of lesser-included-offense charge of voluntary manslaughter to jury in state murder prosecution — Twenty-first century cases, 3 ALR6th 543.

### 16-5-3. Involuntary manslaughter.

(a) A person commits the offense of involuntary manslaughter in the commission of an unlawful act when he causes the death of another human being without any intention to do so by the commission of an unlawful act other than a felony. A person who commits the offense of involuntary manslaughter in the commission of an unlawful act, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years.

(b) A person commits the offense of involuntary manslaughter in the commission of a lawful act in an unlawful manner when he causes the death of another human being without any intention to do so, by the commission of a lawful act in an unlawful manner likely to cause death or great bodily harm. A person who commits the offense of involuntary manslaughter in the commission of a lawful act in an unlawful manner, upon conviction thereof, shall be punished as for a misdemeanor. (Laws 1833, Cobb's 1851 Digest, p. 784; Code 1863, §§ 4224, 4225, 4226; Code 1868, §§ 4261, 4262, 4263; Code 1873, §§ 4327, 4328, 4329; Code 1882, §§ 4327, 4328, 4329; Penal Code 1895, §§ 67, 68, 69; Penal Code 1910, §§ 67, 68, 69; Code 1933, §§ 26-1009, 26-1010; Ga. L. 1951, p. 737, § 1; Code 1933, § 26-1103, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1984, p. 397, § 1.)

**Law reviews.** — For survey article on criminal law and procedure, see 34 Mercer

L. Rev. 89 (1982). For annual survey on criminal law and procedure, 42 Mercer L.

Rev. 141 (1990). For article, "New Challenges for the Georgia General Assembly: Survey of Child Endangerment Statutes," see 7 Ga. St. B.J. 8 (2001).

For note discussing the felony-murder rule, and proposing legislation to place limitations on Georgia's felony-murder statute, see 9 Ga. St. B.J. 462 (1973).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### INTENT

##### CAUSATION

##### UNLAWFUL ACT INVOLUNTARY MANSLAUGHTER

##### LAWFUL ACT — UNLAWFUL MANNER INVOLUNTARY MANSLAUGHTER

##### CRIMINAL NEGLIGENCE

##### INDICTMENT

##### JURY INSTRUCTIONS

##### INDICTMENT

##### APPLICATION GENERALLY

### General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1863, § 4222, former Code 1868, § 4258, former Code 1873, § 4327, former Code 1882, § 4327, former Penal Code 1895, §§ 65, 67, former Penal Code 1910, § 67, and former Code 1933, § 26-1009, as they read prior to revision of title by Ga. L. 1968, p. 1249, are included in the annotations for this Code section.

**Former Code 1933, § 26-1103 was not unconstitutional for classifying improperly.** State v. Edwards, 236 Ga. 104, 222 S.E.2d 385 (1976) (see O.C.G.A. § 16-5-3).

**First element of the corpus delicti** is that the person alleged to have been killed is actually dead. Vassy v. State, 166 Ga. App. 854, 305 S.E.2d 664 (1983).

**Involuntary manslaughter requires intent to do act from which death results,** but does not require intent to kill. Hardrick v. State, 96 Ga. App. 670, 101 S.E.2d 99 (1957) (decided under former Code 1933, § 26-1007).

**There can be no involuntary manslaughter where intention is to kill.** Jackson v. State, 69 Ga. App. 707, 26 S.E.2d 485 (1943) (decided under former Code 1933, § 26-1007).

**When one voluntarily shoots at another and the shot kills, the homicide cannot be involuntary;** and where, un-

der no rational view of the facts, the killing can be involuntary homicide, judge should not confuse jury by charge on law concerning that offense. Harris v. State, 55 Ga. App. 189, 189 S.E. 680 (1937) (decided under former Code 1933, § 26-1007).

**Everyone is presumed to intend natural, probable consequences of conduct,** particularly if unlawful and dangerous to safety and lives of others. Jackson v. State, 204 Ga. 47, 48 S.E.2d 864 (1984) (decided under former Code 1933, § 26-1007).

**Involuntary manslaughter is an unintentional homicide.** Coggins v. State, 227 Ga. 426, 181 S.E.2d 47 (1971).

**There are two types of involuntary manslaughter,** both involving death of another human being without any intention to do so; former Code 1933, § 26-1103 concerned itself with type of involuntary manslaughter which was applicable only to those cases wherein death results by commission of unlawful act other than a felony. Ruff v. State, 150 Ga. App. 238, 257 S.E.2d 203 (1979) (see O.C.G.A. § 16-5-3(a)).

**Involuntary manslaughter in the commission of a lawful act is a lesser included offense of involuntary manslaughter in the commission of a lawful act in an unlawful manner.** Maloof v. State, 139 Ga. App. 787, 229 S.E.2d 560 (1976).

**Mislabeled count.** — Trial court erred in entering judgment and imposing a sen-

**General Consideration (Cont'd)**

tence on an allegedly mislabeled count under the guise that the jury found the defendant guilty of homicide by vehicle in the first degree instead of involuntary manslaughter when the jury specifically acquitted the defendant on another charge of homicide by vehicle in the first degree based upon the same act and against the same victim. *Taylor v. State*, 295 Ga. App. 689, 673 S.E.2d 7 (2009), aff'd, 286 Ga. 328, 687 S.E.2d 409 (2009).

**Vehicular deaths** have been excepted from other forms of involuntary manslaughter and established as misdemeanors except in cases of reckless driving or vehicular offenses connected with police vehicles. *Berrian v. State*, 139 Ga. App. 571, 228 S.E.2d 737 (1976).

Trial court did not err in failing to compel the state to prosecute the defendant under the involuntary manslaughter statute rather than the vehicular homicide statute for the General Assembly made a rational distinction between the two offenses. *Williams v. State*, 171 Ga. App. 546, 320 S.E.2d 389 (1984).

**Aggravated assault conviction.** — There was sufficient evidence to support the defendant's conviction for aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), because the defendant willingly participated in a gunfight in a crowded parking lot which resulted in a fatal shooting of an innocent bystander; the fact that the defendant's codefendant was convicted of involuntary manslaughter, based on the underlying crime of reckless conduct, did not provide a basis for the defendant's challenge to the conviction, as these were different acts committed by different defendants. *Barber v. State*, 273 Ga. App. 129, 614 S.E.2d 105 (2005).

**Cited** in *Byars v. State*, 92 Ga. App. 511, 88 S.E.2d 818 (1955); *Teal v. State*, 122 Ga. App. 532, 177 S.E.2d 840 (1970); *Henderson v. State*, 227 Ga. 68, 179 S.E.2d 76 (1970); *Tate v. State*, 123 Ga. App. 18, 179 S.E.2d 307 (1970); *Teasley v. State*, 228 Ga. 107, 184 S.E.2d 179 (1971); *Addison v. State*, 124 Ga. App. 467, 184 S.E.2d 186 (1971); *Summerour v. State*, 124 Ga. App. 484, 184 S.E.2d 365 (1971);

*Witt v. State*, 124 Ga. App. 535, 184 S.E.2d 517 (1971); *Garrett v. State*, 126 Ga. App. 83, 189 S.E.2d 860 (1972); *Rowell v. State*, 128 Ga. App. 138, 195 S.E.2d 790 (1973); *Parks v. State*, 230 Ga. 157, 195 S.E.2d 911 (1973); *Owens v. State*, 130 Ga. App. 25, 202 S.E.2d 211 (1973); *Powell v. State*, 130 Ga. App. 588, 203 S.E.2d 893 (1974); *Elsasser v. State*, 132 Ga. App. 868, 209 S.E.2d 686 (1974); *Davis v. State*, 233 Ga. 638, 212 S.E.2d 814 (1975); *Barker v. State*, 233 Ga. 781, 213 S.E.2d 624 (1975); *Chappell v. State*, 134 Ga. App. 375, 214 S.E.2d 392 (1975); *Parks v. State*, 234 Ga. 579, 216 S.E.2d 804 (1975); *Jones v. State*, 234 Ga. 648, 217 S.E.2d 597 (1975); *Ray v. State*, 235 Ga. 467, 219 S.E.2d 761 (1975); *Tennon v. State*, 235 Ga. 594, 220 S.E.2d 914 (1975); *Whitley v. State*, 137 Ga. App. 245, 223 S.E.2d 279 (1976); *Baker v. State*, 236 Ga. 754, 225 S.E.2d 269 (1976); *Jones v. State*, 138 Ga. App. 828, 227 S.E.2d 519 (1976); *Robertson v. State*, 140 Ga. App. 506, 231 S.E.2d 367 (1976); *Price v. State*, 141 Ga. App. 335, 233 S.E.2d 462 (1977); *Torley v. State*, 141 Ga. App. 366, 233 S.E.2d 476 (1977); *Hixson v. State*, 239 Ga. 134, 236 S.E.2d 78 (1977); *Prince v. State*, 142 Ga. App. 734, 236 S.E.2d 918 (1977); *Smith v. State*, 142 Ga. App. 810, 237 S.E.2d 216 (1977); *Buckner v. State*, 239 Ga. 838, 239 S.E.2d 22 (1977); *Braxton v. State*, 240 Ga. 10, 239 S.E.2d 339 (1977); *Maloof v. State*, 145 Ga. App. 408, 243 S.E.2d 634 (1978); *Reid v. State*, 145 Ga. App. 302, 243 S.E.2d 700 (1978); *Morrison v. State*, 147 Ga. App. 410, 249 S.E.2d 131 (1978); *Wilson v. State*, 147 Ga. App. 560, 249 S.E.2d 361 (1978); *Newsome v. State*, 149 Ga. App. 415, 254 S.E.2d 381 (1979); *State v. Allen*, 243 Ga. 508, 256 S.E.2d 381 (1979); *Cross v. State*, 150 Ga. App. 206, 257 S.E.2d 330 (1979); *Ballard v. State*, 150 Ga. App. 704, 258 S.E.2d 331 (1979); *Simpson v. State*, 150 Ga. App. 84, 258 S.E.2d 634 (1979); *Spradlin v. State*, 151 Ga. App. 585, 260 S.E.2d 517 (1979); *Futch v. State*, 151 Ga. App. 519, 260 S.E.2d 520 (1979); *Boling v. State*, 244 Ga. 825, 262 S.E.2d 123 (1979); *Phelps v. State*, 245 Ga. 338, 265 S.E.2d 53 (1980); *Arnett v. State*, 245 Ga. 470, 265 S.E.2d 771 (1980); *Dean v. State*, 245 Ga. 503, 265 S.E.2d 805 (1980); *Henderson v. State*, 53 Ga. App. 801, 266

S.E.2d 522 (1980); Head v. State, 246 Ga. 360, 271 S.E.2d 452 (1980); Horne v. State, 155 Ga. App. 851, 273 S.E.2d 193 (1980); Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980); Truitt v. State, 158 Ga. App. 337, 280 S.E.2d 384 (1981); Stewart v. State, 158 Ga. App. 378, 280 S.E.2d 403 (1981); Cervi v. State, 248 Ga. 325, 282 S.E.2d 629 (1981); Martin v. State, 159 Ga. App. 31, 282 S.E.2d 656 (1981); Nutt v. State, 159 Ga. App. 46, 282 S.E.2d 696 (1981); McCorquodale v. Balkcom, 525 F. Supp. 408 (N.D. Ga. 1981); Neal v. State, 160 Ga. App. 498, 287 S.E.2d 399 (1981); Williams v. State, 249 Ga. 6, 287 S.E.2d 31 (1982); Billings v. State, 161 Ga. App. 500, 288 S.E.2d 622 (1982); Donaldson v. State, 249 Ga. 186, 289 S.E.2d 242 (1982); Anderson v. State, 249 Ga. 238, 290 S.E.2d 40 (1982); Green v. State, 249 Ga. 369, 290 S.E.2d 466 (1982); Perault v. State, 162 Ga. App. 294, 291 S.E.2d 122 (1982); Miller v. State, 162 Ga. App. 759, 292 S.E.2d 481 (1982); Washington v. State, 249 Ga. 728, 292 S.E.2d 836 (1982); Smith v. State, 249 Ga. 801, 294 S.E.2d 525 (1982); Stewart v. State, 163 Ga. App. 735, 295 S.E.2d 112 (1982); Williams v. State, 249 Ga. 822, 295 S.E.2d 293 (1982); Rucker v. State, 250 Ga. 371, 297 S.E.2d 481 (1982); McClain v. State, 165 Ga. App. 264, 299 S.E.2d 55 (1983); Conner v. State, 251 Ga. 113, 303 S.E.2d 266 (1983); Dollar v. State, 168 Ga. App. 726, 310 S.E.2d 236 (1983); Ward v. State, 252 Ga. 85, 311 S.E.2d 449 (1984); Wilson v. State, 171 Ga. App. 120, 318 S.E.2d 705 (1984); Keller v. State, 253 Ga. 512, 322 S.E.2d 243 (1984); Boyd v. State, 253 Ga. 515, 322 S.E.2d 256 (1984); Bennett v. State, 254 Ga. 162, 326 S.E.2d 438 (1985); Buie v. State, 254 Ga. 167, 326 S.E.2d 458 (1985); Wigfall v. State, 257 Ga. 585, 361 S.E.2d 376 (1987); Laney v. State, 184 Ga. App. 463, 361 S.E.2d 841 (1987); Binns v. State, 258 Ga. 23, 364 S.E.2d 871 (1988); Griffin v. State, 199 Ga. App. 646, 405 S.E.2d 877 (1991); Dye v. State, 202 Ga. App. 31, 413 S.E.2d 500 (1991); Nelson v. State, 262 Ga. 763, 426 S.E.2d 357 (1993); Alexander v. State, 263 Ga. 474, 435 S.E.2d 187 (1993); Powell v. State, 228 Ga. App. 56, 491 S.E.2d 135 (1997); Walker v. State, 234 Ga. App. 295, 507 S.E.2d 15 (1998); Cox v. State, 243 Ga. App. 668, 533 S.E.2d 435

(2000); Vasser v. State, 273 Ga. 747, 545 S.E.2d 906 (2001); Rhode v. State, 274 Ga. 377, 552 S.E.2d 855 (2001); Reddick v. State, 264 Ga. App. 487, 591 S.E.2d 392 (2003); Ford v. Schofield, 488 F. Supp. 2d 1258 (N.D. Ga. 2007).

### Intent

**When doubt exists as to intention to kill, court should charge involuntary manslaughter.** — If there is any evidence to raise doubt, even though slight, as to intention to kill, court should give in charge the law of involuntary manslaughter, but if there is nothing to raise such a doubt, failure to charge on that subject will not require new trial. Warnack v. State, 3 Ga. App. 590, 60 S.E. 288 (1908), later appeal, 5 Ga. App. 816, 63 S.E. 935 (1909) (decided under former Penal Code 1895, §§ 65, 67). Warnack v. State, 7 Ga. App. 73, 66 S.E. 393 (1909); Hilburn v. State, 57 Ga. App. 854, 197 S.E. 73 (1938), later appeal (decided under former Code 1933, § 26-1009).

**Court should charge on both murder and manslaughter when there is doubt.** — When there is evidence sufficient to raise a doubt, however slight, whether offense is murder or manslaughter, voluntary or involuntary, court should instruct jury upon these grades of manslaughter as well as murder. Ivey v. State, 42 Ga. App. 357, 156 S.E. 290 (1930) (decided under former Penal Code 1910, § 65); Goldsmith v. State, 54 Ga. App. 268, 187 S.E. 694 (1936) (decided under former Code 1933, § 26-1007).

**One intentionally shooting another in self-defense.** — Defendant who causes death of another person by intentional firing of gun, allegedly in self-defense, cannot then claim that the death was unintentional. Mullins v. State, 157 Ga. App. 204, 276 S.E.2d 877 (1981), overruled on other grounds, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599 (1991).

It is not error to refuse a request to charge lawful act — unlawful manner — involuntary manslaughter when defendant asserts that he or she acted in self-defense by use of a pistol, rifle, or shotgun. One who causes death of another human being by use of a gun allegedly in self-defense will not be heard to assert

**Intent (Cont'd)**

that although he or she used excessive force, death was not intended and act was lawful. *Farmer v. State*, 246 Ga. 253, 271 S.E.2d 166 (1980).

It is not necessary to give request to charge law as to involuntary manslaughter, where defendant asserts that he or she fired a gun in self-defense. *Crawford v. State*, 245 Ga. 89, 263 S.E.2d 131 (1980); *Colbert v. State*, 250 Ga. 126, 296 S.E.2d 588 (1982).

One who causes death of another by use of gun, allegedly in self-defense, will not be heard to assert that, although he or she used excessive force, death was not intended and act was lawful. *Appleby v. State*, 247 Ga. 587, 278 S.E.2d 366 (1981).

**Presumption of malice may arise from reckless disregard for human life.** — Wanton and reckless state of mind is sometimes equivalent of specific intent to kill, and such state of mind may be treated by jury as amounting to such intention when willful and intentional performance of an act is productive of violence resulting in destruction of human life. *Biegun v. State*, 206 Ga. 618, 58 S.E.2d 149 (1950) (decided under former Code 1933, § 26-1007).

**Deadly character and manner in which weapon is used is not conclusive of intent to kill**, but is only illustrative of such intent, and where from any circumstance there is doubt of accused's intention to kill, trial court must not exclude question of such intent from consideration of jury by failure to charge lesser offenses included in charge of murder, where from evidence and reasonable inferences to be drawn therefrom the jury would be authorized to find that no intention to kill existed. *Jenkins v. State*, 86 Ga. App. 800, 72 S.E.2d 541 (1952) (decided under former Code 1933, § 26-1007).

**Deadly weapon may be used so as not to raise presumption of malice**, but to leave intent as question of fact for jury. Thus, to strike one with barrel of a pistol, instead of shooting the victim with the weapon, or to strike with handle of a dirk, instead of with the blade, would not be the ordinary way of using such weapon

to kill, and the intention to kill would be a question of fact rather than of presumption. *Huntsinger v. State*, 200 Ga. 127, 36 S.E.2d 92 (1945) (decided under former Code 1933, § 26-1007).

**Where gun is fired deliberately and death results**, court may refuse to charge involuntary manslaughter. *Benford v. State*, 158 Ga. App. 43, 279 S.E.2d 236 (1981), overruled on other grounds, *Bangs v. State*, 198 Ga. App. 404, 401 S.E.2d 599 (1991).

**Shooting victim nine times in back.** — Evidence showing victim had been shot nine times in back by defendant defies conclusion that there was no intention to cause death; such evidence authorizes jury to convict for murder or voluntary manslaughter, each of which requires intentional killing, or to acquit as self-defense, in which killing might or might be intentional, but simply does not support finding of unintentional killing. *Hudson v. State*, 146 Ga. App. 463, 246 S.E.2d 470 (1978).

**When defendant admittedly intended to shoot close to victim.** — In murder prosecution, court did not err in refusing to charge on involuntary manslaughter after the defendant stated that the defendant had intended to shoot close to the victim, a 12-year-old boy who was leaning against defendant's car, but not to hit the boy. *Moody v. State*, 244 Ga. 247, 260 S.E.2d 11 (1979).

**When seventy-five knife wounds were inflicted upon victim.** — Seventy-five knife wounds inflicted leaves no doubt on question of intent or voluntariness and failure of trial court to charge involuntary manslaughter was warranted. *Anderson v. State*, 248 Ga. 682, 285 S.E.2d 533 (1982).

**Causation**

**Independent, intervening, unforeseeable cause of death.** — In every case of involuntary manslaughter, death must be due to unlawful act of defendant, and not to intervening act or negligence of a third person; or to an independent intervening cause in which defendant did not participate and which defendant could not foresee, and death must have been the natural and probable consequence of such

unlawful act and the act the proximate cause. *Fair v. State*, 171 Ga. 112, 155 S.E. 329 (1930) (decided under former Penal Code 1910, § 65); *Thomas v. State*, 91 Ga. App. 382, 85 S.E.2d 644 (1955) (decided under former Code 1933, § 26-1007).

**Wound leaving victim more susceptible to disease or other intervening agencies.** — When one commits a battery upon another, or inflicts a wound, which battery or wound is not likely in itself to produce death, but which renders the other person more susceptible to disease, or leaves the other person at mercy of elements or some other intervening agency, which brings about the person's death, the original wounding or battery of deceased is in a legal sense the cause of death. *Wyrick v. State*, 96 Ga. App. 847, 102 S.E.2d 53 (1958) (decided under former Code 1933, § 26-1007).

**Death from combined effects of injury and disease attributed to former.** — If deceased was in feeble health and died from combined effects of injury and of disease, the person who inflicted injury is liable, although injury alone would not have been fatal. *Wells v. State*, 46 Ga. App. 412, 167 S.E. 709 (1933) (decided under former Penal Code 1910, § 65).

**One inflicting injury which accelerates death from disease.** — If deceased was in feeble health and injury inflicted accelerated death from disease, even if disease itself would probably have been fatal, he who inflicted injury is liable, although injury alone would not have been fatal. *Wells v. State*, 46 Ga. App. 412, 167 S.E. 709 (1933).

**Death resulting from injuries sustained in escaping assault.** — When one perpetrates an assault upon another, and the other, in an effort to escape, runs into a place of danger, and there sustains injuries which result in death, in a legal sense, death resulted from assault, though such assault taken by itself would not likely have produced death. *Wyrick v. State*, 96 Ga. App. 847, 102 S.E.2d 53 (1958) (decided under former Code 1933, § 26-1007).

#### **Unlawful Act Involuntary Manslaughter**

**Essential elements of involuntary manslaughter in commission of an un-**

lawful act are, first, intentional commission of an unlawful act, and, second, killing of a human being without having so intended, but as proximate result of such intended act. *Wells v. State*, 44 Ga. App. 760, 162 S.E. 835 (1932) (decided under former Penal Code 1910, § 65); *Passley v. State*, 62 Ga. App. 88, 8 S.E.2d 131 (1940) (decided under former Code 1933, § 26-1007); *Williams v. State*, 96 Ga. App. 833, 101 S.E.2d 747 (1958) (decided under former Code 1933, § 26-1007); *Thacker v. State*, 103 Ga. App. 36, 117 S.E.2d 913 (1961) (decided under former Code 1933, § 26-1007); *Bond v. State*, 104 Ga. App. 627, 122 S.E.2d 310 (1961) (decided under former Code 1933, § 26-1007).

**Essential elements of involuntary manslaughter in commission of unlawful act** are, first, intent to commit unlawful act, and secondly, killing of human being without having so intended, but as proximate result of such intended unlawful act. *Paulhill v. State*, 229 Ga. 415, 191 S.E.2d 842 (1972).

**An unlawful act within meaning of section is an act prohibited by law;** that is to say, an act condemned by some statute or valid municipal ordinance of this state. *Silver v. State*, 13 Ga. App. 722, 79 S.E. 919 (1913) (decided under former Penal Code 1910, § 65); *Perry v. State*, 78 Ga. App. 273, 50 S.E.2d 709 (1948) (decided under former Code 1933, § 26-1007); *Walters v. State*, 90 Ga. App. 360, 83 S.E.2d 48 (1954) (decided under former Code 1933, § 26-1007).

**Unlawful act involuntary manslaughter can stem from acts malum prohibitum or acts malum in se.** *Silver v. State*, 13 Ga. App. 722, 79 S.E. 919 (1913) (decided under former Penal Code 1910, § 65); *Perry v. State*, 78 Ga. App. 273, 50 S.E.2d 709 (1948) (decided under former Code 1933, § 26-1007).

**Involuntary manslaughter in commission of an unlawful act is not a reducible felony.** *Hardrick v. State*, 96 Ga. App. 670, 101 S.E.2d 99 (1957) (decided under former Code 1933, § 26-1007).

To be entitled to a charge on involuntary manslaughter under O.C.G.A. § 16-5-3, the evidence had to support the conclusion that the killing resulted unintentionally

**Unlawful Act Involuntary  
Manslaughter (Cont'd)**

from an unlawful act other than a felony. Oliver v. State, 274 Ga. 539, 554 S.E.2d 474 (2001).

**In defining involuntary manslaughter, court should give rules.** — In defining involuntary manslaughter it is error for court to fail to give in charge to jury, even without request, rules of law applicable in determining what is an unlawful act. Pope v. State, 52 Ga. App. 411, 183 S.E. 630 (1936) (decided under former Code 1933, § 26-1007).

**Unlawful act involuntary manslaughter requires intentional commission of unlawful act.** Solomon v. State, 113 Ga. App. 116, 147 S.E.2d 467 (1966) (decided under former Code 1933, § 26-1007).

**When involuntary manslaughter may be established by unlawful act committed unintentionally.** — Involuntary manslaughter may be proved by evidence showing that an unlawful act was committed unintentionally, but as a result of conduct so reckless that it imports a thoughtless disregard for consequences or indifference to safety to others and reasonable foresight that death or bodily harm will result. Solomon v. State, 113 Ga. App. 116, 147 S.E.2d 467 (1966) (decided under former Code 1933, § 26-1007).

**Subsection (a) construed.** — O.C.G.A. § 16-5-3(a) is properly not charged when defendant's action would constitute a felony (assault with a deadly weapon). Lancaster v. State, 250 Ga. 871, 301 S.E.2d 882 (1983); Smith v. State, 253 Ga. 476, 322 S.E.2d 58 (1984).

**Not unlawful act of victim.** — Unlawful act referred to in statute was act of person committing manslaughter, not act of victim. McManus v. State, 130 Ga. App. 840, 204 S.E.2d 813 (1974).

**Cause in fact of death.** — Statute requires that unlawful act be cause in fact of victim's death. Burns v. State, 240 Ga. 827, 242 S.E.2d 579 (1978).

**Intentionally pointing a pistol at another in fun or otherwise.** — Intentionally to point a pistol or gun at another, not intending to shoot is unlawful, and if

the weapon is accidentally discharged, the crime would be involuntary manslaughter. Leonard v. State, 133 Ga. 435, 66 S.E. 251 (1909) (decided under former Penal Code 1895, §§ 65, 67); Baker v. State, 12 Ga. App. 553, 77 S.E. 884 (1913) (decided under former Penal Code 1910, §§ 65, 67).

Intentionally to point a pistol at another, in fun or otherwise, save in instances excepted by statute, is unlawful; and if, while performing such unlawful act, the pistol is accidentally discharged, the person so acting, if not guilty of murder, would be guilty of involuntary manslaughter in commission of an unlawful act. Delegal v. State, 92 Ga. App. 744, 90 S.E.2d 32 (1955) (decided under former Code 1933, § 26-1007).

Evidence was sufficient to sustain defendant's conviction when testimony showed that the defendant, a minor, was unlawfully in possession of a handgun which defendant had cocked and recklessly pointed at another causing that person's death. Smith v. State, 234 Ga. App. 314, 506 S.E.2d 659 (1998).

**Russian Roulette.** — Involuntary manslaughter conviction was supported by sufficient evidence after a witness saw the defendant pull a handgun from a pocket, pull the gun's handle back, and make a downward motion, after which the gun fired, injuring the victim, who died of the wound two days later; additionally, the defendant twice contacted the witness after the shooting and asked the witness to lie and implicate another person as the perpetrator, and admitted to an agent that the victim was shot during a game of "Russian Roulette." Kelly v. State, 277 Ga. App. 762, 627 S.E.2d 458 (2006).

**Carrying of a concealed weapon** was not an "unlawful act other than a felony" that justified a charge on felony involuntary manslaughter in a prosecution for voluntary manslaughter; the concealment, while unlawful, did not cause the death, defendant's firing of the gun did so. Carlton v. State, 224 Ga. App. 315, 480 S.E.2d 336 (1997).

**Accidental discharge of pistol killing bystander.** — Assault upon officer, causing accidental discharge of the officer's pistol, thereby killing bystander constitutes involuntary manslaughter. Grey

v. State, 126 Ga. App. 357, 190 S.E.2d 557 (1972).

**Death of a child resulting from a negligent omission to comply with the parental duty** stated in O.C.G.A. § 19-7-2 would amount to involuntary manslaughter by the commission of an unlawful act. Lewis v. State, 180 Ga. App. 369, 349 S.E.2d 257 (1986).

**Lesser included offense of murder.** — Rational trier of fact could reasonably have found the defendant guilty beyond a reasonable doubt of murder. Under such circumstances, the jury was certainly authorized to find defendant guilty of felony-grade involuntary manslaughter as a lesser included offense. Thomas v. State, 183 Ga. App. 819, 360 S.E.2d 75 (1987).

**In homicide trial, defendant's act was clearly felony of aggravated assault,** not the misdemeanor of pointing a weapon at another, where the testimony showed that victim, as well as the three passengers in the victim's car, were aware of and understandably apprehensive of immediate violent injury, and defendant's own testimony ("I was showing the gun to him so he would leave me alone.") revealed that defendant's purpose in pointing the weapon was to place the victim in apprehension of immediate violent injury, and the request for a charge on misdemeanor manslaughter was properly denied. Rhodes v. State, 257 Ga. 368, 359 S.E.2d 670 (1987); Rameau v. State, 267 Ga. 261, 477 S.E.2d 118 (1996).

Because the unlawful use of a knife, a deadly weapon, while repeatedly stabbing the victim constituted the felony of aggravated assault, a charge on involuntary manslaughter would have been improper. Harris v. State, 257 Ga. 385, 359 S.E.2d 675 (1987).

Defendant was, at the very least, engaged in the commission of an aggravated assault when defendant pointed the gun at the victim and the gun fired, since aggravated assault is a felony, the trial court did not err by refusing to charge on felony involuntary manslaughter. Brooks v. State, 262 Ga. 187, 415 S.E.2d 903 (1992).

**Driving under influence of whiskey on wrong side of road** supports conviction of involuntary manslaughter in com-

mission of unlawful act. Tillman v. State, 61 Ga. App. 724, 7 S.E.2d 285 (1940) (decided under former Code 1933, § 26-1007).

**Underlying misdemeanor of reckless conduct.** — An indictment against a defendant is not defective where the felony of involuntary manslaughter is based on an underlying misdemeanor of reckless conduct. Turnipseed v. State, 186 Ga. App. 278, 367 S.E.2d 259 (1988).

**Evidence insufficient.** — In a prosecution for malice murder, where the jury was not authorized by the evidence to find that the death occurred as a result of an unlawful act other than a felony, the trial court correctly refused to give a charge on involuntary manslaughter. Smith v. State, 267 Ga. 838, 483 S.E.2d 589 (1997).

#### **Lawful Act — Unlawful Manner Involuntary Manslaughter**

**Essential elements of offense of involuntary manslaughter in commission of a lawful act,** are: (1) killing of a human being; (2) without any intention to do so; (3) in commission of a lawful act; (4) which might probably produce death; and (5) in a manner not justified by law. Roughlin v. State, 17 Ga. App. 205, 86 S.E. 452 (1915) (decided under former Penal Code 1910, § 65).

**In defining lawful act — unlawful manner involuntary manslaughter, it is best to address criminal negligence.** — In absence of timely written request for broader instruction, it is sufficient to define offense of involuntary manslaughter in the commission of a lawful act without due caution and circumspection in language of section, although it is better to charge that it must result from criminal negligence, which is something more than ordinary negligence which would authorize a recovery in a civil action. Jordan v. State, 103 Ga. App. 493, 120 S.E.2d 30 (1961) (decided under former Code 1933, § 26-1007).

**To render lawful act carelessly performed, resulting in death criminal, carelessness must have been gross, implying indifference to consequences.** Collins v. State, 66 Ga. App. 325, 18 S.E.2d 24 (1941) (decided under former Code 1933, § 26-1007).

**Lawful Act — Unlawful Manner Involuntary Manslaughter (Cont'd)**

**Lawful act — unlawful manner involuntary manslaughter need not be charged absent request.** — There was no error in failing to charge on involuntary manslaughter by committing a lawful act in an unlawful manner where there was no request for such charge. Hart v. State, 157 Ga. App. 716, 278 S.E.2d 419 (1981).

**Use of excessive force in self defense as involuntary manslaughter.** — Self-defense is a lawful act which can be performed in an unlawful manner should jury conclude that more force was utilized than necessary. Hodge v. State, 153 Ga. App. 553, 265 S.E.2d 878 (1980), overruled on other grounds, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599 (1991).

When there is issue of excessive force in act of self-defense and denial of intent to kill, a jury is authorized to find that death was caused unintentionally by commission of a lawful act (self-defense) in an unlawful manner (use of excessive force). Mullins v. State, 157 Ga. App. 204, 276 S.E.2d 877 (1981), overruled on other grounds, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599 (1991).

Provisions on involuntary manslaughter in the commission of a lawful act in an unlawful manner are applicable when evidence would authorize the jury to find that the defendant caused the death unintentionally while acting in self-defense but that defendant used excessive force. Facison v. State, 152 Ga. App. 645, 263 S.E.2d 523 (1979).

When force used exceeds that necessary for self-defense, the law will consider defender the aggressor and if the defender's act results in a homicide, the offense is at least manslaughter. Spradlin v. State, 151 Ga. App. 585, 260 S.E.2d 517 (1979), overruled on other grounds, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599 (1991).

**Clearly reckless conduct.** — Since the defendant's act of repeatedly striking a child over 100 times with a belt was so clearly reckless conduct that it could not qualify as a lawful act, the defendant was not entitled to a jury instruction on lawful act-unlawful manner involuntary man-

slaughter. Paul v. State, 274 Ga. 601, 555 S.E.2d 716 (2001), cert. denied, 537 U.S. 828, 123 S. Ct. 123, 154 L. Ed. 2d 41 (2002).

**Involuntary manslaughter based on use of excessive force is inapplicable where defendant used gun.** — Although a defendant who uses a gun in self-defense is entitled to a charge on the law of self-defense, the defendant is not also entitled to the charge on the law of lawful act — unlawful manner involuntary manslaughter on the theory that force used was excessive. Appleby v. State, 247 Ga. 587, 278 S.E.2d 366 (1981).

One who causes death of another by deliberate use, as opposed to accidental discharge, of a gun, allegedly in self-defense, will not be heard to assert that, although he or she used excessive force, death was not intended and the act was lawful; since the deadly force of a gun is known to all, and it cannot be argued that the excessive force of a gun was unintentional. Benford v. State, 158 Ga. App. 43, 279 S.E.2d 236 (1981), overruled on other grounds, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599 (1991).

It is unnecessary to give instruction as to involuntary manslaughter where defendant asserts that he or she fired gun in self-defense. Pass v. State, 160 Ga. App. 64, 286 S.E.2d 53 (1981).

**Use of gun in self-defense in an unlawful manner constitutes crime of reckless conduct,** under O.C.G.A. § 16-5-60, and thus is not a lawful act within meaning of O.C.G.A. § 16-5-3(b). Crawford v. State, 245 Ga. 89, 263 S.E.2d 131 (1980); Farmer v. State, 246 Ga. 253, 271 S.E.2d 166 (1980); Appleby v. State, 247 Ga. 587, 278 S.E.2d 366 (1981); Pass v. State, 160 Ga. App. 64, 286 S.E.2d 53 (1981).

**Although excessive force by use of gun in self-defense will not authorize O.C.G.A. § 16-5-3(b) charge, excessive force by use of knife may;** it can be error not to charge on O.C.G.A. § 16-5-3(b) if a knife was used in self-defense. Lancaster v. State, 250 Ga. 871, 301 S.E.2d 882 (1983).

**Effect of manslaughter conviction when charge requested and evidence supported murder conviction.** —

When there is evidence which supports a verdict of guilty of the more serious offense of murder, and there is slight evidence of the lesser included offense of manslaughter, the appellant, who requested a charge on and was convicted of the lesser offense, may not successfully urge that the evidence was insufficient. Vick v. State, 166 Ga. App. 572, 305 S.E.2d 17 (1983).

### Criminal Negligence

**Element differentiating lowest grade of involuntary manslaughter from noncriminal killing** is that in former, negligence must be more than ordinary negligence which would be sufficient to authorize recovery in civil action, and must go to extent of being gross or culpable negligence, whereas in latter there is absence of culpable negligence in performance of lawful act which resulted in death of human being. Collins v. State, 66 Ga. App. 325, 18 S.E.2d 24 (1941) (decided under former Code 1933, § 26-1007).

**Mere negligent killing, without more, may not amount to murder.** Patterson v. State, 181 Ga. 698, 184 S.E. 309 (1936) (decided under former Code 1933, § 26-1007).

**Negligence which will render unintentional homicide criminal** is such carelessness or recklessness as is incompatible with a proper regard for human life. An act of omission, as well as commission, may be so criminal as to render death resulting therefrom manslaughter; but the omission must be one likely to cause death. Foy v. State, 40 Ga. App. 617, 150 S.E. 917 (1929) (decided under former Penal Code 1910, § 65).

**Criminal negligence implies knowledge of willful or wanton disregard of probable effects.** — Criminal negligence necessarily implies not only knowledge of probable consequences which may result from use of a given instrumentality, but also willful or wanton disregard of probable effects of such instrumentality upon others likely to be affected thereby. Consequently, criminal negligence is not shown as against a defendant who uses every means in the defendant's power for the safety of those whom it is alleged

defendant's negligence has affected. Foy v. State, 40 Ga. App. 617, 150 S.E. 917 (1929) (decided under former Penal Code 1910, § 65); Thomas v. State, 91 Ga. App. 382, 85 S.E.2d 644 (1955) (decided under former Code 1933, § 26-1007).

**Criminal negligence must be such as shows an indifference to injurious results** of negligent acts and must be inconsiderate of others. In order for one to be held to have been indifferent to the safety of others or inconsiderate of their welfare, it must appear that the person knew, or that an ordinarily prudent person under similar circumstances would have known, that the person's act would probably endanger others. It seems obvious that, for an act thus to appear dangerous, there must of necessity be some commonly recognized danger inherent in it. The instrumentality in connection with which there is negligence must be of a kind that is dangerous because of the manner in which it is handled. Geele v. State, 203 Ga. 369, 47 S.E.2d 283 (1948) (decided under former Code 1933, § 26-1007).

**Negligence necessary to constitute crime is equivalent of and, in fact, is recklessness.** Geele v. State, 203 Ga. 369, 47 S.E.2d 283 (1948) (decided under former Code 1933, § 26-1007).

### Indictment

**Indictment defective.** — State failed to allege that the defendant committed an unlawful act which under any circumstances could be the proximate cause of the unintentional death, thus the defendant's general demurrer should have been granted. Scraders v. State, 263 Ga. App. 754, 589 S.E.2d 315 (2003).

### Jury Instructions

**Charge should cover involuntary manslaughter where there is doubt as to intention.** — When evidence and statement, taken together or separately, raise doubt, although slight, as to intention to kill, law of involuntary manslaughter should be given in charge. Kerbo v. State, 230 Ga. 241, 196 S.E.2d 424 (1973).

**Charge on involuntary manslaughter unwarranted where killing was**

**Jury Instructions (Cont'd)**

**intentional.** — Charge on involuntary manslaughter is not warranted where evidence establishes without conflict that killing was intentional rather than unintentional. *Bullock v. State*, 150 Ga. App. 824, 258 S.E.2d 610 (1979); *Ward v. State*, 151 Ga. App. 36, 258 S.E.2d 699 (1979); *Ward v. State*, 153 Ga. App. 743, 266 S.E.2d 556 (1980).

Because the defendant conceded that the defendant shot at the victims intentionally, albeit in self defense, a charge on the lesser offense of involuntary manslaughter, which requires a lack of intent, was not warranted. *Harris v. State*, 272 Ga. 455, 532 S.E.2d 76 (2000).

**If jury authorized to find only intentional pointing of pistol, charge on involuntary manslaughter required.**

— If from testimony jury would have been authorized to find only an intentional pointing of a pistol, a misdemeanor, justifying a conviction of involuntary manslaughter in commission of unlawful act other than a felony, it was error not to charge the jury on involuntary manslaughter. *Kerbo v. State*, 230 Ga. 241, 196 S.E.2d 424 (1973).

**Charge on involuntary manslaughter not required when defendant testifies victim struck first blow.** — While charge of involuntary manslaughter in commission of unlawful act might be required if defendant were guilty of a simple assault, such a charge is not required when defendant testifies that victim struck first blow by knocking defendant down. *McManus v. State*, 130 Ga. App. 840, 204 S.E.2d 813 (1974).

**Felonious involuntary manslaughter does not invoke felony-murder rule.** — Voluntary manslaughter, and felony of involuntary manslaughter where it applies, are not themselves felonies which will invoke felony-murder rule as to death of main victim. Therefore, if jury finds felonious manslaughter, it should not go on to reason that this offense, being itself a felony, turns killing into a felony murder. The jury should be instructed in accordance with this principle. *Malone v. State*, 238 Ga. 251, 232 S.E.2d 907 (1977).

**Felony or misdemeanor status, not jury consideration.** — Even though the

jurors indicated they would not have voted defendant guilty of involuntary manslaughter had they known it was punishable as a felony, the legal status of the crime (felony or misdemeanor) and the resulting punishment when a guilty verdict is returned, is of absolutely no concern to the jury. The juror's testimony clearly showed correct application of law to facts, so even if the charge confused the jury and was thus error despite being a correct statement of the law, any such error was harmless. *Howard v. State*, 213 Ga. App. 542, 445 S.E.2d 532 (1994).

**Jury instruction properly defining criminal negligence.** — Court did not err in charging that "if you find that the death of the child occurred as a result of negligent omission of the defendant, then this negligent omission would be involuntary manslaughter by an unlawful act," since the court charged that, in order for the accused to be found guilty of any crime, the jury must determine beyond a reasonable doubt that the alleged criminal act or omission was committed with criminal intent or criminal negligence, and properly defined criminal negligence as "reckless conduct such as shows an indifference to the injurious results of a negligent act, and indifference to the safety of others, and a lack of consideration for their welfare." *Lewis v. State*, 180 Ga. App. 369, 349 S.E.2d 257 (1986).

**Charge on unlawful act involuntary manslaughter upheld where no reasonable view would support contrary finding.** — When the court did not instruct on involuntary manslaughter in the commission of a lawful act in an unlawful manner, a misdemeanor, but instructed only on involuntary manslaughter in the commission of an unlawful act, a felony, and no reasonable view of the evidence would have authorized a finding that the death resulted from the commission of a lawful act, the charge was not defective. *Lewis v. State*, 180 Ga. App. 369, 349 S.E.2d 257 (1986).

**Instruction on involuntary manslaughter unwarranted.** — Because the state did not allege that the felony murder victim died as a result of non-felony conduct, but the victim's death occurred as a result of the defendant's commission of a

felony in the course of fleeing and attempting to elude the police, an involuntary manslaughter instruction was not warranted. *Turner v. State*, 281 Ga. 487, 640 S.E.2d 25 (2007).

When the defendant was charged with felony murder, with cruelty to a child in the first degree as the underlying felony, the trial court properly denied the defendant's request for a jury instruction on felony involuntary manslaughter under O.C.G.A. § 16-5-3(a) as a lesser included offense. Contrary to the defendant's argument, the state did not present any evidence that the child died as a result of lack of medical care; furthermore, because the defendant argued that it was the child's parent who shook the child and that the defendant only tried to revive the child, such an instruction was not necessary because the evidence showed either the charged crime or no crime. *Bostic v. State*, 284 Ga. 864, 672 S.E.2d 630 (2009).

In a murder prosecution, as defendant claimed the defendant killed the victim in self-defense, the defendant was not entitled to an additional instruction on involuntary manslaughter in the course of a lawful act under O.C.G.A. § 16-5-3(b) since if the defendant was justified in killing under the self-defense statute, O.C.G.A. § 16-3-21, the defendant was guilty of no crime at all; but if the defendant was not so justified, the homicide did not occur in the course of a lawful act. *Hooper v. State*, 284 Ga. 824, 672 S.E.2d 638 (2009).

With regard to a defendant's convictions for felony murder, with the underlying felony being rape, among other crimes, and although the defendant filed a written request for a jury charge on involuntary manslaughter, the defendant was not entitled to a jury charge on statutory rape as the defendant failed to specify statutory rape as the underlying misdemeanor. Further, the defendant was not entitled to such a jury charge as statutory rape was not a lesser included offense to forcible rape. *Mangrum v. State*, 285 Ga. 676, 681 S.E.2d 130 (2009).

Uncontroverted forensic evidence that a four-year-old homicide victim had suffered repeated blows to the head, approximately 15, consistent with those inflicted

in boxing, did not warrant an instruction on involuntary manslaughter under O.C.G.A. § 16-5-3(a). This evidence was inconsistent with the commission of an unlawful act, such as battery or reckless conduct, other than a felony. *Boyd v. State*, 286 Ga. 166, 686 S.E.2d 109 (2009).

Trial court did not err in refusing to charge a jury on involuntary manslaughter under O.C.G.A. § 16-5-3(a) because the defendant shot the victim, the defendant's spouse, three times in the chest, thigh, and the back of the victim's left arm, and the arm wound was sustained while the victim was either lying prone on the floor or crawling on the victim's hands and knees. These injuries were inconsistent with the commission of an unlawful act other than a felony, and certainly not consistent with the defendant's claimed misdemeanor of reckless conduct. *Hall v. State*, 287 Ga. 755, 699 S.E.2d 321 (2010).

**Charge on O.C.G.A. § 16-5-3(b) unwarranted if killing results from unlawful act.** — When killing decedent, even if unintended, was done as incident to unlawful, criminally negligent act of brandishing knife at others, failure to charge provisions of statute was not error. *Keye v. State*, 136 Ga. App. 707, 222 S.E.2d 172 (1975).

When firing pistol was not lawful, defendant is not entitled to charge of involuntary manslaughter. *Truitt v. State*, 156 Ga. App. 156, 274 S.E.2d 42 (1980).

Evidence adduced at trial did not reflect that defendant's use of a gun amounted to reckless conduct or any other misdemeanor, and although the trial court properly charged the jury on self-defense and accident, it did not err by refusing to charge the jury on involuntary manslaughter as a lesser included offense of murder. *Brown v. State*, 277 Ga. 53, 586 S.E.2d 323 (2003).

Requested jury instruction on involuntary manslaughter was properly denied because the defendant's conduct in producing and displaying a loaded revolver in close proximity to the defendant's victim, who allegedly was under the influence of drugs, and the victim's young child, with the defendant's finger inside the trigger guard while the defendant was watching the road and trying to drive, constituted

**Jury Instructions (Cont'd)**

the crime of crime of reckless conduct under O.C.G.A. § 16-5-60(b). Reed v. State, 279 Ga. 81, 610 S.E.2d 35 (2005).

In a trial for voluntary manslaughter, aggravated assault, and battery, it was not error to refuse to charge on the lesser included offense of involuntary manslaughter under O.C.G.A. § 16-5-3(a). Such a charge required an unlawful act that was not a felony, and the only such act supported by the evidence was the striking of the victim with a gun, which constituted the felony of aggravated assault under O.C.G.A. § 16-5-21. Moon v. State, 291 Ga. App. 499, 662 S.E.2d 283 (2008).

**Charge where evidence authorizes finding of excessive force in self-defense.** — Trial court charged jury on law of self-defense and the evidence would have authorized the jury to find that defendant caused the death of another unintentionally while acting in self-defense, a lawful act, but that the defendant used excessive force, in an unlawful manner; the trial court erred in failing to charge the jury on involuntary manslaughter since the charge on self-defense left open the issue of application of involuntary manslaughter. Allen v. State, 147 Ga. App. 701, 250 S.E.2d 5 (1978).

Defendant is entitled to instruction on involuntary manslaughter when such instruction is timely requested and when there is evidence that homicide was caused by use of excessive force in self-defense. Jackson v. State, 143 Ga. App. 734, 240 S.E.2d 180 (1977), overruled on other grounds, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599 (1991).

**Charge on O.C.G.A. § 16-5-3(b) not required.** — Evidence does not require a charge of involuntary manslaughter for the commission of a "lawful act" in an "unlawful manner," that is, self-defense (lawful act) with use of excessive force (unlawful manner), after the defendant confronted the victim with a hidden, extremely long knife, the deadly force of which is known to all. Fitzhugh v. State, 166 Ga. App. 320, 304 S.E.2d 127 (1983).

Defendant is not entitled to an instruc-

tion on involuntary manslaughter in a prosecution for felony-murder when the defendant bases the defense upon a claim of justification and the court charges the jury as to self defense and accident. Willis v. State, 258 Ga. 477, 371 S.E.2d 376 (1988); Lee v. State, 259 Ga. 230, 378 S.E.2d 855 (1989); Clark v. State, 271 Ga. 27, 518 S.E.2d 117 (1999).

**Charge on O.C.G.A. § 16-5-3(b) unwarranted where aggravated assault committed.** — When a person deliberately gets a gun and brandishes the gun at another in order to scare the other, thus committing an aggravated assault, such circumstances do not give rise to a charge on lawful act — unlawful manner involuntary manslaughter. Brown v. State, 166 Ga. App. 765, 305 S.E.2d 386 (1983).

**Instruction on involuntary manslaughter unwarranted where self-defense asserted.** — Defendant was not entitled to an instruction on the law of involuntary manslaughter where defendant asserted that defendant was attacked by the victim and drew the gun and fired in self-defense. Smith v. State, 251 Ga. 229, 304 S.E.2d 716 (1983); Johnson v. State, 259 Ga. 235, 378 S.E.2d 859 (1989).

Defendant who seeks to justify homicide under the "self-defense" statute, O.C.G.A. § 16-3-21, is not entitled to an additional instruction on involuntary manslaughter in the course of a lawful act, whatever the implement of death. For if defendant is justified in killing under O.C.G.A. § 16-3-21, defendant is guilty of no crime at all. If defendant is not so justified, the homicide does not fall within the "lawful act" predicate of O.C.G.A. § 16-5-3(b), for the jury, in rejecting defendant's claim of justification, has of necessity determined thereby that the act is not lawful. Sailors v. State, 251 Ga. 735, 309 S.E.2d 796 (1983); Moore v. State, 177 Ga. App. 569, 340 S.E.2d 222 (1986); Mims v. State, 180 Ga. App. 3, 348 S.E.2d 498 (1986); Stewart v. State, 182 Ga. App. 576, 356 S.E.2d 535 (1987); Thompson v. State, 257 Ga. 481, 361 S.E.2d 154 (1987); Kennedy v. State, 193 Ga. App. 784, 389 S.E.2d 350, cert. denied, 193 Ga. App. 910, 389 S.E.2d 350 (1989); Nobles v. State, 201 Ga. App. 483, 411 S.E.2d 294, cert. denied, 201 Ga. App. 904, 411 S.E.2d 294 (1991).

Defendant in a murder trial who argued that actions were lawful in defending self with an ax but did so in an unlawful manner, in that the force used was excessive, and who received a self-defense instruction, was not entitled to an additional charge on the lesser included offense of involuntary manslaughter in the commission of a lawful act in an unlawful manner. *Jordan v. State*, 171 Ga. App. 558, 320 S.E.2d 395 (1984).

Trial court did not err in failing to charge on involuntary manslaughter in the course of a lawful act, where the defense was based upon self-defense, which was fully charged to the jury. *King v. State*, 177 Ga. App. 788, 341 S.E.2d 307 (1986).

Although the defendant who uses a gun in self-defense is entitled to a charge on the law of self-defense, that defendant is not also entitled to a charge on the law of lawful act-unlawful manner-involuntary manslaughter on the theory that the use of the gun was unnecessary (i.e., the force used was excessive). *Pullin v. State*, 257 Ga. 815, 364 S.E.2d 848 (1988); *Reid v. State*, 206 Ga. App. 367, 425 S.E.2d 315 (1992).

Charge on involuntary manslaughter is not required when the defendant asserts using a gun in self-defense. *Lamon v. State*, 260 Ga. 119, 390 S.E.2d 582 (1990).

Trial court acted properly in not giving the jury a requested instruction on involuntary manslaughter in the commission of a lawful act in an unlawful manner, pursuant to O.C.G.A. § 16-5-3(b), because defendant asserted self-defense in the fatal shooting of the victim and the jury was instructed on the issues of self-defense and accident. *Mize v. State*, 277 Ga. 148, 586 S.E.2d 648 (2003).

It was not error to fail to give an instruction on involuntary manslaughter when the defendant claimed that the killing of the victim was done in self-defense. *Shipman v. State*, 288 Ga. App. 134, 653 S.E.2d 383 (2007).

Charge on involuntary manslaughter was not authorized in a case in which the defendant alleged self-defense. Similarly, as to the defendant's claim of accident, a charge on involuntary manslaughter in the commission of a lawful act was not

warranted because, under the definition of involuntary manslaughter in O.C.G.A. § 16-5-3(b), no crime would have occurred. *Finley v. State*, 286 Ga. 47, 685 S.E.2d 258 (2009).

**Instruction on involuntary manslaughter unwarranted when battered person syndrome asserted.** — Defendant who sought to justify killing a victim by battered person syndrome was not entitled to an additional instruction on involuntary manslaughter resulting from the commission of a lawful act in an unlawful manner under O.C.G.A. § 16-5-3(b) because if the act was justified, it was not a crime, and if not justified, it was not a lawful act. *Demery v. State*, 287 Ga. 805, 700 S.E.2d 373 (2010).

**Failure to charge jury was not prejudicial.** — Failure to charge the jury on involuntary manslaughter in the commission of a lawful act was not so blatantly apparent and prejudicial that it raised a question whether defendant was deprived of a fair trial because of it, especially when the evidence adduced by the state authorized the jury to find beyond a reasonable doubt that defendant was guilty of voluntary manslaughter, the offense upon which the jury was instructed under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *Chambers v. State*, 205 Ga. App. 16, 421 S.E.2d 88, cert. denied, 205 Ga. App. 899, 421 S.E.2d 88 (1992).

**If state's evidence raises issue of manslaughter court should charge thereon, even without request.** — If jury can find from state's evidence that accused unintentionally killed deceased in commission of an unlawful act, or without due caution and circumspection during a lawful act resulting in culpable negligence, the state's evidence places lesser crime of manslaughter in the case and requires charge thereon without request. *Drake v. State*, 221 Ga. 347, 144 S.E.2d 519 (1965) (decided under former Code 1933, § 26-1007).

**When act may or may not be lawful, both grades should be charged.** — When act from which death results may or may not be lawful under facts, both grades of law of involuntary manslaughter should be given in charge. *Warnack v.*

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State, 3 Ga. App. 590, 60 S.E. 288 (1908), later appeal, 5 Ga. App. 816, 63 S.E. 935; 7 Ga. App. 73, 66 S.E. 393 (1909) (decided under former Penal Code 1895, § 65).

**Court may charge on both accident and involuntary manslaughter.** — Despite fact that defenses of accident and involuntary manslaughter may be inconsistent, since jury, upon finding presence of one, would be precluded from finding the other, a court may properly charge on both theories of law. Benford v. State, 158 Ga. App. 43, 279 S.E.2d 236 (1981), overruled on other grounds, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599 (1991).

**Charge on manslaughter not misleading when evidence authorizes finding of mistake.** — It is not misleading to charge on voluntary manslaughter in a case when the jury might be authorized to find that defendant shot deceased by mistake, intending to shoot a person making an assault on the defendant. Sinkfield v. State, 222 Ga. 51, 148 S.E.2d 409 (1966) (decided under former Code 1933, § 26-1009).

**Failure to charge on manslaughter not erroneous.** — In a prosecution for felony murder, defendant's "catchall" request to charge on "murder, manslaughter, and aggravated assault," pursuant to the pattern charges "Part 4B (as applicable)" was not precisely adjusted to the principles of the case, and the failure to charge on manslaughter was not erroneous. Lane v. State, 268 Ga. 678, 492 S.E.2d 230 (1997).

There was sufficient evidence to convict a defendant of felony murder under O.C.G.A. § 16-5-1 based upon the actions of participating in the attack by hitting the victim with the bat even though the defendant did not actually shoot the victim; thus, instructions tracking O.C.G.A. § 16-5-21(a)(2) aggravated assault could properly be based on another perpetrator's use of a gun but the victim's acts of self-defense were not provocation that justified an O.C.G.A. § 16-5-3(a) involuntary manslaughter instruction. Ros v. State, 279 Ga. 604, 619 S.E.2d 644 (2005).

**Court refusal to give misdemeanor grade involuntary manslaughter**

**charge.** — It is not error to refuse to give a requested charge on misdemeanor grade involuntary manslaughter where the defendant asserts that he or she caused the death of another by the use of a gun in self-defense. Moore v. State, 251 Ga. 499, 307 S.E.2d 476 (1983).

In a prosecution for felony involuntary manslaughter, the trial court did not err in refusing the defendant's requested jury charge on unlawful-act involuntary manslaughter, because the jury considered the defendant's theories of self-defense and accident and rejected them, and evidence in opposition to these defenses showed that the defendant struck the victim with the barrel of the gun, which went off, killing the victim, and the evidence presumed that the defendant committed an aggravated assault under O.C.G.A. § 16-5-21(a)(2). Gore v. State, 272 Ga. App. 156, 611 S.E.2d 764 (2005).

**Erroneous instructions regarding murder or voluntary manslaughter were harmless** where conviction was of involuntary manslaughter. McGraw v. State, 85 Ga. App. 857, 70 S.E.2d 141 (1952) (decided under former Code 1933, § 26-1009).

**To warrant instructions on involuntary manslaughter** evidence must authorize determination that death occurred unintentionally from commission of unlawful act other than a felony, or from commission of lawful act in unlawful manner likely to produce death or great bodily harm. Hewitt v. State, 127 Ga. App. 180, 193 S.E.2d 47 (1972); Trask v. State, 132 Ga. App. 645, 208 S.E.2d 591 (1974); Henderson v. State, 153 Ga. App. 801, 266 S.E.2d 522 (1980).

Decision to charge on involuntary manslaughter is a fact question which must be decided on a case-by-case basis. Byrer v. State, 260 Ga. 484, 397 S.E.2d 120 (1990).

To warrant instruction on involuntary manslaughter, there must be evidence to authorize a determination that death occurred unintentionally from the commission of an unlawful act other than a felony. Byrer v. State, 260 Ga. 484, 397 S.E.2d 120 (1990).

Trial court's instruction on felony involuntary manslaughter as a lesser included offense of felony murder was not improper

when there was evidence that the defendant intentionally pointed a gun at the victim in violation of O.C.G.A. § 16-11-102 just before the gun fired. *Moore v. State*, 286 Ga. App. 313, 649 S.E.2d 337 (2007).

**Involuntary manslaughter should be charged, upon request**, where there is "slight evidence" to support the charge. *Richardson v. State*, 250 Ga. 506, 299 S.E.2d 715 (1983).

**Involuntary manslaughter charge warranted in arson prosecution.** — In a prosecution for felony murder and arson, the trial court erred in refusing to grant defendant's charge on involuntary manslaughter where despite defendant's concession that defendant intentionally set the fire, there was sufficient evidence from which the jury could conclude that the defendant set the fire without intending to burn down the motel building. *Reinhardt v. State*, 263 Ga. 113, 428 S.E.2d 333 (1993), overruled on other grounds, *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008).

**If evidence authorizes finding of involuntary manslaughter** failure to charge thereon is error. *Johnston v. State*, 232 Ga. 268, 206 S.E.2d 468 (1974).

When there is evidence from which jury would be authorized to find accused guilty of involuntary manslaughter in commission of a lawful act without due caution and circumspection, it is error for judge to omit to instruct jury on law relating to that grade of manslaughter. *Maloof v. State*, 139 Ga. App. 787, 229 S.E.2d 560 (1976).

**Charge on involuntary manslaughter unwarranted.** See *Lancaster v. State*, 250 Ga. 871, 301 S.E.2d 882 (1983); *Moses v. State*, 264 Ga. 313, 444 S.E.2d 767 (1994); *Smith v. State*, 264 Ga. 857, 452 S.E.2d 494 (1995); *Grano v. State*, 265 Ga. 346, 455 S.E.2d 582 (1995); *Brown v. State*, 269 Ga. 67, 495 S.E.2d 289 (1998).

Trial court did not err in refusing to charge on involuntary manslaughter when the defendant offered no evidence concerning intent, whereas the state offered testimony that the defendant told the victim, while defendant was beating the victim, that defendant was going to kill her, and whereas several witnesses

testified that the defendant told them after the beating that the victim deserved to die. *Elliott v. State*, 253 Ga. 417, 320 S.E.2d 361 (1984).

When an act that causes a death is a felony, a requested involuntary manslaughter charge is properly denied. *Mayweather v. State*, 254 Ga. 660, 333 S.E.2d 597 (1985); *Rouse v. State*, 265 Ga. 32, 453 S.E.2d 30 (1995); *Smith v. State*, 267 Ga. 502, 480 S.E.2d 838 (1997).

Requested charges on involuntary manslaughter, pointing a firearm at another, and simple assault, were properly refused, where defendant's testimony (that defendant fired shots with the intention of frightening a group) established as a matter of law the offense of aggravated assault, and the testimony that members of the group were frightened and dropped to the ground was inconsistent with the requested charges. *Hawkins v. State*, 260 Ga. 138, 390 S.E.2d 836 (1990).

Charge on involuntary manslaughter is not warranted, even if it is the sole defense, if the evidence does not support the charge. *Hayes v. State*, 261 Ga. 439, 405 S.E.2d 660 (1991).

There was no evidence that the defendant, who murdered the victim with a rifle, was attempting to effect a valid citizen's arrest, and, hence, defendant was not entitled to an involuntary manslaughter charge. It was not reasonable for the defendant to attempt an arrest with a semi-automatic weapon which defendant was not licensed to carry, as deadly force in effecting an arrest is limited to self-defense or to a situation in which it is necessary to prevent a forcible felony. *Hayes v. State*, 261 Ga. 439, 405 S.E.2d 660 (1991).

Defendant, who confessed to intentionally setting defendant's son's bed on fire with the five year-old asleep in it was not entitled to a charge to the jury on involuntary manslaughter; arson was a felony, so involuntary manslaughter would not apply. *Riley v. State*, 278 Ga. 677, 604 S.E.2d 488 (2004).

Because there was no evidence that the defendant was in lawful possession of the gun with which the victim was shot, there was nothing to support a jury charge on misdemeanor involuntary manslaughter

**Jury Instructions (Cont'd)**

as well as felony involuntary manslaughter as a lesser included offense of felony murder. *Moore v. State*, 286 Ga. App. 313, 649 S.E.2d 337 (2007).

Trial court did not err by refusing to charge the jury on involuntary manslaughter in the commission of a lawful act in an unlawful manner, O.C.G.A. § 16-5-3(b), as a lesser included offense of a felony murder charge based on the underlying offense of cruelty to children: the defendant had not requested such a charge in writing; moreover, the evidence, including the defendant's claim that the child's death was caused by an accidental fall while the defendant was playing with the child, did not warrant a charge on lawful act-unlawful manner involuntary manslaughter. *Moore v. State*, 283 Ga. 151, 656 S.E.2d 796 (2008).

When evidence established either that defendant intentionally shot and killed the victim or that a pistol discharged accidentally and no offenses occurred, this showed either commission of felony murder and aggravated assault or commission of no offense, and the trial court did not err in refusing to give a lesser included offense charge on involuntary manslaughter based on reckless conduct. *Lashley v. State*, 283 Ga. 465, 660 S.E.2d 370 (2008).

Because a defendant was a convicted felon in possession of a firearm, a felony under O.C.G.A. § 16-11-131(b), the defendant was not entitled to a jury instruction on involuntary manslaughter under O.C.G.A. § 16-5-3(a), a killing resulting from an unlawful act other than a felony. *Finley v. State*, 286 Ga. 47, 685 S.E.2d 258 (2009).

**Instructions on both voluntary manslaughter and involuntary manslaughter not warranted.** — In a murder prosecution, the trial court properly refused to give jury instructions on voluntary manslaughter, involuntary manslaughter, pointing a pistol at another, and accident as no evidence of provocation was presented and the evidence showed that the victim was killed during the defendant's effort to rob the victim at gunpoint. *Roberts v. State*, 282 Ga. 548, 651 S.E.2d 689 (2007).

**Court did not err in refusing to charge both kinds of involuntary manslaughter.** — See *Eller v. State*, 183 Ga. App. 724, 360 S.E.2d 53 (1987).

**No improper sequential charge.** — When the trial court instructed the jury on the law of malice murder and felony murder, the offenses for which the defendant was indicted, and the included offense of involuntary manslaughter, the court did not give an improper sequential charge as involuntary manslaughter does not contain an element that mitigates a greater offense. *McNeal v. State*, 263 Ga. 397, 435 S.E.2d 47 (1993).

**Incomplete charge.** — When the defendant requested a charge on involuntary manslaughter as a lesser included offense, but the request did not specify pointing a gun or pistol at another, it was not error to fail to charge on involuntary manslaughter while pointing a gun or pistol. *Lashley v. State*, 283 Ga. 465, 660 S.E.2d 370 (2008).

**Jury instructions considered as whole to determine whether misleading.** — Although a portion of the trial court's main charge which states that "a person convicted under subsection (a) is guilty of a misdemeanor" is inappropriate, the trial court's instructions must be considered as a whole to determine whether they would mislead a jury of ordinary intelligence. *Cooper v. State*, 167 Ga. App. 440, 306 S.E.2d 709 (1983).

**Indictment**

**Conviction for manslaughter upon indictment charging murder is proper**, although there is no count for manslaughter in the indictment. *Perry v. State*, 78 Ga. App. 273, 50 S.E.2d 709 (1948) (decided under former Code 1933, § 26-1009).

**Involuntary manslaughter in commission of unlawful act is always included in indictment for murder.** — Indictment having been laid for murder and charging that mortal wound was inflicted by shooting deceased with a pistol and proof being that this was manner in which deceased was killed, a verdict of involuntary manslaughter would find support in the pleading, for reason that involuntary manslaughter is the unlawful

killing of a human being and such crime is always included in an indictment for murder — that is, the indictment necessarily included within itself all essential ingredients of involuntary manslaughter in commission of an unlawful act. *Perry v. State*, 78 Ga. App. 273, 50 S.E.2d 709 (1948) (decided under former Code 1933, § 26-1009).

When defendant's indictment charged that while committing possession of a firearm by a person under the age of 18 years, in violation of O.C.G.A. § 16-11-32, defendant caused a victim's death without any intention to do so, the indictment was fatally defective because it was not sufficient to allege that the unintentional death was caused solely by defendant's possession of the firearm, as the state did not allege an unlawful act which under any circumstances could be the proximate cause of the unintentional death. *Scraders v. State*, 263 Ga. App. 754, 589 S.E.2d 315 (2003).

### Application Generally

**Application of rule of lenity.** — Defendant was not entitled to be sentenced under the rule of lenity for misdemeanor involuntary manslaughter under O.C.G.A. § 16-5-3(b) rather than felony involuntary manslaughter under O.C.G.A. § 16-5-3(a), although the defendant was convicted of both crimes, because the two crimes did not address the same criminal conduct and no ambiguity was created by different punishments being set forth for the same crime. *Campbell v. State*, 297 Ga. App. 387, 677 S.E.2d 312 (2009), cert. denied, No. S09C1263, 2009 Ga. LEXIS 411 (Ga. 2009).

**Former Penal Code 1895, § 65 (now O.C.G.A. § 16-5-3) made no exception in case of convicts but included all persons.** *Westbrook v. State*, 133 Ga. 578, 66 S.E. 788, 25 L.R.A. (n.s.) 591, 18 Ann. Cas. 295 (1909) (decided under former Penal Code 1895, § 65).

**Convictions for involuntary manslaughter and cruelty to children** were not inconsistent because the jury could have found from the evidence both that the defendant maliciously caused the victim excessive pain, and that defendant's actions caused the victim's death,

though defendant may not have intended to kill the victim. *Sanders v. State*, 245 Ga. App. 561, 538 S.E.2d 470 (2000).

**Verdict of involuntary manslaughter will be referred to highest grade of that offense**, i.e., manslaughter in commission of an unlawful act, unless jury specifies otherwise. *Bullock v. State*, 10 Ga. 47, 54 Am. Dec. 369 (1851) (decided under prior law); *Wright v. State*, 78 Ga. 192, 2 S.E. 693 (1886) (decided under former Code 1882, § 4324); *Thomas v. State*, 121 Ga. 331, 49 S.E. 273 (1904) (decided under former Penal Code 1895, § 65); *Register v. State*, 10 Ga. App. 623, 74 S.E. 429, later appeal, 12 Ga. App. 1, 76 S.E. 649 (1912), later appeal, 12 Ga. App. 688, 78 S.E. 142 (1913) (decided under former Penal Code 1910, § 65).

**Murder and manslaughter are different grades of offense of unlawful homicide.** *Perry v. State*, 78 Ga. App. 273, 50 S.E.2d 709 (1948) (decided under former Code 1933, § 26-1007).

**On trial for manslaughter, evidence of previous threats or declarations by accused is inadmissible.** *Hicks v. State*, 55 Ga. App. 149, 189 S.E. 373 (1937) (decided under former Code 1933, § 26-1007).

**Erroneous exclusion of testimony negating malice was harmless.** — When in a murder trial, the jury returns a verdict of guilty of involuntary manslaughter in commission of an unlawful act without an intent to kill, such verdict is equivalent of finding the defendant not guilty of murder and thus there was no malice, and also acquitted the defendant of voluntary manslaughter and thus found there was no intention to kill the deceased; hence, ruling out of certain testimony which the defense hoped would negative intent or malice, if error, was harmless because the jury found in the defendant's favor on issues the defendant was seeking to support by an answer which was ruled out. *Perry v. State*, 78 Ga. App. 273, 50 S.E.2d 709 (1948) (decided under former Code 1933, § 26-1007).

**Unintended death caused by unlawful blow with nondeadly weapon constitutes involuntary manslaughter.** — If jury should find that weapon used was one which would not ordinarily

**Application Generally (Cont'd)**

produce death, and therefore was not a deadly weapon, and circumstances demonstrated to satisfaction of jury that there was no intention to kill, then, even though blow was not justified, accused would be guilty only of offense of involuntary manslaughter. *Huntsinger v. State*, 200 Ga. 127, 36 S.E.2d 92 (1945) (decided under former Code 1933, § 26-1007).

**Accidental discharge of gun.** — If the gun discharged accidentally, in the absence of criminal negligence, then no crime was committed and, as the jury was instructed, acquittal was required. *Clark v. State*, 265 Ga. 243, 454 S.E.2d 492 (1995).

Evidence supported a defendant's conviction for involuntary manslaughter as there was ample evidence that the state disproved the defendant's accident defense since: (1) the defendant was hurt by the fact that the defendant's significant other had begun a relationship with the victim; (2) the defendant threatened to blow the victim's and the significant other's heads off a few weeks before the shooting; (3) defendant testified that the victim was standing in the defendant's way, that the defendant was searching for a cell phone, and that the defendant pulled out several items, including a gun; (4) a door hit the defendant in the back, causing the gun to discharge into the victim's chest; (5) the defendant testified that the defendant was careless with the gun; and (6) a detective testified that after the detective Mirandized the defendant, the defendant stated that "(the defendant) put a shell in every chamber" and that "(the defendant) fired every shell, every round." *Noble v. State*, 282 Ga. App. 311, 638 S.E.2d 444 (2006).

**Reckless handling of a gun may be basis of involuntary manslaughter.** *Pool v. State*, 87 Ga. 526, 13 S.E. 556 (1891) (decided under former Code 1882, § 4324); *Austin v. State*, 110 Ga. 748, 36 S.E. 52, 78 Am. St. R. 134 (1900) (decided under former Penal Code 1895, § 67).

Evidence was sufficient to sustain the conviction because one witness testified that the defendant shot the victim without provocation, and the defendant struck

the victim with the barrel of a gun which went off, killing the victim, after the defendant had gone to the victim's apartment to settle a debt. *Gore v. State*, 272 Ga. App. 156, 611 S.E.2d 764 (2005).

**Shooting, believing gun to be unloaded, constitutes involuntary manslaughter.** *Irvin v. State*, 9 Ga. App. 865, 72 S.E. 440 (1911) (decided under former Penal Code 1910, § 65).

**Killing to prevent escape of prisoner arrested without warrant.** — An officer killing to prevent escape of prisoner arrested without warrant is at least guilty of manslaughter in commission of an unlawful act. *O'Conner v. State*, 64 Ga. 125, 37 Am. R. 58 (1879) (decided under former Code 1873, § 4324).

**When defendant admits act but denies intention to kill,** former Code 1933, § 26-1103 deserves special scrutiny. *Jackson v. State*, 234 Ga. 549, 216 S.E.2d 834 (1975); *Jackson v. State*, 143 Ga. App. 734, 240 S.E.2d 180 (1977), overruled on other grounds, *Bangs v. State*, 198 Ga. App. 404, 401 S.E.2d 599 (1991) (see O.C.G.A. § 16-5-3).

**Section inapplicable where, had victim survived, offense would have been a felony.** — If the victim had survived, defendant would have been guilty not merely of pointing a pistol at another but of aggravated battery, which itself is a felony, O.C.G.A. § 16-5-3(a) is inapplicable. *Raines v. State*, 247 Ga. 504, 277 S.E.2d 47 (1981).

**Homicide resulting from assault constitutes involuntary manslaughter.** — Simple assault being a misdemeanor, an unintentional homicide proximately resulting from such unlawful act would amount to involuntary manslaughter and not murder. *Norrell v. State*, 116 Ga. App. 479, 157 S.E.2d 784 (1967) (decided under former Code 1933, § 26-1009).

When the defendant unlawfully commits an assault and battery upon the deceased, without any purpose or intention to kill, but thereby, during commission of such unlawful but not felonious act, inflicts a wound by reason of which the deceased dies, the defendant is guilty of involuntary manslaughter in the commission of an unlawful act. *Jackson v.*

State, 69 Ga. App. 707, 26 S.E.2d 485 (1943) (decided under former Code 1933, § 26-1009).

**Homicide occurring in commission of crime punishable by confinement in penitentiary** cannot be involuntary manslaughter. Norrell v. State, 116 Ga. App. 479, 157 S.E.2d 784 (1967) (decided under former Code 1933, § 26-1009).

**Homicide resulting from shooting at another constitutes murder.** — Under former Code 1933, § 26-1702 shooting at another was a crime punishable by confinement in the penitentiary, and therefore a homicide resulting from such unlawful act constituted the crime of murder. Norrell v. State, 116 Ga. App. 479, 157 S.E.2d 784 (1967) (decided under former Code 1933, § 26-1009) (see O.C.G.A. § 16-5-21).

**Homicide resulting from aggravated assault.** — When appellant's admitted and undisputed conduct disclosed commission of an act which would be a felony if the victim had lived, i.e., aggravated assault by shooting at another unless legally excusable, a charge under O.C.G.A. § 16-5-3(a) was not authorized. Simmons v. State, 164 Ga. App. 643, 298 S.E.2d 313 (1982).

**Merger with aggravated assault.** — Defendant's sufficiency challenge became moot on appeal as the trial court merged the involuntary manslaughter count into the aggravated assault count for sentencing purposes. Ramirez v. State, 288 Ga. App. 249, 653 S.E.2d 837 (2007).

Failure of defense counsel to make a written request for a charge on involuntary manslaughter did not deprive appellant of due process and the trial judge did not err in failing to give such a charge where the unlawful act engaged in by appellant was aggravated assault, a felony, and when there was no evidence of any lawful act committed by appellant when appellant caused the unarmed victim's death. Jester v. State, 250 Ga. 119, 296 S.E.2d 555 (1982).

**No merger with nonhomicide counts.** — Defendant's convictions of involuntary manslaughter while in the commission of a simple battery, aggravated assault, aggravated battery, cruelty to children, and reckless conduct were not

mutually exclusive, and the trial court did not err in not merging the nonhomicide counts upon sentencing. Waits v. State, 282 Ga. 1, 644 S.E.2d 127 (2007).

O.C.G.A. § 16-5-3 inapplicable when gun is used because a gun is a deadly weapon and assault with a deadly weapon constitutes aggravated assault, a felony. Pass v. State, 160 Ga. App. 64, 286 S.E.2d 53 (1981).

**In cases involving intentional discharge of gun,** charge on either subsection is not necessary. Strickland v. State, 250 Ga. 624, 300 S.E.2d 156 (1983).

**Shooting another without provocation** cannot constitute involuntary manslaughter. Fann v. State, 254 Ga. 514, 331 S.E.2d 547 (1985).

**Evidence disclosing aggressive behavior of deceased and unintentional killing.** — Whenever the evidence discloses that the deceased displays aggression toward the defendant, unprovoked, and there is some evidence from which the jury could have found the killing was not intentional, a requested charge on involuntary manslaughter should be given. Hodge v. State, 153 Ga. App. 553, 265 S.E.2d 878 (1980), overruled on other grounds, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599 (1991).

**Death caused by victim's loss of control during drag race.** — When indictment for involuntary manslaughter plainly alleges that it was loss of control by deceased in drag race, the deceased's own independent act, which caused death, and not any act on part of defendant, indictment fails to allege essential elements of offense of involuntary manslaughter. Thacker v. State, 103 Ga. App. 36, 117 S.E.2d 913 (1961) (decided under former Code 1933, § 26-1009).

**This state does not have a reckless homicide statute;** it has only voluntary and involuntary manslaughter statutes which create degrees of homicide less than murder. A history of punishing recklessly caused homicide as murder simply has nothing to do with deficiencies in felony-murder scheme because it provides no category of homicide less culpable than murder. Malone v. State, 238 Ga. 251, 232 S.E.2d 907 (1977).

**Jury instructions considered as whole to determine whether mislead-**

**Application Generally (Cont'd)**

**ing.** — Although a portion of the trial court's main charge which states that "a person convicted under subsection (a) is guilty of a misdemeanor" is inappropriate, the trial court's instructions must be considered as a whole to determine whether they would mislead a jury of ordinary intelligence. *Cooper v. State*, 167 Ga. App. 440, 306 S.E.2d 709 (1983).

**Evidence was sufficient to sustain defendant's conviction**, when defendant, an apartment security guard, instructed another security guard to put a key in the lock on a door and, when the victim opened the door from the inside, defendant's gun immediately discharged, striking the victim in the chest and fatally wounding the victim. *Cross v. State*, 199 Ga. App. 266, 404 S.E.2d 633, cert. denied, 199 Ga. App. 905, 404 S.E.2d 633 (1991).

Evidence establishing that codefendants became intoxicated, and, in violation of order requiring them to get child care when they intended to drink, placed baby between them in bed, and that one codefendant rolled over onto baby, causing the baby's death, was sufficient to support involuntary manslaughter conviction. *Bohannon v. State*, 230 Ga. App. 829, 498 S.E.2d 316 (1998).

Establishment of the causal relationship between defendant's physical contact with son and the child's death by the testimony of a pediatrician and the medical examiner that the death resulted from "Shaken Baby Syndrome" was sufficient for conviction. *Hill v. State*, 243 Ga. App. 124, 532 S.E.2d 491 (2000).

There was sufficient evidence to convict the defendant of involuntary manslaughter where the defendant was seen at a paramour's apartment with a gun in a book bag, a witness stated that the defendant pointed the gun at the paramour's head and threatened to kill the paramour, the paramour was found shot dead a short time later, and the defendant admitted firing the gun but claimed that the shooting was accidental. *Jackson v. State*, 276 Ga. 408, 577 S.E.2d 570 (2003).

Evidence showed the defendant was guilty of felony murder under O.C.G.A. § 16-5-1 and involuntary manslaughter

under O.C.G.A. § 16-5-3 after beating the defendant's child to death together with the defendant's love interest where the defendant's child was struck at least 100 times and with such force that the fat beneath the child's skin was emulsified, entered broken capillaries, and clogged the vessels leading to the child's lungs. *Marshall v. State*, 276 Ga. 854, 583 S.E.2d 884 (2003).

Evidence was sufficient to allow a rational trier of fact to have found beyond a reasonable doubt that the defendant committed involuntary manslaughter by causing the victim's death, without any intention to do so, by the commission of the unlawful act of simple battery. *Jones v. State*, 265 Ga. App. 97, 592 S.E.2d 888 (2004).

Sufficient evidence supported two defendants' convictions for involuntary manslaughter; evidence that both defendants purposefully involved the shooter in their confrontation with the victim, knew the shooter was armed with a rifle, and assisted the shooter in pursuing the victim, was sufficient to enable a rational trier of fact to find both defendants guilty beyond a reasonable doubt as parties to the shooter's crimes or any lesser included offenses. *Morris v. State*, 276 Ga. App. 775, 624 S.E.2d 281 (2005).

While the defendant and the codefendant insisted that their victim had a gun, no other witness saw the victim with a gun, and no such gun was found at the scene of the victim's shooting death; there was evidence that the defendant chased the victim as the victim ran away and shot the victim from behind, so the jury was entitled to reject the defendant's claims of self-defense and defense of another, and the evidence supported the defendant's convictions of voluntary manslaughter, O.C.G.A. § 16-5-3, and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106. *Windham v. State*, 278 Ga. App. 663, 629 S.E.2d 837 (2006).

Defendant's involuntary manslaughter conviction was affirmed on appeal as: (1) the victim's statement was properly admitted, and not hearsay; (2) the Vienna Convention on Consular Affairs did not afford the defendant any relief; (3) a fireman was properly allowed to remain on

the jury, despite previously working with law enforcement on many investigations and having a friendship with the chief assistant district attorney; (4) a reference to the defendant's immigration status did not warrant a mistrial; and (5) challenged portions of the state's argument were not improper. *Banegas v. State*, 283 Ga. App. 346, 641 S.E.2d 593 (2007).

Because sufficient direct and circumstantial evidence showed that the defendant, a prior felon wielding a weapon, engaged in a fight with the two victims, fatally wounding one and shooting the other in the arm, and thereafter fled from police, the defendant's convictions for involuntary manslaughter, reckless conduct, fleeing and eluding, and possession of a firearm by a convicted felon were upheld on appeal. *Alvin v. State*, 287 Ga. App. 350, 651 S.E.2d 489 (2007).

There was sufficient evidence to support a defendant's conviction for involuntary manslaughter of the defendant's romantic friend given the evidence of the defendant's admission that the defendant placed the friend in a headlock during a fight, and the medical examiner's findings that the friend was strangled to death. As a result, the jury was authorized to exclude all other reasonable hypotheses and conclude that the defendant unintentionally caused the friend's death while committing simple battery. *Lemon v. State*, 293 Ga. App. 488, 667 S.E.2d 654 (2008).

Sufficient evidence was presented to convict a defendant of felony involuntary manslaughter under O.C.G.A. § 16-5-3(a), possession of a knife during the commission of a crime, and misdemeanor involuntary manslaughter by causing the victim's death in the commission of a lawful act in an unlawful manner under O.C.G.A. § 16-5-3(b) because the defendant, who had been drinking, had been involved in an altercation with the victim over money, the victim jumped on the defendant's back and began hitting the defendant, and the victim subsequently died from a stab wound. *Campbell v. State*, 297 Ga. App. 387, 677 S.E.2d 312 (2009), cert. denied, No. S09C1263, 2009 Ga. LEXIS 411 (Ga. 2009).

Evidence that a defendant was the only person home with defendant's 17-month-

old son when the son became unresponsive, along with the defendant's admission that the defendant had shaken defendant's son to make the son stop crying and shaken the son again to try to wake the son up was sufficient to support the defendant's convictions for involuntary manslaughter and child cruelty. *Lewis v. State*, 304 Ga. App. 831, 698 S.E.2d 365 (2010).

Evidence was sufficient to support defendant's conviction for felony involuntary manslaughter in violation of O.C.G.A. § 16-5-3(a) because several eyewitnesses testified that, following an argument with the victim, defendant, who had been drinking whiskey, drew a cocked and loaded handgun from defendant's jacket in another's residence, pointed the gun directly at the victim, and deliberately shot the victim at point blank range. In addition, the sheriff who responded to the scene testified that defendant said that defendant shot the victim after the victim had been running the victim's mouth. *Snell v. State*, 306 Ga. App. 651, 703 S.E.2d 93 (2010).

Evidence was sufficient to enable a rational trier of fact to find defendants guilty of involuntary manslaughter since both defendants repeatedly beat the defendants' eight-year-old son with a foot long glue stick, then forced the child into a wooden box, beating the boy about the head as the defendants did so, and when numerous medical experts testified that the cause of the child's death was either blunt force trauma or asphyxiation. *Smith v. State*, 288 Ga. 348, 703 S.E.2d 629 (2010).

**Evidence sufficient to support conviction for involuntary manslaughter in commission of unlawful act.** — See *Lewis v. State*, 180 Ga. App. 369, 349 S.E.2d 257 (1986).

**Statement of deceased victim admitted.** — When the deceased victim was unavailable, statements the victim made which were relevant to show motive for the defendant's fatal act, made shortly before the victim's death to one to whom no reason to lie or to misrepresent existed, were properly admitted, and not hearsay; moreover, as the defendant was found guilty of involuntary manslaughter rather

**Application Generally (Cont'd)**

than murder, the admission of this testimony appeared to have been harmless. *Banegas v. State*, 283 Ga. App. 346, 641 S.E.2d 593 (2007).

**Circumstantial evidence insufficient.** — Conviction for involuntary manslaughter under O.C.G.A. § 16-5-3(b) was reversed because the state failed to meet its burden of proof in a circumstantial evidence case; the evidence showed that a parent was caring for an infant, the defendant had no significant contact with the infant, the defendant had not harmed the infant in the past, and the defendant had no knowledge of the abuse. *Edwards v. State*, 272 Ga. App. 540, 612 S.E.2d 868 (2005).

**Conforming verdict to pleadings and evidence.** — When the jury returns a verdict of "involuntary manslaughter," without specification, the trial court does no more than conform the verdict to the pleadings and the evidence when it asks the foreman to conform the verdict to the language of O.C.G.A. § 16-5-3(a), unlawful act involuntary manslaughter, when there is no evidence of lawful act — unlawful manner involuntary manslaughter.

*Brown v. State*, 166 Ga. App. 765, 305 S.E.2d 386 (1983).

**Mutually exclusive convictions cannot stand.** — Defendant's convictions for felony murder based on aggravated assault and involuntary manslaughter could not stand because they were mutually exclusive as the jury illogically found that defendant acted with both criminal intent and criminal negligence in shooting a woman. *Jackson v. State*, 276 Ga. 408, 577 S.E.2d 570 (2003).

**Verdicts of involuntary manslaughter and felony murder not mutually exclusive.** — Verdicts convicting the defendants of involuntary manslaughter under O.C.G.A. § 16-5-3 and felony murder were not mutually exclusive since the evidence authorized the jury to logically conclude that the defendants had committed several acts of child abuse, some of which may have been non-felony acts of abuse that inadvertently led to or contributed to the child's death and others that may have constituted felony cruelty to children, under O.C.G.A. § 16-5-70(b), which would have served as the underlying basis for the felony murder conviction. *Smith v. State*, 288 Ga. 348, 703 S.E.2d 629 (2010).

## OPINIONS OF THE ATTORNEY GENERAL

**Owner of an automobile, while riding in car,** may in some circumstances be guilty of manslaughter when the car is

involved in a fatal accident. 1948-49 Op. Att'y Gen. p. 78 (decided under former Code 1933, § 26-1009).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 366 et seq. 40AAm. Jur. 2d, Homicide, §§ 61, 62.

**C.J.S.** — 40 C.J.S., Homicide, § 123 et seq.

**ALR.** — Acquittal on charge as to one as bar to charge as to the other, where one person is killed or assaulted by acts directed at another, 2 ALR 606.

Homicide by wanton or reckless use of firearm without express intent to inflict injury, 5 ALR 603; 23 ALR 1554.

Drunkenness as affecting existence of elements essential to murder in second degree, 8 ALR 1052.

Homicide by unlawful act aimed at another, 18 ALR 917.

Discharge of firearm without intent to inflict injury as proximate cause of homicide resulting therefrom, 55 ALR 921.

Negligent homicide as affected by negligence or other misconduct of the defendant, 67 ALR 922.

Absence of evidence supporting charge of lesser degree of homicide as affecting duty of court to instruct as to, or right of jury to convict of, lesser degree, 102 ALR 1019.

Corpus delicti in prosecution for killing of newborn child, 159 ALR 523.

Test or criterion of term "culpable negligence", "criminal negligence", or "gross negligence", appearing in statute defining or governing manslaughter, 161 ALR 10.

Criminal responsibility for injury or death resulting from hunting accident, 23 ALR2d 1401.

Who other than actor is liable for manslaughter, 95 ALR2d 175.

Homicide based on killing of unborn child, 40 ALR3d 444; 64 ALR5th 671.

Homicide predicated on improper treatment of disease or injury, 45 ALR3d 114.

Homicide by withholding food, clothing, or shelter, 61 ALR3d 1207.

Propriety of predicating manslaughter conviction on violation of local ordinance or regulation not dealing with motor vehicles, 85 ALR3d 1072.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense, 15 ALR4th 983.

Criminal liability for injury or death caused by operation of pleasure boat, 18 ALR4th 858.

Propriety of lesser-included-offense charge of voluntary manslaughter to jury in state murder prosecution — Twenty-first century cases, 3 ALR6th 543.

#### **16-5-4. Time elapsed between injury and death.**

In order to be a homicide punishable under this article, death need not have occurred within a year and a day from the date of the injury alleged to have caused such death. (Code 1981, § 16-5-4, enacted by Ga. L. 1991, p. 719, § 1.)

**Editor's notes.** — Ga. L. 1991, p. 719, § 2, not codified by General Assembly, provides: "It is the intent of this Act to make statutory the ruling of the Supreme

Court of Georgia that the year and a day rule referred to herein is not the law of Georgia."

#### **16-5-5. Offering to assist in commission of suicide; criminal penalties.**

(a) As used in this Code section, the term:

(1) "Intentionally and actively assisting suicide" means direct and physical involvement, intervention, or participation in the act of suicide which is carried out free of any threat, force, duress, or deception and with understanding of the consequences of such conduct.

(2) "Suicide" means the intentional and willful termination of one's own life.

(b) Any person who publicly advertises, offers, or holds himself or herself out as offering that he or she will intentionally and actively assist another person in the commission of suicide and commits any overt act to further that purpose is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

(c) Any person who knowingly and willfully commits any act which destroys the volition of another, such as fraudulent practices upon such

person's fears, affections, or sympathies; duress; or any undue influence whereby the will of one person is substituted for the wishes of another, and thereby intentionally causes or induces such other person to commit or attempt to commit suicide shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten years.

(d) The provisions of this Code section shall not be deemed to affect any of the laws, in whole or in part, that may be applicable to the withholding or withdrawal of medical or health care treatment, including, but not limited to, laws related to a living will, a durable power of attorney for health care, an advance directive for health care, or a written order not to resuscitate. (Code 1981, § 16-5-5, enacted by Ga. L. 1994, p. 1370, § 1; Ga. L. 2007, p. 133, § 5/HB 24.)

**Editor's notes.** — Ga. L. 2007, p. 133, § 1, not codified by the General Assembly, provides: "(a) The General Assembly has long recognized the right of the individual to control all aspects of his or her personal care and medical treatment, including the right to insist upon medical treatment, decline medical treatment, or direct that medical treatment be withdrawn. In order to secure these rights, the General Assembly has adopted and amended statutes recognizing the living will and health care agency and provided statutory forms for both documents.

"(b) The General Assembly has determined that the statutory forms for the living will and durable power of attorney for health care are confusing and inconsistent and that the statutes providing for the living will and health care agency contain conflicting concepts, inconsistent and out-of-date terminology, and confusing and inconsistent requirements for execution. In addition, there is a commendable trend among the states to combine the concepts of the living will and health care agency into a single legal document.

"(c) The General Assembly recognizes that a significant number of individuals representing the academic, medical, legislative, and legal communities, state officials, ethics scholars, and advocacy groups worked together to develop the advance directive for health care contained in this Act, and the collective intent was to create a form that uses understandable and ev-

eryday language in order to encourage more citizens of this state to execute advance directives for health care.

"(d) The General Assembly finds that the clear expression of an individual's decisions regarding health care, whether made by the individual or an agent appointed by the individual, is of critical importance not only to citizens but also to the health care and legal communities, third parties, and families. In furtherance of these purposes, the General Assembly enacts a new Chapter 32 of Title 31, setting forth general principles governing the expression of decisions regarding health care and the appointment of a health care agent, as well as a form of advance directive for health care."

**Law reviews.** — For article, "Death Penalty Law," see 53 Mercer L. Rev. 233 (2001). For article, "Medical Decision-Making in Georgia," see 10 Ga. St. B.J. 50 (No. 7, 2005). For article, "Looking for a Way Out: How to Escape the Assisted Suicide Law in England," see 24 Emory Int'l L. Rev. 697 (2010).

For note on the 1994 enactment of this Code section, see 11 Georgia St. U.L. Rev. 103 (1994). For note, "Compassion in Dying v. Washington: A Resolution to the 'Jurisprudence of Doubt' Enshrouding Physician-Assisted Suicide?," see 47 Mercer L. Rev. 1145 (1996). For note, "People v. Kevorkian: Michigan's Supreme Court Leads the Way in Declaring No Fundamental Right to Assist Another in Suicide," see 47 Mercer L. Rev. 1191 (1996).

**JUDICIAL DECISIONS**

**Execution of defendant was not assisted suicide.** — Fact that the defendant agreed with the jury's determination that defendant's crimes deserved death did not mean that defendant's execution

would constitute assisted suicide. Colwell v. State, 273 Ga. 634, 544 S.E.2d 120 (2001), cert. denied, 534 U.S. 972, 122 S. Ct. 394, 151 L. Ed. 2d 298 (2001).

## ARTICLE 2

### ASSAULT AND BATTERY

**Cross references.** — Battery, assault, stalking, etc., involving family members, § 19-13-1 et seq.

Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated," see 34 Emory L.J. 855 (1985).

**Law reviews.** — For comment, "The

**JUDICIAL DECISIONS**

**Cited** in Giles v. State, 143 Ga. App. 558, 239 S.E.2d 168 (1977).

**RESEARCH REFERENCES**

**Am. Jur. Proof of Facts.** — Assault and Battery, 1 POF3d 613.

laws limited to protection of females only or which provide greater penalties for males than for females, 5 ALR4th 708.

Liability of governmental unit for intentional assault by employee other than police officer, 17 ALR4th 881.

Liability of hotel or motel operator for injury to guest resulting from assault by third party, 28 ALR4th 80.

Provocation as basis for mitigation of compensatory damages in action for assault and battery, 35 ALR4th 947.

Liability for injury to martial arts participant, 47 ALR4th 403.

Damages for Sexual Assault, 15 POF3d 259.

**ALR.** — Danger or apparent danger of death or great bodily harm as condition of self-defense in prosecution for assault as distinguished from prosecution for homicide, 114 ALR 634.

Indecent proposal to woman as assault, 12 ALR2d 971.

Assault: criminal liability as barring or mitigating recovery of punitive damages, 98 ALR3d 870.

Constitutionality of assault and battery

**16-5-20. Simple assault.**

(a) A person commits the offense of simple assault when he or she either:

- (1) Attempts to commit a violent injury to the person of another; or
- (2) Commits an act which places another in reasonable apprehension of immediately receiving a violent injury.

(b) Except as provided in subsections (c) through (h) of this Code section, a person who commits the offense of simple assault shall be guilty of a misdemeanor.

(c) Any person who commits the offense of simple assault in a public transit vehicle or station shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature. For purposes of this Code section, "public transit vehicle" means a bus, van, or rail car used for the transportation of passengers within a system which receives a subsidy from tax revenues or is operated under a franchise contract with a county or municipality of this state.

(d) If the offense of simple assault is committed between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons excluding siblings living or formerly living in the same household, the defendant shall be punished for a misdemeanor of a high and aggravated nature. In no event shall this subsection be applicable to corporal punishment administered by a parent or guardian to a child or administered by a person acting in loco parentis.

(e) Any person who commits the offense of simple assault against a person who is 65 years of age or older shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature.

(f) Any person who commits the offense of simple assault against an employee of a public school system of this state while such employee is engaged in official duties or on school property shall, upon conviction of such offense, be punished for a misdemeanor of a high and aggravated nature. For purposes of this Code section, "school property" shall include public school buses and stops for public school buses as designated by local school boards of education.

(g) Any person who commits the offense of simple assault against a female who is pregnant at the time of the offense shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature.

(h) Nothing in this Code section shall be construed to permit the prosecution of:

(1) Any person for conduct relating to an abortion for which the consent of the pregnant woman, or person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(2) Any person for any medical treatment of the pregnant woman or her unborn child; or

(3) Any woman with respect to her unborn child.

For the purposes of this subsection, the term "unborn child" means a member of the species homo sapiens at any stage of development who is

carried in the womb. (Laws 1833, Cobb's 1851 Digest, p. 787; Code 1863, §§ 4256, 4257; Code 1868, §§ 4291, 4292; Code 1873, §§ 4357, 4358; Code 1882, §§ 4357, 4358; Penal Code 1895, §§ 95, 96; Penal Code 1910, §§ 95, 96; Code 1933, §§ 26-1401, 26-1402; Code 1933, § 26-1301, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1991, p. 971, §§ 1, 2; Ga. L. 1999, p. 381, § 2; Ga. L. 1999, p. 562, § 2; Ga. L. 2004, p. 621, § 1; Ga. L. 2005, p. 60, § 16/HB 95; Ga. L. 2006, p. 643, § 1/SB 77.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1999, "subsections (c), (d), and (e)" was substituted for "subsections (c) and (d)" in subsection (b), and subsection (d) as enacted by Ga. L. 1999, p. 562, § 2, was redesignated as subsection (e).

**Editor's notes.** — Ga. L. 1999, p. 381, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crimes Against Family Members Act of 1999'."

Ga. L. 1999, p. 381, § 7, not codified by the General Assembly, provides that: "Nothing herein shall be construed to validate a relationship between people of the same sex as a 'marriage' under the laws of this State."

Ga. L. 1999, p. 562, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited

as the 'Crimes Against Elderly Act of 1999'."

Ga. L. 2004, p. 621, § 9(b), not codified by the General Assembly, provides that the amendment by that Act shall apply to offenses committed on or after July 1, 2004.

Ga. L. 2006, p. 643, § 5, not codified by the General Assembly, provides that the amendment by that Act shall apply to all offenses committed on or after July 1, 2006.

**Law reviews.** — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001). For article on 2006 amendment of this Code section, see 23 Georgia St. U.L. Rev. 37 (2006).

For note on 1999 amendments to Code sections in this article, see 16 Georgia St. U.L. Rev. 72 (1999).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### APPLICATION

#### JURY INSTRUCTION

### General Consideration

**Concurrent jurisdiction with federal labor legislation.** — Even under situations involving the jurisdiction of the National Labor Relations Act, 29 U.S.C. § 151 et seq., the state has retained concurrent jurisdiction to enforce O.C.G.A. § 16-5-20 as it directly relates to the prevention of, or incitement to, immediate violence or to the prevention of the threat of immediate violence or violent injury. State v. Klinakis, 206 Ga. App. 318, 425 S.E.2d 665 (1992).

**Simple assault defined.** — Offense of

simple assault is complete if there is such a demonstration of violence, coupled with an apparent ability to inflict injury so as to cause the person against whom it is directed reasonably to fear the injury unless the person retreats to secure that person's safety. Hise v. State, 127 Ga. App. 511, 194 S.E.2d 274 (1972); Hudson v. State, 135 Ga. App. 739, 218 S.E.2d 905 (1975).

**Simple assault does not require physical contact with victim.** Tuggle v. State, 145 Ga. App. 603, 244 S.E.2d 131 (1978).

**Any attempt to do any unlawful act**

**General Consideration (Cont'd)**

**of violence injurious to another** was included in former Code 1933, § 26-1401 (see now O.C.G.A. § 16-5-20). Williams v. State, 15 Ga. App. 306, 82 S.E. 938 (1914).

**Assault is inchoate violence, with present means of carrying the violence into effect.** The intention to do bodily harm is the essence of assault. Mullen v. State, 51 Ga. App. 385, 180 S.E. 521 (1935).

**"Person".** — State may present a surviving aggravated assault victim for view by the jurors, where, even though the victim does not testify, the victim's presence establishes that the victim is a "person" for purposes of proving the elements of O.C.G.A. § 16-5-20(a). Perry v. State, 276 Ga. 836, 585 S.E.2d 614, rev'd, 276 Ga. 839, 584 S.E.2d 253 (2003).

**"Commits an act."** — When there was no evidence that defendant performed any act constituting a substantial step toward the commission of a battery, defendant could not be convicted of assault, as the evidence could not satisfy the element of "commits an act." In re C.S., 251 Ga. App. 411, 554 S.E.2d 558 (2001).

**"Intent to commit injury" inconsistent with negligence.** — Charge of aggravated assault under O.C.G.A. § 16-5-21 based upon the "intent to commit injury" provisions of O.C.G.A. § 16-5-20(a)(1) requires a criminal intent that is fatally inconsistent with the negligence required by a charge of reckless conduct under O.C.G.A. § 16-5-60(b). Reddick v. State, 264 Ga. App. 487, 591 S.E.2d 392 (2003).

Aggravated assault convictions were affirmed because the defendant accelerated toward officers standing in front of a road-block, forcing them to jump out of the way, and causing one to fall. Williams v. State, 270 Ga. App. 371, 606 S.E.2d 594 (2004).

**Intention to commit unlawful act must exist.** Woodruff v. Woodruff, 22 Ga. 237 (1857); Dorsey v. State, 108 Ga. 477, 34 S.E. 135 (1899).

**Intent is question for jury.** Thomas v. State, 99 Ga. 38, 26 S.E. 748 (1896); Robinson v. State, 118 Ga. 750, 45 S.E. 620 (1903).

**Apparent ability, not actual present**

**ability to commit injury is necessary.**

— There does not have to be an actual present ability to commit the injury. There need only be an apparent ability to commit violent injury upon the person assailed. Thomas v. State, 99 Ga. 38, 26 S.E. 748 (1896).

**Mere preparation unaccompanied by physical effort to commit violent injury** upon another person is not assault. Fennell v. State, 164 Ga. 59, 137 S.E. 762 (1927); Mullen v. State, 51 Ga. App. 385, 180 S.E. 521 (1935).

**Contact proceeding from rudeness** is as offensive and harmful as that from anger or lust, and in law constitutes an assault and battery. Brown v. State, 57 Ga. App. 864, 197 S.E. 82 (1938).

**Completion of assault.** — While a mere threat or menace to commit a violent injury upon the person of another is not sufficient to constitute an assault, yet where the threat or menace is accompanied by an apparent attempt to commit such an injury, and its consummation is prevented, either by the act of the person upon whom the assault is threatened or by the interposition of a third person, the violence has commenced, and the assault is complete. Harrison v. State, 60 Ga. App. 610, 4 S.E.2d 602 (1939).

There need not be an actual present ability to commit a violent injury upon the person assailed but, if there be such a demonstration of violence, coupled with an apparent ability to inflict the injury, so as to cause the person against whom it was directed reasonably to fear the injury unless the person retreats to secure that person's safety, and under such circumstances, the person is compelled to retreat to avoid an impending danger, the assault is complete though the assailant may never have been within actual striking distance of the person assaulted. Harrison v. State, 60 Ga. App. 610, 4 S.E.2d 602 (1939).

**Assault is attempted battery.** — It is lawful to convict for simple assault even though the proof shows that a battery was committed because by definition an assault is nothing more than an attempted battery. Scott v. State, 141 Ga. App. 848, 234 S.E.2d 685 (1977).

**Assault is necessarily included in every battery.** Terry v. State, 166 Ga.

App. 632, 305 S.E.2d 170 (1983); Anderson v. State, 170 Ga. App. 634, 317 S.E.2d 877 (1984).

**When offense of simple assault is complete.** — Offense of simple assault is complete if there is a demonstration of violence, coupled with apparent present ability to inflict injury so as to cause person against whom it is directed reasonably to fear that the person will receive an immediate violent injury unless the person retreats to secure that person's safety. Johnson v. State, 158 Ga. App. 432, 280 S.E.2d 856 (1981).

**There must be substantial step toward committing battery** before there can be assault since assault is attempted battery. Bissell v. State, 153 Ga. App. 564, 266 S.E.2d 238 (1980).

**When two acts charged, State must prove only one.** — Indictment charged defendant with aggravated assault by committing two acts, however, the state need prove only one of the two acts constituting the crime of aggravated assault to sustain the conviction. Brown v. State, 242 Ga. App. 347, 529 S.E.2d 650 (2000).

**In every assault there must be intent to injure.** The test is, was there a present purpose of doing bodily injury? Riddle v. State, 145 Ga. App. 328, 243 S.E.2d 607 (1978), overruled on other grounds, Adsitt v. State, 248 Ga. 237, 282 S.E.2d 305 (1981).

**State of mind** of either a perpetrator or a victim, including whether a victim has been placed under reasonable apprehension of injury or fear from an event, when in issue, may be proved by indirect or circumstantial evidence. Williams v. State, 208 Ga. App. 12, 430 S.E.2d 157 (1993).

When the language of the indictment did not track the exact language of the assault statute, but did allege that the defendant "maliciously" struck the victim, it properly alleged the necessary element of intent since, given the circumstances of the case whereby the victim did not see the defendant strike the victim, it would have been difficult to conclude that the victim was placed in reasonable apprehension of being injured violently. Gamble v. State, 235 Ga. App. 777, 510 S.E.2d 69 (1998).

**Apparent ability to injure is necessary element of assault.** — To constitute an assault no actual injury need be shown, it being only necessary to show an intention to commit an injury, coupled with an apparent ability to do so. Reeves v. State, 128 Ga. App. 750, 197 S.E.2d 843 (1973).

**There need not be actual present ability to commit violent injury** upon person assailed; but, if there be such a demonstration of violence, coupled with an apparent ability to inflict the injury, so as to cause the person against whom it is directed reasonably to fear the injury unless the person retreats to secure that person's safety, and under such circumstances the person is compelled to retreat to avoid an impending danger, the assault is complete though the assailant may never have been within actual striking distance of the person assailed. Reeves v. State, 128 Ga. App. 750, 197 S.E.2d 843 (1973).

**Victim's apprehension may be inferred from victim's conduct.** — Proof that victim has been placed in apprehension of immediately receiving a violent injury need not necessarily be solely by reason of victim's testimony of victim's mental state but may be inferred from conduct of victim such as when the victim retreats to secure safety. Hurt v. State, 158 Ga. App. 722, 282 S.E.2d 192 (1981).

**Fear is not the same as reasonable apprehension.** — Simple assault is defined as an act which places another in reasonable apprehension of immediately receiving a violent injury pursuant to O.C.G.A. § 16-5-20(a)(2), an assault becomes aggravated when it is committed with a deadly weapon, O.C.G.A. § 16-5-21(a)(2); thus, if the victim is in reasonable apprehension of an immediate violent injury from a weapon, an aggravated assault has occurred. Because reasonable apprehension of injury is not the same as simple fear, the testimony that the victim was not afraid of the defendant does not preclude conviction. Lunsford v. State, 260 Ga. App. 818, 581 S.E.2d 638 (2003).

**Mere threat to commit violent injury upon person of another** is not sufficient to constitute an assault. Hudson

**General Consideration (Cont'd)**

v. State, 135 Ga. App. 739, 218 S.E.2d 905 (1975); Johnson v. State, 158 Ga. App. 432, 280 S.E.2d 856 (1981).

**Elements of simple assault must be included in definition of aggravated assault.** — In every criminal case of aggravated assault, trial judge must include statement as to elements of simple assault within the judge's definition of aggravated assault. Harper v. State, 157 Ga. App. 480, 278 S.E.2d 28 (1981).

**"Assault" in aggravated assault is not equivalent to simple assault** in O.C.G.A. § 16-5-20. Zachery v. State, 158 Ga. App. 448, 280 S.E.2d 860 (1981).

**Indictment sufficient.** — Because an indictment, which included charging language that the defendant "unlawfully, and with malice aforethought, caused the death of the victim by striking," placed the defendant on notice of a possible conviction of an assault upon the victim with the intent to murder or commit a violent injury, the defendant could be convicted of aggravated assault as a lesser included crime of malice murder; the only difference was that the malice murder indictment alleged that the defendant actually accomplished the murder, in addition to having intended to accomplish the murder. Reagan v. State, 281 Ga. App. 708, 637 S.E.2d 113 (2006).

**Failure to include definition of simple assault in charge on aggravated assault.** — Trial court does not necessarily err in failing to charge upon the definition of simple assault in charging on aggravated assault as a charge on simple assault need not be given in order to complete the definition of aggravated assault. Willis v. State, 167 Ga. App. 626, 307 S.E.2d 133 (1983).

There is no merit in defendant's contention that a charge on simple assault under O.C.G.A. § 16-5-20 must be given in order to complete the definition of aggravated assault under O.C.G.A. § 16-5-21 as the latter does not need the former to make it complete. Spaulding v. State, 185 Ga. App. 812, 366 S.E.2d 174, cert. denied, 185 Ga. App. 911, 366 S.E.2d 174 (1988).

**Simple assault is lesser included offense of aggravated assault with**

**deadly weapon.** — Simple assault under former Code 1933, § 26-1301 (see O.C.G.A. § 16-5-20) and pointing a gun or pistol at another under former Code 1933, § 26-2908 (see O.C.G.A. § 16-11-102) are both misdemeanors and are included in the greater crime of aggravated assault with a deadly weapon. Morrison v. State, 147 Ga. App. 410, 249 S.E.2d 131 (1978).

**Simple assault is not a lesser included offense of terroristic threats.** McQueen v. State, 184 Ga. App. 630, 362 S.E.2d 436 (1987).

**Defendant failed to show error in refusal to merge offenses** because the defendant failed to show that aggravated assault was established by the same facts used to prove simple battery; evidence that the defendant entered a store wearing a mask, that the defendant opened the cash drawer, that the defendant tried to wrangle a key to the drawer from the employee's hand, that the defendant demanded money, that the defendant banged on the register, and that the defendant appeared to have had a gun supported the aggravated assault conviction, but none of this evidence was needed to prove simple battery, which was established by evidence of the defendant's bruising blows to the employee's arm. Lawson v. State, 275 Ga. App. 334, 620 S.E.2d 600 (2005).

**Effect of section on offenses under prior law.** — Under Ga. L. 1968, pp. 1249, 1280 et seq. (see O.C.G.A. § 16-5-20), numerous offenses formerly specifically set out are grouped as assaults or batteries. Wells v. State, 125 Ga. App. 579, 188 S.E.2d 407 (1972).

**When evidence of circumstances clearly supports guilt of simple assault.** — When the circumstances clearly disclose a situation in which the jury could determine that the alleged victim, with a pistol pointed at the victim, was in reasonable apprehension of immediately receiving a violent injury, the evidence clearly supports the verdict of guilty of simple assault. Hise v. State, 127 Ga. App. 511, 194 S.E.2d 274 (1972).

**Mutually exclusive verdicts.** — Defendant's convictions of aggravated assault on a peace officer and serious injury by vehicle based on reckless driving were

mutually exclusive as it was reasonably probable that the jury found the defendant guilty of aggravated assault under O.C.G.A. § 16-5-20(a)(1) for intentionally attempting to commit a violent injury to the officer. A verdict of guilt under § 16-5-20(a)(1), requiring proof of intent, was mutually exclusive with a verdict of guilt as to serious injury by vehicle predicated on reckless driving. *Dryden v. State*, 285 Ga. 281, 676 S.E.2d 175 (2009).

**Evidence did not require reversal.** — Convictions for theft, aggravated assault, and making a terroristic threat was supported by evidence because the defendant admitted to taking gas cans, raised a machete to scare or strike the sibling, the sibling was frightened and ran, and the defendant then threatened the siblings that if either called the sheriff the defendant would return and kill them. *Turner v. State*, 273 Ga. App. 535, 615 S.E.2d 603 (2005).

Convictions against the defendant for aggravated assault and simple assault did not require reversal because the police failed to preserve the defendant's car after the defendant had engaged in an aggressive car chase, which resulted in the assault charges based on the defendant having used his car as a weapon, as there was no showing that the police acted in bad faith in failing to preserve the evidence and no evidence that suggested that the possible exculpatory value of the car was apparent before its destruction. *Ransby v. State*, 273 Ga. App. 594, 615 S.E.2d 651 (2005).

Despite the recantation by a juvenile's parent at trial, because sufficient evidence that the juvenile placed the parent in reasonable apprehension of being struck with a hammer, which was in line with the allegations in the parent's complaint filed immediately following the incident, the juvenile court's adjudication against the juvenile for aggravated assault was upheld on appeal. *In the Interest of C.B.*, 288 Ga. App. 752, 655 S.E.2d 342 (2007).

**Cited** in *Johnson v. State*, 122 Ga. App. 542, 178 S.E.2d 42 (1970); *Smith v. State*, 127 Ga. App. 468, 193 S.E.2d 921 (1972); *Bentley v. State*, 131 Ga. App. 425, 205 S.E.2d 904 (1974); *Harvey v. State*, 233 Ga. 41, 209 S.E.2d 587 (1974); *Hale v.*

*State*, 135 Ga. App. 625, 218 S.E.2d 643 (1975); *Harper v. State*, 135 Ga. App. 924, 219 S.E.2d 636 (1975); *Ray v. State*, 235 Ga. 467, 219 S.E.2d 761 (1975); *Smith v. State*, 140 Ga. App. 395, 231 S.E.2d 143 (1976); *Williams v. State*, 141 Ga. App. 201, 233 S.E.2d 48 (1977); *Leach v. State*, 143 Ga. App. 598, 239 S.E.2d 177 (1977); *Pass v. State*, 144 Ga. App. 253, 240 S.E.2d 777 (1977); *Oliver v. State*, 146 Ga. App. 551, 246 S.E.2d 734 (1978); *Peterkin v. State*, 147 Ga. App. 437, 249 S.E.2d 152 (1978); *Ruff v. State*, 150 Ga. App. 238, 257 S.E.2d 203 (1979); *Jarrad v. State*, 152 Ga. App. 553, 263 S.E.2d 444 (1979); *Sutton v. State*, 245 Ga. 192, 264 S.E.2d 184 (1980); *Henderson v. State*, 153 Ga. App. 801, 266 S.E.2d 522 (1980); *Hayslip v. State*, 154 Ga. App. 835, 270 S.E.2d 61 (1980); *Webb v. State*, 156 Ga. App. 623, 275 S.E.2d 707 (1980); *C.L.T. v. State*, 157 Ga. App. 180, 276 S.E.2d 862 (1981); *Delano v. State*, 158 Ga. App. 296, 279 S.E.2d 743 (1981); *Craft v. State*, 158 Ga. App. 745, 282 S.E.2d 203 (1981); *Jackson v. State*, 248 Ga. 480, 284 S.E.2d 267 (1981); *Jefferson v. State*, 159 Ga. App. 740, 285 S.E.2d 213 (1981); *Goodman v. Davis*, 249 Ga. 11, 287 S.E.2d 26 (1982); *Williams v. State*, 249 Ga. 6, 287 S.E.2d 31 (1982); *Merrell v. State*, 162 Ga. App. 886, 293 S.E.2d 474 (1982); *Capitol T.V. Serv., Inc. v. Derrick*, 163 Ga. App. 65, 293 S.E.2d 724 (1982); *Joiner v. State*, 163 Ga. App. 521, 295 S.E.2d 219 (1982); *Chastain v. State*, 163 Ga. App. 678, 296 S.E.2d 69 (1982); *Talley v. State*, 164 Ga. App. 150, 296 S.E.2d 173 (1982); *Petouvis v. State*, 165 Ga. App. 409, 301 S.E.2d 483 (1983); *McWilliams v. State*, 172 Ga. App. 55, 322 S.E.2d 87 (1984); *Lester v. State*, 173 Ga. App. 300, 325 S.E.2d 912 (1985); *Hamby v. State*, 173 Ga. App. 750, 328 S.E.2d 224 (1985); *Swint v. State*, 173 Ga. App. 762, 328 S.E.2d 373 (1985); *Hambrick v. State*, 174 Ga. App. 444, 330 S.E.2d 383 (1985); *Green v. State*, 175 Ga. App. 92, 332 S.E.2d 385 (1985); *Cook v. State*, 255 Ga. 565, 340 S.E.2d 843 (1986); *King v. State*, 178 Ga. App. 343, 343 S.E.2d 401 (1986); *Robinson v. State*, 182 Ga. App. 423, 356 S.E.2d 55 (1987); *Rhodes v. State*, 257 Ga. 371, 359 S.E.2d 670 (1987); *Binns v. State*, 258 Ga. 23, 364 S.E.2d 871 (1988); *Munoz v. State*, 190 Ga. App. 806, 380 S.E.2d 88

**General Consideration** (Cont'd)

(1989); Freeman v. State, 194 Ga. App. 905, 392 S.E.2d 330 (1990); State v. Seignious, 197 Ga. App. 766, 399 S.E.2d 559 (1990); Knox v. State, 261 Ga. 272, 404 S.E.2d 269 (1991); Gaston v. State, 209 Ga. App. 477, 433 S.E.2d 306 (1993); Smiley v. State, 263 Ga. 716, 438 S.E.2d 75 (1994); Powell v. State, 228 Ga. App. 56, 491 S.E.2d 135 (1997); Reeves v. State, 233 Ga. App. 802, 505 S.E.2d 540 (1998); Fletcher v. Screven County, 92 F. Supp. 2d 1377 (S.D. Ga. 2000); Huguley v. State, 242 Ga. App. 645, 529 S.E.2d 915 (2000); Lowery v. State, 242 Ga. App. 375, 530 S.E.2d 22 (2000); Brinson v. State, 272 Ga. 345, 529 S.E.2d 129 (2000); Tucker v. State, 245 Ga. App. 551, 538 S.E.2d 458 (2000); Robertson v. State, 245 Ga. App. 649, 538 S.E.2d 755 (2000); Brown v. State, 246 Ga. App. 60, 539 S.E.2d 545 (2000); Maynor v. State, 257 Ga. App. 151, 570 S.E.2d 428 (2002); Heard v. State, 257 Ga. App. 315, 573 S.E.2d 82 (2002); Damare v. State, 257 Ga. App. 508, 571 S.E.2d 507 (2002); Jackson v. State, 257 Ga. App. 817, 572 S.E.2d 360 (2002); Williams v. State, 270 Ga. App. 371, 606 S.E.2d 594 (2004); Taylor v. State, 271 Ga. App. 701, 610 S.E.2d 668 (2005); Harris v. State, 273 Ga. App. 90, 614 S.E.2d 189 (2005); Kelley v. State, 279 Ga. App. 187, 630 S.E.2d 783 (2006); Ivey v. State, 284 Ga. App. 232, 644 S.E.2d 169 (2007); May v. State, 287 Ga. App. 407, 651 S.E.2d 510 (2007); Brown v. State, 288 Ga. App. 812, 655 S.E.2d 692 (2007); Boyd v. State, 289 Ga. App. 342, 656 S.E.2d 864 (2008); Taul v. State, 290 Ga. App. 288, 659 S.E.2d 646 (2008); Louis v. State, 290 Ga. App. 106, 658 S.E.2d 897 (2008); Quiroz v. State, 291 Ga. App. 423, 662 S.E.2d 235 (2008); Branton v. State, 292 Ga. App. 104, 663 S.E.2d 414 (2008); Lewis v. State, 292 Ga. App. 257, 663 S.E.2d 721 (2008); Armstrong v. State, 292 Ga. App. 145, 664 S.E.2d 242 (2008); Carlos v. State, 292 Ga. App. 419, 664 S.E.2d 808 (2008); Hardy v. State, 293 Ga. App. 265, 666 S.E.2d 730 (2008); Adams v. State, 293 Ga. App. 377, 667 S.E.2d 186 (2008); Gordon v. State, 294 Ga. App. 908, 670 S.E.2d 533 (2008); Bradshaw v. State, 284 Ga. 675, 671 S.E.2d 485 (2008); Hollis v. State, 295 Ga.

App. 529, 672 S.E.2d 487 (2009); Hudson v. State, 296 Ga. App. 692, 675 S.E.2d 578 (2009); In the Interest of J. W. B., 296 Ga. App. 131, 673 S.E.2d 630 (2009); Williams v. State, 288 Ga. 7, 700 S.E.2d 564 (2010); Rainy v. State, 307 Ga. App. 467, 705 S.E.2d 246 (2010).

**Application**

**Person aiding and abetting assault is equally guilty.** — When two people confederate with the mutual intent of committing an assault on another, and in pursuance of this purpose one commits the actual assault, while the other stands by in a position to assist, if necessary, and thus aids and abets in the commission of the crime, the latter is guilty equally with the one committing the actual assault, even though that person does not inflict a blow. *Knight v. State*, 52 Ga. App. 199, 182 S.E. 684 (1935).

**No fatal variance.** — Defendant's conviction for aggravated assault was affirmed since there was not a fatal variance between the evidence and the indictment, which alleged that the defendant unlawfully made an assault with intent to rob, with a knife, by holding the knife in a threatening manner while demanding money; the defendant was a conspirator in an armed robbery and the demands for money could be attributed to the defendant as the defendant entered the apartment without permission and held the knife at the defendant's side with the blade exposed as the defendant's partner demanded money, and the victims were afraid that the defendant "would do something." *Brown v. State*, 281 Ga. App. 523, 636 S.E.2d 709 (2006), cert. denied, No. S07C0168 , 2007 Ga. LEXIS 99 (Ga. 2007).

**Testimony showing subsequent circumstances and natural consequences of act alleged as assault is admissible.** — Since the state contended the defendant threw a lighted lamp at the prosecutrix, testimony relative to the fire in the room, the fire's height, the things burned by the fire, and the place where the things were burned at the time when the prosecutrix came back to her house a few minutes after she had fled and when the officers had arrived was admissible in

assault prosecution as showing subsequent circumstances that grew out of and were the natural consequences of throwing the lighted lamp. *Harrison v. State*, 60 Ga. App. 610, 4 S.E.2d 602 (1939).

**Unintentional homicide resulting from simple assault.** — Because simple assault is a misdemeanor, an unintentional homicide proximately resulting from that unlawful act would amount to involuntary manslaughter and not murder. *Norrell v. State*, 116 Ga. App. 479, 157 S.E.2d 784 (1967).

**Jury determination of assault and battery.** — When the defendant refused to leave, the complainant had a right to eject defendant from complainant's property, but with force not disproportionate to that required to eject the defendant. Whether or not force in excess of that necessary was used, giving defendant the right to defend self against an unwarranted assault but not to an extent within itself to constitute an assault and battery on the complainant, or whether the defendant was arbitrarily refusing to leave and was committing an unwarranted battery, were all questions for the jury under the proper instructions of the court. *Slaughter v. State*, 64 Ga. App. 423, 13 S.E.2d 391 (1941).

**Assault within meaning of exclusionary provision of life insurance policy.** — In a suit under a life insurance policy, an exclusionary provision which eliminates coverage and liability if loss resulted from the insured's attempt to commit an assault, and where from the undisputed evidence all the apparent circumstances, reasonably viewed, are such as to lead a person reasonably to apprehend a violent injury from the unlawful act of another, there is an assault within the meaning of the exclusionary provision. *Quaker City Life Ins. Co. v. Sutson*, 102 Ga. App. 53, 115 S.E.2d 699 (1960).

**Simple assault merged into assault with intent to rob.** — Since the state's evidence showed no assault other than the assault with intent to rob with a shotgun, the simple assault lost its identity and was merged into the greater crime of assault with intent to rob. *Alexander v. State*, 66 Ga. App. 708, 19 S.E.2d 353 (1942).

**Whether pointing or swinging pistol is assault should be left to jury.** *Kerbo v. State*, 230 Ga. 241, 196 S.E.2d 424 (1973).

**In resisting unlawful arrest, one is justified in using force as reasonably necessary** to prevent arrest, i.e., force proportionate to the force being used in the unlawful detention. *Brooks v. State*, 144 Ga. App. 97, 240 S.E.2d 593 (1977).

**Arrestee is justified in assaulting arresting officer** only when officer has assaulted the arrestee first. *Brooks v. State*, 144 Ga. App. 97, 240 S.E.2d 593 (1977).

**Communication of terroristic threat** is not punishable under the simple assault statute. *Lanthrip v. State*, 235 Ga. 10, 218 S.E.2d 771 (1975).

**Threat alone.** — Plaintiff's alleged threat to "kick" a child's "ass" if the child did not get out of the plaintiff's yard did not constitute a simple assault under O.C.G.A. § 16-5-20(a) because the plaintiff made the allegedly threatening statement from inside an open window and had no present ability to injure the child, who was outside and on a bicycle, with the ability to leave the area at will; furthermore, plaintiff's alleged threat to "kick" the child's parent's "ass," where the parent also happened to be the complaining officer who caused the plaintiff's arrest, without more, did not constitute a simple assault, since the parent was also outside the house and in no apparent danger from plaintiff. *Payne v. Dekalb County*, 414 F. Supp. 2d 1158 (N.D. Ga. 2004).

**One may be guilty of simple assault without violating terroristic threats.** *Lanthrip v. State*, 235 Ga. 10, 218 S.E.2d 771 (1975).

**No assault when the defendant told the officers the defendant was going into back room to get gun** to prevent the officers from arresting the defendant's mother. *Hudson v. State*, 135 Ga. App. 739, 218 S.E.2d 905 (1975).

**Reasonable apprehension of violent injury.** — Defendant's conduct did constitute simple assault where there was ample evidence upon which jury could reasonably have found that defendant placed victim "in reasonable apprehension of immediately receiving a violent injury."

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McGee v. State, 165 Ga. App. 423, 299 S.E.2d 573 (1983).

Evidence was sufficient to support a conviction for aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), where the defendant fired shots towards the victim, who was "having a good time" with a group of other people in the apartment parking lot; the victim's reasonable apprehensive of receiving a violent injury was sufficient to satisfy the intent element under O.C.G.A. § 16-5-20(a)(2). Thompson v. State, 277 Ga. App. 323, 626 S.E.2d 825 (2006).

Under O.C.G.A. § 16-5-20(a)(2), the evidence established that the victim reasonably apprehended immediate violent injury where, during an exchange between the defendant and the defendant's spouse, the victim, who had accompanied the spouse, asked the defendant to lower the defendant's voice, the defendant came after the victim, and, as the victim backed away, the defendant slammed the door shut, yelling "Stay out of it," walked to the defendant's car, drove around the parking lot, and returned. Wroge v. State, 278 Ga. App. 753, 629 S.E.2d 596 (2006).

Juvenile court's adjudication entered against a juvenile on charges of aggravated assault and terroristic threats was upheld on appeal given sufficient evidence that: (1) the state adequately showed venue; and (2) the victim's testimony described the juvenile's act of pointing a gun, threatening to use the gun, and that such caused fear that something could happen as a result of defendant's acts. In the Interest of J.A.L., 284 Ga. App. 220, 644 S.E.2d 162 (2007).

There was sufficient evidence to convict the defendant of aggravated assault when after the victim flicked a cigarette that landed on the defendant's car seat, the defendant said "I'll shoot you," and pointed a gun at the victim; although the defendant claimed that the defendant and the victim were just joking around, the evidence presented was sufficient to support a finding that the defendant's act placed the victim in reasonable apprehension of immediately receiving a violent injury under O.C.G.A. § 16-5-20(a)(2).

Moore v. State, 286 Ga. App. 313, 649 S.E.2d 337 (2007).

**Violence against a parent.** — When the defendant, while cursing and screaming at the defendant's parent, stood near the parent, holding a pot of boiling water and staring at the parent, the defendant's acts constituted aggravated assault under O.C.G.A. § 16-5-21(a)(2). They constituted both a substantial step toward committing a battery and a demonstration of violence against the parent, and showed a present ability to inflict injury that placed the parent in reasonable apprehension of immediately receiving a violent injury under § 16-5-20(a)(2). In the Interest of T.Y.B., 288 Ga. App. 610, 654 S.E.2d 688 (2007).

**Reasonable apprehension of violent injury in domestic case.** — Defendant's convictions for family violence battery and simple battery were supported by evidence from the victim that the defendant had slapped the victim and choked the victim, an officer's observation of red marks around the victim's neck, and evidence of the defendant's two prior guilty pleas to batteries against the defendant's spouse. Evidence of the victim's fear of retrieving the victim's children from the house and the defendant's threats to spread the victim's brains on the wall supported the simple assault conviction. Cuzzort v. State, 307 Ga. App. 52, 703 S.E.2d 713 (2010).

**No reasonable apprehension prior to auto accident.** — Evidence was insufficient to convict defendant of aggravated assault on facts arising out of an automobile crash that occurred as defendant was fleeing police, because criminal negligence was an insufficient degree of culpability to support a conviction of violating O.C.G.A. § 16-5-20(a)(1) and because there was no evidence that a police officer attempting to join the chase ever experienced an immediate apprehension of danger before the accident as required by O.C.G.A. § 16-5-20(a)(2) since the officer never saw the suspect's car. Montford v. State, 254 Ga. App. 524, 564 S.E.2d 216 (2002).

**Admission of evidence of drug use proper.** — Evidence of the defendant's prior drug use and history of crimes committed against family members fueled by

drug usage were properly admitted as relevant to the crimes charged, despite incidentally placing the defendant's character in issue; thus, convictions for both aggravated assault and simple assault were upheld on appeal. *Jones v. State*, 283 Ga. App. 812, 642 S.E.2d 887 (2007).

**Defendant guilty of simple assault.** — Because the defendant was aware the victim was the judicial officer responsible for defendant's arrest, had a face-to-face encounter with the victim within 48 hours after the arrest, and because the defendant had made a profane threat of physical violence against the victim, defendant was guilty, beyond a reasonable doubt, of simple assault despite defendant's argument that the threat against the victim was justified because the victim first said the victim would put defendant back in jail. *Wells v. State*, 204 Ga. App. 91, 418 S.E.2d 438 (1992).

In an altercation where the victim was shot by defendant's codefendant, even though defendant did not hit the victim, there was evidence of defendant's threats against the victim and other actions sufficient to convict the defendant of simple assault; because defendant was acquitted of aggravated assault, however, defendant could not be ordered to pay restitution to the victim for gunshot wounds inflicted by the codefendant. *Rider v. State*, 210 Ga. App. 716, 437 S.E.2d 493 (1993).

Defendant's aggressive driving, the defendant's act of following the victim, the defendant's estranged spouse, in the defendant's vehicle after the victim left the hospital, yelling at the victim, impeding the victim's movement, forcing the victim into oncoming lanes of traffic, and, on several occasions, bumping the victim's car, constituted at least simple assault in that it placed the victim in reasonable apprehension of immediately receiving a violent injury, pursuant to O.C.G.A. § 16-5-20(a)(2). *Johnson v. State*, 260 Ga. App. 413, 579 S.E.2d 809 (2003).

Evidence supported guilt since the defendant tried to steal DVD players from a store, tried to hit an employee, and resisted arrest. *Williams v. State*, 261 Ga. App. 176, 582 S.E.2d 141 (2003).

Reviewing the evidence in the light most favorable to the verdict, the evidence

was sufficient to support the verdicts against the defendant for false imprisonment, aggravated battery, and simple assault in regard to acts of domestic violence against the victim, the defendant's spouse, as the evidence showed that the defendant dragged the spouse down a hallway by the spouse's hair and held the spouse in a bedroom against the spouse's will, that the defendant broke the spouse's nose and arm, and that the defendant beat the spouse with a car-washing brush. *Mize v. State*, 262 Ga. App. 486, 585 S.E.2d 913 (2003).

Factfinder was allowed to find the defendant's hands to have been deadly weapons depending on the circumstances surrounding their use, including the extent of the victim's injuries; the jury was authorized to find the defendant guilty of aggravated assault where the defendant punched the victim in the face, shattering the victim's nose, and causing an injury so severe that the victim was required to undergo surgery. *Lewis v. State*, 263 Ga. App. 98, 587 S.E.2d 245 (2003).

Where the record revealed that the defendant and the defendant's love interest went to a party together, that the defendant became enraged when the defendant's love interest and another left the party without telling the defendant, and that upon returning home, the defendant strangled the defendant's love interest, whom the defendant had a history of abusing, and the defendant assaulted the other person, there was sufficient evidence to support the defendant's convictions for malice murder in violation of O.C.G.A. § 16-5-1 and simple assault in violation of O.C.G.A. § 16-5-20. *Rickman v. State*, 277 Ga. 277, 587 S.E.2d 596 (2003).

Testimony about how sound traveled from the kitchen to the den and the victim's comments concerning how the defendant could keep tabs on where the victim was constituted sufficient evidence to authorize the jury to conclude that the defendant knew where the victim was in the small kitchen and intentionally fired the defendant's gun at the victim through the upstairs flooring just above the site the victim was occupying in the kitchen, intending to inflict violent injury upon the

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victim and, thus, to establish that the defendant committed a simple assault. *Chase v. State*, 277 Ga. 636, 592 S.E.2d 656 (2004).

Evidence was sufficient to show that the defendant committed an assault against the victims where the evidence showed that after one of the victims separated defendant and the defendant's sibling who were involved in a minor altercation, the defendant left and came back with a gun, which the defendant fired into the truck in which the victims were sitting; accordingly, the evidence showed the defendant intended to commit violence to the person of another. *Bishop v. State*, 266 Ga. App. 129, 596 S.E.2d 674 (2004).

Sufficient evidence supported defendant's convictions on one count of simple assault and two counts of battery, which arose from a fight with a romantic friend, as it was within the jury's province to consider defendant's self-defense theory and reject that defense; the jury heard witnesses and observed testimony and was more capable of determining the reasonableness of the hypothesis produced by the evidence or lack of evidence than the appellate court. *Thompson v. State*, 291 Ga. App. 355, 662 S.E.2d 135 (2008).

**Defendant's acts sufficient to cause the victim to retreat** and to generate a reasonable fear that the defendant intended to inflict injury upon the victim, authorized the jury to conclude that the defendant committed assault. *Holbrook v. State*, 168 Ga. App. 380, 308 S.E.2d 869 (1983).

Evidence was sufficient to convict defendant of simple assault after demonstrating violence through verbal threats and damage to property, coupled with an apparent ability to inflict injury, causing victims to reasonably fear injury unless they retreated to secure their safety. *Lewis v. State*, 253 Ga. App. 578, 560 S.E.2d 73 (2002).

**Criminal negligence cannot substitute for criminal intent** in cases of aggravated assault with a deadly weapon based on either O.C.G.A. § 16-5-20(a)(1) or (a)(2). *Dunagan v. State*, 269 Ga. 590, 502 S.E.2d 726 (1998), overruling Osborne

v. State, 228 Ga. App. 758, 492 S.E.2d 732 (2007) and *Jordan v. State*, 214 Ga. App. 598, 448 S.E.2d 917 (1994).

Criminal negligence cannot substitute for criminal intent in proving the commission of an aggravated assault. *Cadle v. State*, 271 Ga. App. 595, 610 S.E.2d 574 (2005).

**Evidence sufficient for conviction.**

— See *Wells v. State*, 178 Ga. App. 82, 342 S.E.2d 21 (1986); *Larkin v. State*, 191 Ga. App. 269, 381 S.E.2d 421 (1989); *King v. State*, 213 Ga. App. 268, 444 S.E.2d 381 (1994); *Richards v. State*, 222 Ga. App. 853, 476 S.E.2d 598 (1996); *Veal v. State*, 242 Ga. App. 873, 531 S.E.2d 422 (2000).

Evidence that defendant shot the victim in the face with a handgun was sufficient to show defendant committed "violent injury to the person of another." *Johnson v. State*, 225 Ga. App. 863, 485 S.E.2d 551 (1997).

Rational trier of fact could have found the defendant guilty of simple assault beyond a reasonable doubt where defendant's parents/victims both testified that the parents were afraid of the defendant and the defendant had the capability of carrying out threats. *Paul v. State*, 231 Ga. App. 528, 499 S.E.2d 914 (1998).

When the evidence established more than the defendant's mere presence at the scene of the crimes, the evidence was sufficient to find the defendant guilty beyond a reasonable doubt of felony murder and simple assault; although the defendant was not indicted for conspiracy, the evidence also supported a conspiracy charge. *Belsar v. State*, 276 Ga. 261, 577 S.E.2d 569 (2003).

Aggravated assault convictions were upheld on appeal, based on the defendant's act of deliberately firing a gun in the direction of another; moreover, the fact that one of the defendant's cohorts also fired a weapon in the direction of the shooting victims was sufficient for defendant to be guilty as a party to said criminal acts. *Thompson v. State*, 281 Ga. App. 627, 636 S.E.2d 779 (2006).

Evidence supported a defendant's conviction for the simple assault of the defendant's older child. The child and a sibling testified to the defendant's violent behavior on the night in question, and their

testimony was corroborated by statements they and the defendant's live-in companion made to a detective and by property damage observed by the detective; furthermore, the older child testified that the child was afraid that night that the defendant might hit the child, that the defendant had previously pushed the child when angry, and that the defendant had a history of abusing persons of the opposite sex. Bearden v. State, 291 Ga. App. 805, 662 S.E.2d 736 (2008).

There was sufficient evidence to support a defendant's convictions for false imprisonment, simple assault, and criminal trespass with regard to actions the defendant took toward the victim, who was a prior romantic friend, as the evidence established that the defendant went to the victim's home uninvited and entered the home; as the victim exited the bathroom, the defendant was standing in the hallway in front of the victim; alarmed, the victim attempted to flee into an adjacent room at which time the victim and the defendant struggled as the defendant attempted to prevent the victim from passing the defendant; once in the adjacent room, the defendant took the telephone from the victim as the victim tried to call 9-1-1; and the victim ultimately pushed out the screen and successfully exited the residence through an open window despite the defendant's attempt to pull the victim back inside. Port v. State, 295 Ga. App. 109, 671 S.E.2d 200 (2008).

Based on a child's testimony that the defendant hit the child with the defendant's car after attempting to hit the child's parent, as well as the corroborating testimony of three other witnesses, the jury was authorized to conclude that the defendant assaulted the child with the car. Barnes v. State, 296 Ga. App. 493, 675 S.E.2d 233 (2009).

Conviction of assault, O.C.G.A. § 16-5-20(a)(2), was supported by sufficient evidence because the defendant shouted at the victim in an agitated and angry manner, while standing in close proximity to the victim and blocking the victim's movement, the defendant had the apparent present ability to inflict injury, and the victim testified that the victim feared that the defendant might harm the

victim; eyewitnesses also testified that the eyewitnesses feared for the victim's safety. The victim's fear was also shown by the fact that the victim was trying to escape the defendant's immediate presence, but was prevented from doing so by the defendant's actions. Daniels v. State, 298 Ga. App. 736, 681 S.E.2d 642 (2009).

Trial court did not err in convicting the defendant of rape, O.C.G.A. § 16-6-1(a)(1), sexual battery, O.C.G.A. § 16-6-22.1(b), aggravated battery, O.C.G.A. § 16-5-24(a), and assault, O.C.G.A. § 16-5-20(a)(1), because the victim's testimony that the defendant raped, sodomized, punched, burned, and threatened to kill the victim was sufficient to authorize the defendant's convictions. Harris v. State, 308 Ga. App. 523, 707 S.E.2d 908 (2011).

**Conviction of juvenile for assault against school official.** — There was sufficient evidence that the defendant, a juvenile, committed acts that would constitute simple assault if done by an adult since while in a vice principal's office, the defendant took off the defendant's outer clothing and watch, made fists, squared the defendant's shoulders, and asked the vice principal, "Now what are you going to do?"; the vice principal testified that the vice principal felt threatened, and there was evidence of a present ability to inflict injury in that although the distance between the defendant and the vice principal was greater than an arm's length, they were standing in a confined office. In the Interest of D.B., 284 Ga. App. 445, 644 S.E.2d 305 (2007).

**Evidence sufficient for aggravated assault.** — Evidence was sufficient to support the defendant's conviction of aggravated assault, as: (1) the defendant previously threatened to kill the victim; (2) the defendant pointed a gun at the victim, warned the victim not to give information to the police about what they did, and said, "We own this area"; (3) the frightened victim told the defendant to leave; and (4) the defendant left after further words were exchanged. Husband v. State, 275 Ga. App. 246, 620 S.E.2d 479 (2005).

Evidence was sufficient to support the defendant's convictions for aggravated as-

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sault and simple battery because the perpetrator of a robbery entered a business wearing a mask, opened the cash drawer, an employee closed the drawer shut and locked it, the perpetrator and the employee then fought over the key to the drawer, leaving bruises on the employee's arm, the employee testified that the perpetrator had a shirt wrapped around the perpetrator's hand and it appeared that the perpetrator held a gun, the defendant then fled from police, within 10 minutes of the robbery both the employee and a customer identified the defendant as the perpetrator, and later, the defendant admitted that a hat found at the scene of the robbery belonged to the defendant. *Lawson v. State*, 275 Ga. App. 334, 620 S.E.2d 600 (2005).

Trial court properly denied the defendant's motion for acquittal as a matter of law, pursuant to O.C.G.A. § 17-9-1, as the evidence was sufficient to support the defendant's conviction on four counts of assault, in violation of O.C.G.A. §§ 16-5-20 and 16-5-21(a)(2), as the defendant and the perpetrator's codefendant committed two home invasions, whereupon the victims therein were fearful, some were harmed, and during the incidents, the defendant held a night stick and instructed the victims to cooperate with the perpetrator's codefendant, who brandished a handgun. *Moyer v. State*, 275 Ga. App. 366, 620 S.E.2d 837 (2005), overruled on other grounds, *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008).

Trial court properly denied the defendant's motion for a new trial on grounds that the state failed to prove that the defendant intentionally threatened two deputies the defendant forced off the road with a car, given evidence that prior to driving directly at the deputies, the car was being used offensively toward others by forcing those individuals off the road, and thereafter, in driving toward the two deputies at 90 miles per hour, a jury could infer that the defendant intended to threaten the deputies in hopes of forcing them from the road. *Adams v. State*, 280 Ga. App. 779, 634 S.E.2d 868 (2006).

Because the defendant failed to present

any evidence that the state ever threatened the victim into testifying against the defendant, and the defendant failed to acknowledge that the victim's statement to police would have been tendered into evidence regardless of what version of events were recounted on the stand, the appeals court rejected the defendant's claim that the state's coercion of the victim warranted reversal of a simple assault conviction. *Wheeler v. State*, 281 Ga. App. 158, 635 S.E.2d 415 (2006).

Jury was entitled to find the defendant guilty of aggravated assault, charged in the indictment "with the intent to rob," based on the corroboration of the defendant's admission to going on a "lick," which meant to go find someone to rob, and that the defendant knew what a passenger was going to do when that passenger reached out of the car window in an attempt to snatch the elderly victim's purse, resulting in the victim being struck by the car and falling to the ground; hence, the trial court did not err in denying the defendant's amended motion for a new trial. *Jackson v. State*, 281 Ga. App. 506, 636 S.E.2d 694 (2006).

Because the state showed that the victim had an apprehension, reasonable under the circumstances, of immediately receiving a violent injury, this testimony, if believed, together with a finding that the defendant intended to drive rapidly out of the car wash while dragging the victim, was sufficient to authorize the jury to find the defendant guilty of aggravated assault; further, an assault under O.C.G.A. § 16-5-20(a)(2) did not require that a defendant act with criminal intent in regard to the victim, but did require that an intentional act be shown. *Kirkland v. State*, 282 Ga. App. 331, 638 S.E.2d 784 (2006).

Because sufficient evidence was presented showing that the defendant cut a correctional officer's face with either a razor blade or other sharp object, requiring more than 150 stitches and cosmetic surgery to repair, the defendant's convictions of aggravated assault and aggravated battery upon a correctional officer were upheld on appeal. *White v. State*, 289 Ga. App. 224, 656 S.E.2d 567 (2008).

Testimony of both an aggravated as-

sault victim and another witness, which demonstrated that the defendant shot the victim in the leg, coupled with the defendant's flight after the incident, was sufficient to support the defendant's aggravated assault conviction. *Jones v. State*, 289 Ga. App. 219, 656 S.E.2d 556 (2008), cert. denied, 2008 Ga. LEXIS 381 (Ga. 2008).

With regard to a defendant's conviction for aggravated assault, there was sufficient evidence to support the conviction based on the victim's testimony that the defendant was the individual who approached the victim's car with a gun and ordered the victim out, causing the victim to be in fear. *Kashamba v. State*, 295 Ga. App. 540, 672 S.E.2d 512 (2009).

Evidence was sufficient to enable the trial court to find, beyond a reasonable doubt, that the defendant possessed the intent necessary to commit aggravated assault, O.C.G.A. § 16-5-21(a), and felony murder, O.C.G.A. § 16-5-1(c), because the defendant used a vehicle as an offensive weapon while the defendant was extremely drunk, and the evidence was sufficient to prove both forms of simple assault under O.C.G.A. § 16-5-20(a)(1)-(2) by the defendant against all six of the victims; the defendant engaged in an extended high-speed car chase with a driver, deliberately rammed the other driver's truck, and attempted to smash into the other driver head-on after the truck stalled, and within minutes after the driver escaped, the defendant came upon the other five victims by swerving sharply into oncoming traffic and slamming into a vehicle. *Guyse v. State*, 286 Ga. 574, 690 S.E.2d 406 (2010).

**Probable cause supported arrest for simple assault.** — Police officers had probable cause to arrest defendant for simple assault in violation of O.C.G.A. § 16-5-20(a)(2) based on: (a) the statements of defendant's wife that he tried to force her to have sex against her will, became angry when she rebuffed him, and then threw against a wall the vacuum cleaner that she was using; and (b) evidence at the scene which bolstered the wife's story. The fact that defendant was ultimately acquitted of the simple assault did not invalidate the arrest. *Lammerding*

v. *State*, 255 Ga. App. 606, 565 S.E.2d 908 (2002).

**Assault did not merge with kidnapping.** — Trial court did not err in declining to merge a defendant's convictions for assault and kidnapping with bodily injury because assault under O.C.G.A. § 16-5-20(a)(2) was established by evidence that the victim was placed in reasonable apprehension of immediately receiving a violent injury when defendant told the victim the defendant had a gun, and kidnapping with bodily injury in violation of O.C.G.A. § 16-5-40(a), on the other hand, was established by evidence that defendant abducted and held the victim against the victim's will in the victim's car, driving from one location to another, during which time the victim received bodily injuries. *Walker v. State*, 306 Ga. App. 16, 701 S.E.2d 523 (2010).

**Evidence insufficient.** — Trial court erred in denying the defendant juvenile's motion to reconsider, vacate, or modify a delinquency adjudication for the offense of simple assault because the evidence was insufficient to support the finding of delinquency since, pursuant to O.C.G.A. § 16-5-20(a)(2), the crime of simple assault required proof that the defendant's actions placed the defendant's grandmother in reasonable apprehension of immediately receiving a violent injury, but the only evidence of that fact was hearsay; a police officer, who was the only witness, testified that the grandmother told the officer that the grandmother was afraid of the defendant, and that the defendant was perhaps going to hit the grandmother, but the officer admitted that there were no allegations that the defendant attempted to hit the grandmother, nor did the officer witness any of the alleged events. *In the Interest of J. L. K.*, 302 Ga. App. 844, 691 S.E.2d 892 (2010).

Evidence was insufficient to support a juvenile's adjudication of delinquency for aggravated assault because the State failed to prove that the juvenile placed the victim in reasonable apprehension of immediately receiving a violent injury when the juvenile placed the juvenile's hands in the victim's pockets to see what the victim was carrying. The evidence did not show that the juvenile assaulted the victim by

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attempting to commit a violent injury to the person of the victim, and there was no evidence that the juvenile demonstrated violence through physical acts or gestures. In the Interest of D.M., No. A10A2353, 2011 Ga. App. LEXIS 239 (Mar. 21, 2011).

**Sentence was proper.** — Defendant's sentence to 10 years for false imprisonment, 12 months for sexual battery, and 12 months for simple battery, to run concurrently, provided that upon service of four years in custody, the defendant could serve the remaining six years on probation, was not void as the sentence fell within the allowable sentencing ranges of no less than one nor more than 10 years for false imprisonment, and up to 12 months each for sexual battery and simple battery. Rehberger v. State, 267 Ga. App. 778, 600 S.E.2d 635 (2004).

**Any error was harmless in light of overwhelming evidence of guilt.** — Any error in the admission of a witness's statements under the necessity exception to the hearsay rule was harmless in light of the overwhelming evidence of the defendant's guilt for assault and possession of a firearm by a convicted felon, including the exact match of the defendant's blood sample to the blood found at the scene, the location and timing of the defendant's capture, and the fact that the defendant had a recent gunshot wound. Porter v. State, 275 Ga. App. 513, 621 S.E.2d 523 (2005).

**Jury Instruction**

**Charge on simple assault not required.** — When, according to the evidence, either the defendant committed a battery or an aggravated assault or did nothing at all, a charge on simple assault is not required. Sheffield v. State, 124 Ga. App. 295, 183 S.E.2d 525 (1971).

Trial court is not required to charge the jury on simple assault where a battery is actually committed. Arnett v. State, 245 Ga. 470, 265 S.E.2d 771 (1980); Sanders v. State, 251 Ga. 70, 303 S.E.2d 13 (1983).

When there is no question of simple assault, the failure to charge simple assault in explanation of the elements of aggravated assault is harmless error be-

cause it is highly probable the error does not contribute to the judgment. Wilkie v. State, 153 Ga. App. 609, 266 S.E.2d 289 (1980).

If defendant committed a simple assault with a deadly weapon, the offense is aggravated assault, and a charge on simple assault was not warranted. Stobart v. State, 272 Ga. 608, 533 S.E.2d 379 (2000).

Trial court's jury instructions in the defendant's criminal trial on multiple charges arising out of a domestic dispute were proper, as: (1) there was no requirement that the jury be instructed on the element of assault (O.C.G.A. § 16-5-20) in order to be properly instructed on the crime of aggravated assault (O.C.G.A. § 16-5-21); (2) the methods of committing an aggravated battery, pursuant to O.C.G.A. § 16-5-24(a), were properly defined based on the methods asserted in the indictment; (3) there was no support for a requested charge on the lesser included offense of reckless conduct, pursuant to O.C.G.A. § 16-5-60(b); and (4) there was no possibility of a lesser included conviction for false imprisonment (O.C.G.A. § 16-5-41), such that instruction only on the indicted offense of kidnapping (O.C.G.A. § 16-5-40) was proper. Brown v. State, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

In a prosecution for aggravated assault, the trial court did not err in failing to give a charge on the lesser-included offense of simple battery, as the defendant failed to request the same in writing, at or before the close of the evidence, and an oral request to give such a charge was insufficient. Morales v. State, 281 Ga. App. 18, 635 S.E.2d 325 (2006).

In the defendant's prosecution for aggravated assault under O.C.G.A. § 16-5-21(a)(2), the defendant was not entitled to a jury instruction on the lesser included offense of simple assault under O.C.G.A. § 16-5-20 because the defendant's spouse could have reasonably apprehended that the black microrecorder allegedly in the defendant's hand was a gun. Dixon v. State, 285 Ga. App. 694, 647 S.E.2d 370 (2007).

Defendant was accused of hitting the victim in the head with a beer bottle, cutting the victim's head and requiring

stitches. The evidence allowed the jury to either find that the defendant had not committed an aggravated assault, or to find the defendant guilty as charged; the defendant was not entitled to an instruction on the lesser included-charge of simple assault as there was no evidence to support that charge. *Maiorano v. State*, 294 Ga. App. 726, 669 S.E.2d 678 (2008).

Because the evidence showed that defendant committed an assault with intent and a deadly weapon, the crime constituted an aggravated assault under O.C.G.A. § 16-5-21(a)(2); therefore, a charge on the lesser-included offenses of simple assault or reckless conduct under O.C.G.A. §§ 16-5-20(a)(2) and 16-5-60(b) was not warranted. *Paul v. State*, 296 Ga. App. 6, 673 S.E.2d 551 (2009).

During the defendant's trial for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2), the trial court did not err in failing to instruct the jury on simple assault, O.C.G.A. § 16-5-20(a), as an essential element of aggravated assault because the record failed to indicate that the defendant submitted a written request to charge on simple assault, and the trial court's instruction was sufficient to define the offense charged and provided a proper guideline for the determination of the defendant's guilt or innocence. *Williams v. State*, 307 Ga. App. 577, 705 S.E.2d 332 (2011).

Trial counsel's performance was not deficient due to counsel's failure to request a jury charge on simple assault as a lesser included offense of the charged crime of aggravated assault because there was no evidence showing that the defendant committed merely simple assault; the evidence showed that the defendant's assault upon the victim was with a screwdriver within the purview of the aggravated assault statute, O.C.G.A. § 16-5-21(a)(2). *Davis v. State*, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

**Charge on battery not required.** — With regard to defendant's conviction for aggravated battery of a taxi driver, defendant was not entitled to a jury instruction on the lesser included offense of battery based on defendant's argument that the jury could have found under the facts of the case that the gun was not used as a

deadly weapon as the evidence showed without conflict that defendant's physical assault upon the taxi driver with the handgun caused the taxi driver to bleed from the head and the entire right side of the face, and the taxi driver testified that, during the attack, the taxi driver was very afraid of being killed. Thus, the pistol in the case, if used in the manner testified to by the taxi driver, was per se a deadly weapon, and the offense was either aggravated assault or no offense at all. *Ortiz v. State*, 292 Ga. App. 378, 665 S.E.2d 333 (2008), cert. denied, No. S08C1851, 2008 Ga. LEXIS 928 (Ga. 2008).

**Instruction on reckless conduct not warranted.** — After threatening to kill the victim, because the defendant's actions in continuing to drive away, as the victim was caught on the outside of the car screaming, supported the crime of either aggravated or simple assault, and not simple negligence, the trial court did not err in rejecting a reckless conduct instruction. *Martin v. State*, 283 Ga. App. 652, 642 S.E.2d 340 (2007).

**Charge on simple assault as element of aggravated assault.** — Two charged methods of committing simple assault under O.C.G.A. § 16-5-20(a)(1) and (a)(2), as an element of aggravated assault, did not provide an improper basis for the jury to convict the defendant of aggravated assault as the trial court did not charge a separate, unalleged method of committing aggravated assault, but simply defined both methods of committing simple assault, a lesser included offense; because the jury's charge did not authorize a conviction in a manner other than that alleged in the indictment, the charge was not erroneous and the defendant's conviction for aggravated assault with intent to rape was affirmed. *McGuire v. State*, 266 Ga. App. 673, 598 S.E.2d 55 (2004).

Because the defendant's conduct put the officer-victim in reasonable apprehension of immediately sustaining a violent injury, which satisfied the elements required to prove simple assault under O.C.G.A. § 16-5-20(a)(2), the trial court properly charged the jury on simple assault as a lesser-included offense of aggravated assault upon a police officer. *Bostic v. State*, 289 Ga. App. 195, 656 S.E.2d 546 (2008).

**Jury Instruction (Cont'd)**

Trial court was authorized to give an instruction on the lesser-included offense of simple assault because some evidence showed that the defendant attempted to violently injure a store manager by stabbing the manager with a pen with such force that the defendant bent the pen; the fact that actual contact occurred did not diminish the fact that there was evidence of a simple assault. Griggs v. State, 303 Ga. App. 442, 693 S.E.2d 615 (2010).

**Failure to charge on simple assault not reversible error.** — When the accused was convicted of assaulting a female under the age of fourteen years with the intent to rape her, and in the defendant's statement to the jury the defendant denied committing any assault or assault and battery upon the female, while the evidence of the female, if true, proved the felonious assault as alleged in the indictment, failure of the court to charge the jury on the law of assault, or assault and battery, was not error. Finney v. State, 51 Ga. App. 545, 181 S.E. 144 (1935).

Two city police officers who shot at prosecutor's car 12 times, finally causing the prosecutor to run the car off a bridge some 12 miles outside the city limits, after which they arrested the prosecutor, where they had no warrant for the prosecutor's arrest and no crime had been committed by the prosecutor in their presence, were guilty of shooting at another, and failure of the court to charge on simple assault in the absence of a timely and appropriate written request was not error. Hart v. State, 55 Ga. App. 85, 189 S.E. 547 (1936).

When the theory that the defendant could have been found guilty of a simple assault rather than assault with intent to rob and that the judge should have charged thereon was sustained only by the defendant's statement to the jury, without a proper request the judge did not commit reversible error in failing to charge on the law of assault. Alexander v. State, 66 Ga. App. 708, 19 S.E.2d 353 (1942).

Trial court erred in quashing an aggravated assault count against defendant because, in part, the indictment did not need to additionally charge the language of

simple assault in order to withstand demurrer. State v. Tate, 262 Ga. App. 311, 585 S.E.2d 224 (2003).

**Reversible error in charging jury.**

— In the trial of one accused of murder, it is reversible error for the court in charging the jury to assume or intimate that the accused had "assaulted" the deceased when the evidence and the defendant's statement did not demand a finding that an assault had been made. Tyner v. State, 70 Ga. App. 56, 27 S.E.2d 351 (1943).

With regard to a defendant's conviction for the felony murder of the defendant's spouse, with aggravated assault as the underlying felony, the trial court erred by refusing the defendant's requested charge on involuntary manslaughter with pointing a pistol at another as the predicate misdemeanor, which entitled the defendant to a new trial based on the defendant testifying that the shooting occurred inadvertently when, in the course of horseplay with the pistol, the defendant pulled the trigger while pointing the pistol at the victim's head, not knowing there was a round in the chamber. Manzano v. State, 282 Ga. 557, 651 S.E.2d 661 (2007).

Trial court erred by failing to provide the statutory definition of assault, pursuant to O.C.G.A. § 16-5-20, in a jury charge, which resulted in the final charge being fatally insufficient since the charge did not instruct on substantive points and issues involved in the case and allowed the jury to find defendant guilty of aggravated assault based merely on criminal negligence. As a result, defendant's conviction for aggravated assault was reversed and a retrial was ordered since there was sufficient evidence to support defendant's conviction. Coney v. State, 290 Ga. App. 364, 659 S.E.2d 768 (2008).

**Proper jury charge.** — When an indictment for aggravated assault alleged the aggravating aspect of simple assault, this was sufficient to put the defendant on notice that the defendant could be convicted for aggravated assault if the defendant committed a simple assault in either manner contained in the simple assault statute; accordingly, the trial court did not err by charging the jury that the jury could convict the defendant for aggravated assault in a manner not alleged in

the indictment. *Simpson v. State*, 277 Ga. 356, 589 S.E.2d 90 (2003).

Two charged methods of committing simple assault, as an element of aggravated assault, did not provide an improper basis for the jury to convict the defendant of aggravated assault, and the trial court did not charge a separate, unalleged method of committing aggravated assault, but simply defined both methods of committing simple assault, a lesser included offense; hence, because the jury's charge did not authorize a conviction in a manner other than that alleged in the indictment, the charge was not erroneous. *Opio v. State*, 283 Ga. App. 894, 642 S.E.2d 906 (2007).

**Charges as to other crimes properly refused.** — Requested charges on involuntary manslaughter, pointing a firearm at another, and simple assault, were properly refused, where defendant's testimony (that defendant fired shots with the intention of frightening a group) established as a matter of law the offense of aggravated assault, and the testimony that members of the group were frightened and dropped to the ground was inconsistent with the requested charges. *Hawkins v. State*, 260 Ga. 138, 390 S.E.2d 836 (1990).

## OPINIONS OF THE ATTORNEY GENERAL

**Authority of Georgia Crime Information Center to maintain records of crimes.** — Georgia Crime Information Center is authorized to maintain records of reported crime and, in some instances, to record information identifying persons charged with the commission of crime; however, the center is not authorized to maintain records identifying persons charged with disorderly conduct except

when the charge is directly connected with or directly related to certain statutory offenses including simple assault. 1976 Op. Att'y Gen. No. 76-33.

**For an update of crimes and offenses** for which the Georgia Crime Information Center is authorized to collect and file identifying data, see 1991 Op. Att'y Gen. No. 91-35.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Assault and Battery, §§ 3, 4.

**C.J.S.** — 6A C.J.S., Assault and Battery, § 78 et seq.

**ALR.** — Recovery for physical consequences of fright resulting in a physical injury, 11 ALR 1119; 40 ALR 983; 76 ALR 681; 98 ALR 402.

Liability of tort-feasor for consequences of act induced by fear aroused by tort, 35 ALR 1447.

Indecent proposal to woman as assault, 12 ALR2d 971.

Truant or attendance officer's liability for assault and battery or false imprisonment, 62 ALR2d 1328.

Civil liability of one instigating or inciting an assault or assault and battery

notwithstanding primary or active participant therein has been absolved of liability, 72 ALR2d 1229.

Attempt to commit assault as criminal offense, 79 ALR2d 597.

Unintentional killing of or injury to third person during attempted self-defense, 55 ALR3d 620.

Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 ALR3d 245.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient, 99 ALR3d 854.

Attempt to commit assault as criminal offense, 93 ALR5th 683.

**16-5-21. Aggravated assault.**

(a) A person commits the offense of aggravated assault when he or she assaults:

(1) With intent to murder, to rape, or to rob;

(2) With a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury; or

(3) A person or persons without legal justification by discharging a firearm from within a motor vehicle toward a person or persons.

(b) Except as provided in subsections (c) through (k) of this Code section, a person convicted of the offense of aggravated assault shall be punished by imprisonment for not less than one nor more than 20 years.

(c) A person who knowingly commits the offense of aggravated assault upon a peace officer while the peace officer is engaged in, or on account of the performance of, his or her official duties shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years.

(d) Any person who commits the offense of aggravated assault against a person who is 65 years of age or older shall, upon conviction thereof, be punished by imprisonment for not less than three nor more than 20 years.

(e)(1) As used in this subsection, the term "correctional officer" shall include superintendents, wardens, deputy wardens, guards, and correctional officers of state, county, and municipal penal institutions who are certified by the Georgia Peace Officer Standards and Training Council pursuant to Chapter 8 of Title 35 and employees of the Department of Juvenile Justice who are known to be employees of the department or who have given reasonable identification of their employment. The term "correctional officer" shall also include county jail officers who are certified or registered by the Georgia Peace Officer Standards and Training Council pursuant to Chapter 8 of Title 35.

(2) A person who knowingly commits the offense of aggravated assault upon a correctional officer while the correctional officer is engaged in, or on account of the performance of, his or her official duties shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years.

(f) Any person who commits the offense of aggravated assault in a public transit vehicle or station shall, upon conviction thereof, be punished by imprisonment for not less than three nor more than 20

years. For purposes of this Code section, "public transit vehicle" has the same meaning as in subsection (c) of Code Section 16-5-20.

(g) Any person who commits the offense of aggravated assault upon a person in the course of violating Code Section 16-8-2 where the property that was the subject of the theft was a vehicle engaged in commercial transportation of cargo or any appurtenance thereto, including without limitation any such trailer, semitrailer, container, or other associated equipment, or the cargo being transported therein or thereon, shall upon conviction be punished by imprisonment for not less than five years nor more than 20 years, a fine not less than \$50,000.00 nor more than \$200,000.00, or both such fine and imprisonment. For purposes of this subsection, the term "vehicle" includes without limitation any railcar.

(h) A person convicted of an offense described in paragraph (3) of subsection (a) of this Code section shall be punished by imprisonment for not less than five nor more than 20 years.

(i) Any person who commits the offense of aggravated assault involving the use of a firearm upon a student or teacher or other school personnel within a school safety zone as defined in paragraph (1) of subsection (a) of Code Section 16-11-127.1 shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years.

(j) If the offense of aggravated assault is committed between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons excluding siblings living or formerly living in the same household, the defendant shall be punished by imprisonment for not less than three nor more than 20 years.

(k) Any person who commits the offense of aggravated assault with intent to rape against a child under the age of 14 years shall be punished by imprisonment for not less than 25 nor more than 50 years. Any person convicted under this subsection shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.

(l) A person who knowingly commits the offense of aggravated assault upon an officer of the court while such officer is engaged in, or on account of the performance of, his or her official duties shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years. As used in this subsection, the term "officer of the court" means a judge, attorney, clerk of court, deputy clerk of court, court reporter, court interpreter, or probation officer. (Laws 1833, Cobb's 1851 Digest, pp. 787-789; Laws 1840, Cobb's 1851 Digest, p. 788; Code 1863, §§ 4250, 4258, 4259, 4260; Ga. L. 1866, p. 151, § 1; Code 1868, §§ 4285, 4293, 4294, 4295; Code 1873, §§ 4351, 4359, 4360, 4361; Code

1882, §§ 4351, 4359, 4360, 4361; Penal Code 1895, §§ 97, 98, 99, 100; Penal Code 1910, §§ 97, 98, 99, 100; Code 1933, §§ 26-1403, 26-1404, 26-1405, 26-1406; Code 1933, § 26-1302, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 543, § 1; Ga. L. 1982, p. 1242, § 2; Ga. L. 1984, p. 900, § 1; Ga. L. 1985, p. 628, § 1; Ga. L. 1991, p. 971, §§ 3, 4; Ga. L. 1994, p. 1012, § 8; Ga. L. 1994, p. 1920, §§ 1, 2; Ga. L. 1996, p. 988, § 1; Ga. L. 1997, p. 1453, § 1; Ga. L. 1999, p. 381, § 3; Ga. L. 2000, p. 1626, § 1; Ga. L. 2003, p. 140, § 16; Ga. L. 2004, p. 1072, § 1; Ga. L. 2006, p. 379, § 4/HB 1059; Ga. L. 2010, p. 999, § 1/HB 1002; Ga. L. 2011, p. 752, § 16/HB 142.)

**The 2010 amendment**, effective July 1, 2010, added subsection (l).

**The 2011 amendment**, effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, revised punctuation in the last sentence of subsection (l).

**Cross references.** — Indemnification program for law enforcement officers, firefighters, and prison guards killed or injured on duty, § 45-9-80 et seq.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1994, since both Ga. L. 1994, p. 1012 and p. 1920 enacted a new subsection (g), the amendment by Ga. L. 1994, p. 1012 has been redesignated as subsection (h).

**Editor's notes.** — Ga. L. 1994, p. 1012, § 1, not codified by the General Assembly, provides that the Act shall be known and may be cited as the "School Safety and Juvenile Justice Reform Act of 1994."

Ga. L. 1994, p. 1012, § 2, not codified by the General Assembly, sets forth legislative findings and determinations for the "School Safety and Juvenile Justice Reform Act of 1994."

Ga. L. 1994, p. 1012, § 29, not codified by the General Assembly, provides for severability.

Ga. L. 1999, p. 381, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crimes Against Family Members Act of 1999'."

Ga. L. 1999, p. 381, § 7, not codified by the General Assembly, provides that: "Nothing herein shall be construed to validate a relationship between people of the same sex as a 'marriage' under the laws of this State."

Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides that: "The

General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

**Law reviews.** — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article, "Criminal Law," see 53 Mercer L. Rev. 209 (2001). For article on 2006 amendment of this Code section, see 23 Georgia St. U.L. Rev. 11 (2006). For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008). For annual survey on death penalty law, see 61 Mercer L. Rev. 99 (2009).

For note contrasting assault with intent and attempt in food poisoning cases, see 25 Ga. St. B.J. 199 (1962). For note on the 1994 amendment of this Code section, see 11 Georgia St. U.L. Rev. 110 (1994). For review of 1996 children and youth services legislation, see 13 Georgia St. U.L. Rev. 314 (1996).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### INDICTMENT

#### INCLUDED CRIMES

#### ASSAULT WITH DEADLY WEAPON

#### ASSAULT WITH GUN

#### ASSAULT WITH AUTOMOBILE

#### ASSAULT WITH HANDS, FISTS, OR OTHER BODY PARTS

#### ASSAULT WITH OTHER OBJECTS

#### ASSAULT WITH INTENT TO MURDER

#### ASSAULT WITH INTENT TO ROB

#### ASSAULT WITH INTENT TO RAPE

#### JURY INSTRUCTIONS

### General Consideration

**Constitutionality.** — Legislature, in not providing for defense of opprobrious language, did not act unconstitutionally. *Watkins v. State*, 254 Ga. 267, 328 S.E.2d 537 (1985).

**Venue.** — Adjudication of delinquency was reversed as the state presented no evidence of venue and the juvenile court

did not take judicial notice that the location of an aggravated assault described at a hearing was in Sumter County; the county in which the offense was committed was not established and the evidence was insufficient to support the conviction, but retrial was not barred by the double jeopardy clause so long as venue was properly established at retrial. In the In-

**General Consideration (Cont'd)**

terest of T.W., 280 Ga. App. 693, 634 S.E.2d 854 (2006).

Because the element of venue was sufficiently testified to by the victim's parent, the state adequately proved that element as part of its aggravated assault charges. *Boyd v. State*, 289 Ga. App. 342, 656 S.E.2d 864 (2008), cert. denied, 2008 Ga. LEXIS 498 (Ga. 2008).

**Elements of aggravated assault.** — Offense of aggravated assault has two essential elements: (1) that an assault, (see O.C.G.A. § 16-5-20), was committed on the victim; and (2) that it was aggravated by (a) an intention to murder, to rape, or to rob, or (b) use of a deadly weapon. *Harper v. State*, 127 Ga. App. 359, 193 S.E.2d 259 (1972); *Hardin v. State*, 137 Ga. App. 391, 224 S.E.2d 82 (1976); *Smith v. State*, 140 Ga. App. 395, 231 S.E.2d 143 (1976); *King v. State*, 178 Ga. App. 343, 343 S.E.2d 401 (1986).

O.C.G.A. § 16-5-21 proscribes the commission of assault with the intent to accomplish the more serious crime of murder, robbery, or rape. No more need be alleged or proved. The statute deliberately sets out the offense of having intent, as disjunctive to an assault with a deadly weapon. *Scroggins v. State*, 198 Ga. App. 29, 401 S.E.2d 13 (1990), cert. denied, 198 Ga. App. 898, 401 S.E.2d 13 (1991).

Trial court properly denied defendant's motion to dismiss the aggravated assault count of the indictment under O.C.G.A. § 16-5-21(a) where it charged that defendant made an assault upon the person of the victim with a pistol, a deadly weapon, by shooting the victim with said pistol; the language was sufficient to charge the elements of aggravated assault. *Sallie v. State*, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

Person commits the offense of aggravated assault when the person assaults another with a deadly weapon which, when used offensively against a person, is likely to or actually does result in serious bodily injury. There is no requirement that the victim sustain an actual injury, and the crime is complete without proof thereof. *Turbeville v. State*, 268 Ga. App. 88, 601 S.E.2d 461 (2004).

Juvenile court's adjudication entered against a juvenile on charges of aggravated assault and terroristic threats was upheld on appeal, given sufficient evidence that: (1) the state adequately showed venue; and (2) the victim's testimony described the juvenile's act of pointing a gun, threatening to use the gun, and that such caused fear that something could happen as a result of those acts. *In the Interest of J.A.L.*, 284 Ga. App. 220, 644 S.E.2d 162 (2007).

**Intent to injure is not an element of the offense of aggravated assault with a deadly weapon.** *Ganaway v. State*, 282 Ga. 297, 647 S.E.2d 590 (2007).

**Aiding and abetting.** — After defendant-A hijacked a victim's car at gunpoint, defendant-B's actions in punching the victim in the face while defendant-A waited in the car constituted aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(1), as defendant-B aided and abetted the commission of the carjacking pursuant to O.C.G.A. § 16-2-20(b)(3) for purposes of the aggravated nature of the assault conviction. *Johnson v. State*, 279 Ga. App. 182, 630 S.E.2d 778 (2006).

Trial court did not err in convicting the defendant and the defendant's codefendant of aggravated assault because based on the circumstantial evidence, the jury was entitled to infer that the defendant and the codefendant accompanied their accomplice to a convenience store knowing that the accomplice intended to assault the victim because of their past differences, that the defendant had specifically served as the getaway driver, and that the codefendant had accompanied the accomplice inside the store as a lookout, making both individuals parties to the crime of aggravated assault. *Romero v. State*, 307 Ga. App. 348, 705 S.E.2d 195 (2010).

**Conduct of third parties not admissible to support self-defense claim.** — During a defendant's trial for aggravated assault and other charges arising out of a road rage incident, the defendant was properly precluded from testifying about a prior attempted robbery in which the defendant was the victim and allegedly used a pistol in self-defense; because the defendant was asserting self-defense, other spe-

cific acts of violence committed by a victim would have been admissible if any such acts existed, but the defendant could not support the defense by the proffer of any evidence based upon the commission of extraneous acts of violence committed by others because it would have been difficult or impossible for the state to rebut, refute, or test the credibility of such evidence. Adams v. State, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

**Intent element of aggravated assault** was shown by evidence of the victim's fearful reactions to defendant's actions and words when defendant forced the victim to surrender the victim's purse by pointing a gun at the victim's chest. Cole v. State, 232 Ga. App. 795, 502 S.E.2d 742 (1998).

In a prosecution for aggravated assault, under O.C.G.A. § 16-5-21, and possession of a knife during the commission of a crime, under O.C.G.A. § 16-11-106(b)(1), evidence that the defendant stabbed another in an incident eight years previously was admissible to show whether the defendant intended to threaten or harm the victim when the defendant brandished a knife, and the evidence was not more prejudicial than probative, given the prior incident's relevance to a necessary element of the current crimes. Ledford v. State, 275 Ga. App. 107, 620 S.E.2d 187 (2005).

Defendant's convictions for felony murder and the underlying crime of aggravated assault were supported by sufficient evidence because no proof of the defendant's criminal intent to murder was required for the felony murder conviction, and the aggravated assault conviction did not require proof that the defendant intended to injure the victim, as only proof that the defendant intended to do the act which placed the victim in reasonable apprehension of harm was required. Smith v. State, 280 Ga. 490, 629 S.E.2d 816 (2006).

Trial court properly denied the defendant's motion for a new trial on grounds that the state failed to prove that the defendant intentionally threatened two deputies the defendant forced off the road with a car, given evidence that prior to driving directly at the deputies, the car

was being used offensively toward others by forcing those individuals off the road, and thereafter, in driving toward the two deputies at 90 miles per hour, a jury could infer that the defendant intended to threaten the deputies in hopes of forcing them from the road. Adams v. State, 280 Ga. App. 779, 634 S.E.2d 868 (2006).

Trial court did not err by denying a defendant's motion for a directed verdict of acquittal on the charge of aggravated assault as the evidence was sufficient to support the conviction on that count in that the state proved that the defendant, while engaging the victim in an altercation, choked the victim so that the victim could not breath and, in fact, lost consciousness briefly. As such, the state proved that the defendant intended to injure the victim. Hall v. State, 292 Ga. App. 544, 664 S.E.2d 882 (2008), cert. denied, No. S08C1841, 2008 Ga. LEXIS 926 (Ga. 2008).

**Victim's apprehension of receiving a violent injury was not an essential element of aggravated assault** in which the defendant intentionally fired a gun at the victim; sufficient evidence supported the defendant's conviction for aggravated assault, despite the failure of the victim to testify, because witnesses established that during a dispute with the victim over drugs, the defendant pointed a gun at the victim, struck the victim in the head, and shot the victim. Anthony v. State, 276 Ga. App. 107, 622 S.E.2d 450 (2005).

**Simple assault becomes aggravated when it is perpetrated by use of a deadly weapon.** Gentry v. State, 212 Ga. App. 79, 441 S.E.2d 249 (1994).

**Defendant could not be convicted for "criminal attempt to commit aggravated assault"** where the victim was asleep or passed out; there is no law authorizing conviction for an attempt to commit a crime which itself is a particular type of attempt to commit a crime. Patterson v. State, 192 Ga. App. 449, 385 S.E.2d 311, cert. denied, 192 Ga. App. 902, 385 S.E.2d 311 (1989).

**Neither simple nor aggravated assault requires physical contact with victim.** Tuggle v. State, 145 Ga. App. 603, 244 S.E.2d 131 (1978).

**General Consideration (Cont'd)**

O.C.G.A. § 16-5-21(a)(2) does not make a battery an essential element of the offense of aggravated assault. *Watkins v. State*, 254 Ga. 267, 328 S.E.2d 537 (1985).

**Physical contact is required for simple battery but not for aggravated assault**, and hence the crime of simple battery is not necessarily included in the crime of aggravated assault. *Tuggle v. State*, 145 Ga. App. 603, 244 S.E.2d 131 (1978); *Anderson v. State*, 170 Ga. App. 634, 317 S.E.2d 877 (1984).

Indictment charging the defendant with making an assault "with [the defendant's] hands and fists, objects which when used offensively . . . were likely to result in serious bodily injury" contained all of the essential elements of the crime, even though it did not expressly allege that the defendant's hands were used as deadly weapons. *Moore v. State*, 246 Ga. App. 163, 539 S.E.2d 851 (2000).

**Aggravated assault does not require that injury be in fact inflicted.** *Radford v. State*, 140 Ga. App. 451, 231 S.E.2d 365 (1976), rev'd on other grounds, 238 Ga. 532, 233 S.E.2d 785 (1977).

**In every assault there must be intent to injure.** The test is: was there a present purpose of doing bodily injury? *Riddle v. State*, 145 Ga. App. 328, 243 S.E.2d 607 (1978), overruled on other grounds, *Adsitt v. State*, 248 Ga. 237, 282 S.E.2d 305 (1981).

**Assault against several persons.** — After the defendant fired a pistol into a group of nine people, the defendant's act of firing into the group made each individual in the group a separate victim and, thus, the seven aggravated assault convictions of which the defendant was found guilty did not merge. *Pace v. State*, 239 Ga. App. 506, 521 S.E.2d 444 (1999).

When a defendant intentionally shoots several times into a group of people intending to harm only one of them, a jury would be authorized to find defendant guilty of aggravated assault against each person in the group. *Robertson v. State*, 245 Ga. App. 649, 538 S.E.2d 755 (2000).

**Assault with shotgun.** — Evidence supported the defendant's conviction for armed robbery, possession of a weapon

during the commission of a crime, aggravated assault, burglary, aggravated battery, and impersonating an officer because the defendant kicked in the door of a home while shouting that the defendant was a "federal agent," fired a shotgun through a door, shooting off a victim's thumb, inserted the barrel of the shotgun in the same person's mouth, and demanded money, which the victims turned over, two codefendants identified the defendant as the user of the shotgun, and the defendant's DNA was found on a ski mask recovered from the getaway car and the defendant's fingerprints were found on the car. *Garrison v. State*, 276 Ga. App. 243, 622 S.E.2d 910 (2005).

**Elderly victims.** — Proof that the victim was at least 65 years old was not necessary to establish a *prima facie* case of aggravated assault, however, such evidence was required to enhance the penalty under O.C.G.A. § 16-5-21(d). *Howard v. State*, 230 Ga. App. 437, 496 S.E.2d 532 (1998).

**Photographs depicting victim's injuries.** — Photographs depicting the victim's injuries were admissible because, pursuant to O.C.G.A. § 16-5-21(a)(2), proving serious bodily injury is a part of the state's burden of proof. *Clay v. State*, 214 Ga. App. 160, 447 S.E.2d 156 (1994).

Defendant's amended motion for a new trial was properly denied, and an aggravated assault conviction was upheld on appeal as the trial court did not abuse the court's discretion in admitting three photographs depicting the victim's knife wounds; the photographs were not inadmissible merely because the photographs also showed alterations to the victim's body made by medical personnel. *McRae v. State*, 282 Ga. App. 852, 640 S.E.2d 323 (2006), cert. denied, 2007 Ga. LEXIS 200 (Ga. 2007).

**Injury requiring hospital stay and removal of part of brain deemed "serious."** — Defendant's challenge of aggravated assault provisions on grounds of vagueness, in that O.C.G.A. § 16-5-21 requires a subjective evaluation by law enforcement personnel as to what constitutes "serious injury," was not viable where injury required removal of part of brain and a month-long hospital stay.

Watkins v. State, 254 Ga. 267, 328 S.E.2d 537 (1985).

**There are wanton or reckless states of mind sometimes equivalent to specific intention to kill,** and which may and should be treated by the jury as amounting to such intention, when productive of violence likely to result in the destruction of life. Messer v. State, 120 Ga. App. 747, 172 S.E.2d 194 (1969), cert. denied, 400 U.S. 866, 91 S. Ct. 107, 27 L. Ed. 2d 105 (1970).

**Homicide occurring during aggravated assault not accident.** — Evidence that the defendant had cocked a gun and pointed the gun at her husband's head in order to scare him, and that the gun discharged when the victim struck the gun with his arm, was sufficient to authorize a conviction for felony-murder and the defense of "accident" was inapplicable. Stiles v. State, 264 Ga. App. 446, 448 S.E.2d 172 (1994).

There was sufficient evidence to convict the defendant of aggravated assault when the defendant was seen at a paramour's apartment with a gun in a book bag, a witness stated that the defendant pointed the gun at the paramour's head and threatened to kill the paramour, the paramour was found shot dead a short time later, and the defendant admitted firing the gun but claimed that the shooting was accidental. Jackson v. State, 276 Ga. 408, 577 S.E.2d 570 (2003).

**Victim's awareness of danger is not essential element** of crime of aggravated assault. Sutton v. State, 245 Ga. 192, 264 S.E.2d 184 (1980).

When the defendant was charged with the offense of aggravated assault by making an assault upon the victim's person with a gun, it was not incumbent upon the prosecution to prove that the victim was aware the defendant was shooting at the victim. Brown v. State, 200 Ga. App. 537, 408 S.E.2d 836 (1991).

**Appropriate test of mental capacity in trial for murder** and aggravated assault is whether the accused is capable of distinguishing between right and wrong at the time the offense was committed. Duck v. State, 250 Ga. 592, 300 S.E.2d 121 (1983).

**Intent need not be directed toward person actually injured.** — Offenses of

murder, voluntary manslaughter, and aggravated assault do not require that the necessary element of intent, to kill or injure as the case may be, must have been directed toward the person who actually was killed or injured. Cook v. State, 255 Ga. 565, 340 S.E.2d 843, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Jury was authorized to find that the defendant intended to assault the first victim with a deadly weapon and that, in the course of that assault the second victim was injured. Similarly, the jury was also authorized to find the original intent was transferred in law to the second victim as well. Fussell v. State, 187 Ga. App. 134, 369 S.E.2d 511 (1988).

Trial court did not err in adjudicating a defendant juvenile delinquent based upon the defendant's commission of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because evidence that the defendant deliberately fired a BB gun in the direction of the victim and the victim's family established the offense, since, by intentionally firing the gun in the direction of the family, the defendant was likely to seriously injure any of the family members present, including the victim; the defendant's intent to assault any one of the family members was transferred to the victim, who suffered the harm, regardless of whether the defendant knew that the victim was in the line of fire or whether the victim was aware of the shooting as the shooting occurred. In the Interest of I.C., 300 Ga. App. 683, 686 S.E.2d 279 (2009).

**Convictions as aider and abettor proper despite lack of personal involvement.** — Defendant's contention that the crimes against a stabbing victim were solely committed by a codefendant was rejected, pursuant to O.C.G.A. § 16-2-20(a), as ample evidence existed to conclude that defendant either committed the crimes or was a party to the crimes, including that both defendant and the codefendant drove to the stabbing victim's home, that victim was stabbed to death, and the victim's wallet and checkbook were stolen so that both defendants could have money to buy more drugs. Odom v. State, 279 Ga. 599, 619 S.E.2d 636 (2005).

**General Consideration (Cont'd)**

**"Intent" aspect of attempted vehicular suicide by colliding with another vehicle.** — Evidence supported conclusion that defendant, who crossed center line at 68 miles per hour without braking, intended to injure the occupants of an oncoming vehicle, despite defendant's contention that defendant was attempting suicide and therefore was intending only to inflict bodily injury on self. Anderson v. State, 254 Ga. 470, 330 S.E.2d 592 (1985).

**Intent to perform illegal act.** — It was unnecessary to prove that the defendant intended to injure the victim to sustain an aggravated assault conviction under O.C.G.A. § 16-5-21(a)(2) as long as it was proved that the defendant intended to perform the illegal act which caused the intended victim to be apprehensive of receiving a violent injury. Gray v. State, 257 Ga. App. 393, 571 S.E.2d 435 (2002).

**Evidence as to weapon's character.** — In an aggravated assault case, since no witness saw a weapon or "sharp instrument" as alleged in the indictment, evidence that as a result of the defendant's attack, the victim suffered a clean cut from the forehead to the lip was sufficient to allow the jury to infer that the wound was caused by a sharp instrument. Evidence as to wounds inflicted was sufficient for a jury to infer a weapon's character. Miller v. State, 292 Ga. App. 641, 666 S.E.2d 35 (2008), cert. denied, 2008 Ga. LEXIS 903 (Ga. 2008).

**No requirement that assault must be with deadly weapon** in order to convict under Ga. L. 1968, pp. 1249, 1280 (see O.C.G.A. § 16-5-21). Thadd v. State, 231 Ga. 623, 203 S.E.2d 230 (1974).

**"Assault with a deadly weapon" and "assault with intent to murder" compared.** — While an assault with intent to commit murder is usually manifested by the use of some deadly weapon, yet the offense of an assault with intent to commit murder may be committed without a weapon likely to produce death. Wright v. State, 40 Ga. App. 118, 149 S.E. 153 (1929).

**Aggravated assault was intended to include former offense of stabbing** provided the weapon was in fact of the

denominated character. A knife "designed for the purpose of offense and defense" is a deadly weapon almost by definition. Wells v. State, 125 Ga. App. 579, 188 S.E.2d 407 (1972); Johnson v. State, 185 Ga. App. 167, 363 S.E.2d 773 (1987).

**Offense of shooting at another is form of aggravated assault.** Bentley v. State, 131 Ga. App. 425, 205 S.E.2d 904 (1974).

**Offense of shooting at another is replaced by aggravated assault under Ga. L. 1968, pp. 1249, 1280 et seq. (see O.C.G.A. § 16-5-21).** Wells v. State, 125 Ga. App. 579, 188 S.E.2d 407 (1972).

**Deliberately firing gun in direction of another constitutes aggravated assault.** — When defendant admitted deliberately firing a gun in the direction of a victim to scare the victim, such action constitutes use of a deadly weapon to commit an act which places another in reasonable apprehension of immediately receiving a violent injury and amounts to aggravated assault, absent justification. Williams v. State, 249 Ga. 6, 287 S.E.2d 31 (1982).

Intentionally firing a gun at another, absent justification, is sufficient in and of itself to support a conviction of aggravated assault. Steele v. State, 196 Ga. App. 330, 396 S.E.2d 4 (1990); Belins v. State, 210 Ga. App. 259, 435 S.E.2d 675 (1993); Lewis v. State, 215 Ga. App. 161, 450 S.E.2d 448 (1994); Creson v. State, 218 Ga. App. 184, 460 S.E.2d 83 (1995); Tiller v. State, 267 Ga. 888, 485 S.E.2d 720 (1997); Goodman v. State, 237 Ga. App. 795, 516 S.E.2d 824 (1999).

Trial court did not err in denying the defendant's motion for directed verdict of acquittal, as direct evidence that the defendant fired at the victim and the defendant's own admission that the defendant fired at the victim was sufficient to submit the question of whether the defendant was guilty of aggravated assault to the jury; no error occurred pursuant to O.C.G.A. § 24-4-6, involving a conviction based solely on circumstantial evidence, as the state offered more than circumstantial evidence to support its case against the defendant. Cobb v. State, 268 Ga. App. 66, 601 S.E.2d 443 (2004).

Because O.C.G.A. § 24-4-8 provided

that a victim's testimony, standing alone, was sufficient, the victim's testimony that defendant twice shot at the victim was sufficient to find defendant guilty of violating O.C.G.A. § 16-5-21(a)(2) despite testimony to the contrary. *Hartley v. State*, 299 Ga. App. 534, 683 S.E.2d 109 (2009).

**That defendant did not initiate fight** does not necessarily show that defendant was not guilty of aggravated assault. *Russell v. State*, 152 Ga. App. 693, 263 S.E.2d 689 (1979).

**Admission of evidence of drug use was proper.** — Defendant was properly convicted for felony murder, malice murder, and aggravated assault where the defendant was seen twice beating someone with a pipe and yelling at the person regarding drugs, and where the person died as a result of injuries from that beating two days later. Admission at the defendant's trial of use of drugs was proper because it was not admitted purely to impugn the defendant's character, but was relevant as to motive. *Dyers v. State*, 277 Ga. 859, 596 S.E.2d 595 (2004).

Because evidence of the defendant's prior drug use, and history of crimes committed against family members fueled by that drug usage, were properly admitted as relevant to the crimes charged, despite incidentally placing the defendant's character in issue, convictions for both aggravated assault and simple assault were upheld on appeal. *Jones v. State*, 283 Ga. App. 812, 642 S.E.2d 887 (2007).

**Pre- and post-Miranda statements properly admitted.** — In a prosecution for aggravated assault and possession of a firearm during the commission of a crime, despite testimony from the arresting officer that the defendant was complaining of physical problems and under the influence of alcohol, both the pre- and post-Miranda statements made, as well as the numerous voluntary and unsolicited remarks which were not made in response to any form of interrogation, were properly admitted. *Dorsey v. State*, 285 Ga. App. 510, 646 S.E.2d 713 (2007).

**Evidence of victim's character properly excluded.** — In a prosecution for aggravated assault, to the extent that the defendant sought to attack the vic-

tim's character through testimony about the victim's use of alcohol during pregnancy, whether the victim hid the defendant from the police, and the victim's alleged jealousy over the defendant's new relationship, the trial court did not abuse its discretion in limiting the scope of cross-examination to the issues directly related to the incidents. *Massey v. State*, 278 Ga. App. 303, 628 S.E.2d 706 (2006).

**Evidence was properly excluded under rape shield law.** — Trial court properly applied O.C.G.A. § 23-2-3 by refusing to allow testimony that a victim of domestic violence had been seen working as a prostitute because that information had no relevance to the aggravated assault and false imprisonment charges for which a defendant was convicted, and further, the defendant failed to produce any evidence that could have provided a nexus between the alleged prostitution and a conclusion that someone else might have inflicted the victim's injuries. *Moorer v. State*, 290 Ga. App. 216, 659 S.E.2d 422 (2008).

**No speedy trial violation.** — Convictions for armed robbery, aggravated assault with the intent to rob, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon were proper because the defendant's right to a speedy trial was not violated by the 20-month delay between the date the indictment was issued to the date of the defendant's actual trial as the delay was due to a higher priority of statutory speedy trial demands, so it was not a deliberate delay on the part of the state, and as the defendant failed to show any prejudice from the delay. *Herndon v. State*, 277 Ga. App. 374, 626 S.E.2d 579 (2006).

**Denial of motion to sever.** — In a prosecution on two counts of attempting to hijack a motor vehicle, four counts of aggravated assault, possession of a firearm during the commission of a crime, and criminal trespass, because the offenses committed by a defendant and a co-defendant amounted to a series of continuous acts connected together both in time and the area in which committed, and there was no likelihood of confusion, the trial court did not abuse of discretion in deny-

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ing the defendant's motion to sever the trial from that of the codefendant; furthermore, the mere fact that the codefendants' defenses were antagonistic was insufficient in itself to warrant separate trials. *Diaz v. State*, 280 Ga. App. 413, 634 S.E.2d 160 (2006).

**State's peremptory strikes were valid.** — While defendant made out a *prima facie* case of racial discrimination regarding the state's use of three peremptory strikes, sufficient race-neutral reasons existed for those strikes; thus, given the court's jury charges and recharge to the jury, the court's responses to questions from the jury, and waiver of improper bolstering objection on appeal, defendant's aggravated assault and armed robbery convictions were upheld on appeal, as was the court's denial of a motion for a new trial. *LeMon v. State*, 290 Ga. App. 527, 660 S.E.2d 11 (2008).

**Jury determinations.** — Whether the defendant's means of attack was deadly and whether the defendant's acts were punishable as an aggravated assault or as simple battery were matters properly left to the jury. *Guevara v. State*, 151 Ga. App. 444, 260 S.E.2d 491 (1979).

Viewed in the light most favorable to the verdict, the defendant's aggravated assault conviction was upheld on appeal as conflicts in the evidence between the defendant's version of the facts and that version offered by the other witnesses were for the jury, not the appeals court, to resolve. *Hicks v. State*, 281 Ga. App. 461, 636 S.E.2d 183 (2006).

Sufficient evidence was presented to the jury to support the defendant's convictions for armed robbery, aggravated assault, burglary, criminal attempt to commit aggravated sodomy, and possession of a knife during the commission of a crime because the victim's testimony alone was sufficient to support the convictions; regardless of any inconsistencies in the victim's testimony, it was for the jury to assess witness credibility, and the jury chose to believe the victim's identification of the defendant as the individual who committed the crimes. *Williams v. State*, 300 Ga. App. 839, 686 S.E.2d 446 (2009).

**Guilty plea free and voluntary.** — Trial court did not abuse the court's discretion in denying the defendant's motion to withdraw a guilty plea to two counts of kidnapping and two counts of aggravated assault as the trial court was well aware of the medications the defendant was taking when the plea was entered, the medications did not affect the defendant's ability to understand the proceedings, and an expert opined that the defendant was feigning hallucinations and was competent to stand trial; hence, at that point, the trial court had no duty to make any further inquiries into the defendant's ability to competently tender a plea. *McDowell v. State*, 282 Ga. App. 754, 639 S.E.2d 644 (2006).

**Double jeopardy since aggravated assault was underlying offense in felony murder.** — Second prosecution on an aggravated assault charge was barred by double jeopardy because the assault charge served as the underlying offense to the felony murder charge and was a lesser included offense of felony murder; the court of appeals erred by failing to consider the implications of the modified merger rule when reviewing the defendant's double jeopardy claim because the aggravated assault charge was perpetrated against the victim and was an integral part of the homicide, and the evidence authorized a charge on voluntary manslaughter on which the defendant was convicted. *Williams v. State*, 288 Ga. 7, 700 S.E.2d 564 (2010).

**Aggravated assault is not a capital felony.** *Jones v. State*, 246 Ga. 109, 269 S.E.2d 6 (1980).

**State was not required to prove victim's certification as a police officer** under the Georgia Peace Officer Standards and Training Act, O.C.G.A. § 35-8-1 et seq., in order to make a *prima facie* showing that the victim was acting as a peace officer within the contemplation of O.C.G.A. § 16-5-21(c). *Cornwell v. State*, 193 Ga. App. 561, 388 S.E.2d 353, cert. denied, 193 Ga. App. 909, 388 S.E.2d 353 (1989).

**Victim's apprehension of violent injuries.** — In a prosecution for felony murder, where defendant was charged with the underlying felony of aggravated as-

sault by stabbing the victim with a knife, a deadly weapon, it was unnecessary for the state to show the victim's apprehension of the violent injuries inflicted. Brinson v. State, 272 Ga. 345, 529 S.E.2d 129 (2000).

Evidence was sufficient to allow the court to adjudicate the defendant a delinquent for committing an act which would have been an aggravated assault, under O.C.G.A. § 16-5-21(a)(2), if committed by an adult, because a police officer testified that the juvenile pointed a gun at the officer. In the Interest of M.F., 276 Ga. App. 402, 623 S.E.2d 234 (2005).

Because sufficient evidence was presented supporting the jury's determination that the defendant's act of shooting the victim was not an accident and was not justified, the victim testified to knowing defendant had a gun, and the presence of a gun normally placed a victim in reasonable apprehension of being injured violently, the defendant's convictions for aggravated assault and possession of a firearm during the commission of a crime were supported by the record. Dukes v. State, 285 Ga. App. 172, 645 S.E.2d 664 (2007).

Evidence was sufficient to support a finding of juvenile delinquency based on aggravated assault. The defendant committed an act with a deadly weapon, advancing on a deputy with a baton in the defendant's hand, putting the deputy in reasonable apprehension of immediately receiving a violent injury. In the Interest of J.A.C., 291 Ga. App. 728, 662 S.E.2d 811 (2008).

**Violence against a parent.** — When the defendant, while cursing and screaming at the defendant's parent, stood near the parent, holding a pot of boiling water and staring at the parent, the defendant's acts constituted aggravated assault under O.C.G.A. § 16-5-21(a)(2). The acts constituted both a substantial step toward committing a battery and a demonstration of violence against the parent, and showed a present ability to inflict injury that placed the parent in reasonable apprehension of immediately receiving a violent injury under § 16-5-21(a)(2). In the Interest of T.Y.B., 288 Ga. App. 610, 654 S.E.2d 688 (2007).

**Prior transaction evidence properly admitted.** — Trial court did not err in admitting prior transaction evidence sufficiently similar to the charged aggravated assault offense in order to disprove the defendant's claim of accident and to show intent and course of conduct as proof of the prior offense helped prove an element of the aggravated assault. Mack v. State, 283 Ga. App. 172, 641 S.E.2d 194 (2007).

Similar transaction evidence of an eight-year-old incident in which the defendant robbed two victims at gunpoint was not too remote in time or dissimilar to the armed robbery and aggravated assault charges the defendant was being tried for, and was thus properly admitted to show course of conduct, bent of mind, motive, and identity. Wallace v. State, 295 Ga. App. 452, 671 S.E.2d 911 (2009).

**Error in admitting similar transaction evidence required reversal.** — While state presented sufficient evidence of the victim's age to support assault charge under O.C.G.A. § 16-5-21(a)(1), because the trial court clearly erred in admitting evidence of two burglaries defendant committed in 1998 as similar transactions to help prove the issue of identity, defendant's aggravated assault, burglary, robbery, theft, and battery convictions were reversed. Usher v. State, 290 Ga. App. 710, 659 S.E.2d 920 (2008).

**Prior convictions properly admitted for both impeachment and sentencing purposes.** — Trial court properly admitted certified copies of the defendant's two prior convictions of aggravated assault and possession of a firearm during the commission of a felony as: (1) the court carefully balanced the competing interests; (2) the prior offenses had a substantial probative value which outweighed their prejudicial effect; and (3) nothing prevented the use of a defendant's convictions for both impeachment and sentencing purposes. Moreover, the court rejected the defendant's claim that by adding the word "substantially" to the balancing test, the Georgia legislature meant to incorporate the standard for admissibility embodied in Fed. R. Evid. 609(b). Newsome v. State, 289 Ga. App. 590, 657 S.E.2d 540 (2008), cert. denied, No.

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S08C1042, 2008 Ga. LEXIS 494 (Ga. 2008).

**Comment in closing did not warrant new trial.** — Aggravated assault conviction was upheld on appeal, and the defendant was not entitled to a new trial, as the prosecution's closing argument, utilizing an analogy between the defendant's case and a similar separate case involving other parties, was within the parameters of an appropriate closing argument. *Moss v. State*, 278 Ga. App. 221, 628 S.E.2d 648 (2006).

**Guilty verdicts were of aggravated assaults of peace officers.** — Defendant was convicted of aggravated assault of a peace officer where: (1) the evidence showed that the defendant attempted to run law enforcement officers off the road; (2) the indictment was sufficient to charge aggravated assault of a peace officer; (3) the jury was instructed to determine whether any guilty verdict was aggravated assault or aggravated assault of a peace officer; (4) the jury did not specify whether the guilty verdicts were of assaults against peace officers; and (5) the defendant did not object to the jury's failure to specify whether the convictions were for assaults against peace officers at the time the verdicts were announced. *Dupree v. State*, 267 Ga. App. 561, 600 S.E.2d 654 (2004).

**Mutually exclusive verdict of assault on peace officer and serious injury by vehicle.** — Defendant's convictions of aggravated assault on a peace officer and serious injury by vehicle based on reckless driving were mutually exclusive as it was reasonably probable that the jury found the defendant guilty of aggravated assault under O.C.G.A. § 16-5-20(a)(1) for intentionally attempting to commit a violent injury to the officer. A verdict of guilt under § 16-5-20(a)(1), requiring proof of intent, was mutually exclusive with a verdict of guilt as to serious injury by vehicle predicated on reckless driving. *Dryden v. State*, 285 Ga. 281, 676 S.E.2d 175 (2009).

**Aggravated assault on security guard.** — When, in an obvious attempt to incapacitate an armed security guard, the

defendant pulled the trigger of the defendant's own weapon in that direction, an aggravated assault was committed. *Lambert v. State*, 157 Ga. App. 275, 277 S.E.2d 66 (1981).

**Lawful discharge of official duties.** — Officers who were summoned to the scene of a domestic disturbance and saw defendant forcibly march defendant's family into their dwelling, quite possibly at gunpoint, had probable cause to effectuate a warrantless arrest for a battery constituting a family violence and, thus, were engaged in the performance of official duties for purposes of O.C.G.A. § 16-5-21. *Duitsman v. State*, 212 Ga. App. 348, 441 S.E.2d 888 (1994).

Defendant was properly convicted of aggravated assault on a police officer, under O.C.G.A. § 16-5-21(c), when, under the totality of the circumstances, the officer had a particularized and objective basis for suspecting the defendant of criminal activity. *Ramirez v. State*, 279 Ga. 569, 619 S.E.2d 668 (2005), cert. denied, 546 U.S. 1217, 126 S. Ct. 1435, 164 L. Ed. 2d 138 (2006).

**Police officer moonlighting as security guard performing "official duties."** — State proved every element of crime charged although indictment charged defendant with aggravated assault on a police officer engaged in the performance of the officer's official duties where the officer was moonlighting as a security guard at the time of the assault, as the officer had an "official duty" to take action when defendant breached the peace. *Loumakis v. State*, 179 Ga. App. 294, 346 S.E.2d 373 (1986).

**Conviction for assault authorized though intended criminal act is completed.** — It is the intent of the Legislature that, although an assault may be a criminal attempt, and even though the intended criminal act be completed, a conviction for an assault is authorized. *Williams v. State*, 141 Ga. App. 201, 233 S.E.2d 48 (1977).

**Aggravated assault conviction approved although battery completed.** *Williams v. State*, 141 Ga. App. 201, 233 S.E.2d 48 (1977).

**Assault with pistol not completed.** — When defendant was arrested, in-

dicted, and tried on three counts of aggravated assault: (1) shooting at another with a pistol; (2) attempting to shoot another with a pistol; and (3) attempting to run over another with an automobile, the assault with the automobile was clearly completed (the car had been stopped and placed in "park") before the assault with the pistol began. However, the evidence did not authorize the jury to conclude that the assault with the pistol was "completed" between the time that defendant fired shots while on the run and the time when defendant caught up with defendant's quarry and attempted to fire additional shots from a stationary position, so that the two charges involving the use of a pistol referred to acts that were parts of a single transaction and defendant therefore could not properly be convicted on both charges. *Davis v. State*, 186 Ga. App. 491, 367 S.E.2d 884 (1988).

**Aggravated assault and hit-and-run are not mutually exclusive crimes.** — Aggravated assault with a motor vehicle and hit-and-run with that same vehicle are not mutually exclusive crimes, since an aggravated assault includes a finding of intent which is not an element of hit-and-run. *Gutierrez v. State*, 235 Ga. App. 878, 510 S.E.2d 570 (1998).

**Conduct outside scope of involuntary manslaughter.** — Whether the conduct of an accused is lawful at the outset, e.g., in self-defense or unlawful, when what takes place thereafter discloses felonious conduct in committing either an aggravated assault with an instrument likely to produce death or an aggravated battery which causes the death of another, such conduct is not within the scope of involuntary manslaughter. *Trask v. State*, 132 Ga. App. 645, 208 S.E.2d 591 (1974).

**Cruelty to children conviction did not merge with aggravated assault or false imprisonment.** — Defendant's cruelty to children in the first degree charge did not merge with the aggravated assault or false imprisonment charge because neither aggravated assault nor false imprisonment required proof that the victim suffered cruel or excessive physical or mental pain. *Kirt v. State*, No. A10A1933, 2011 Ga. App. LEXIS 247 (Mar. 22, 2011).

**Merger not appropriate.** — Trial court did not err in failing to merge an

aggravated assault count into a kidnapping with bodily injury count, the aggravated assault count into an aggravated battery count, and the aggravated battery count into the kidnapping count, as each count referred to a separate cut of the victims with a decorative sword that the defendant had pulled off the wall during a domestic dispute with the defendant's spouse and child. *Brown v. State*, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

Due to the entry of a guilty plea over 20 years before the filing of a motion to correct alleged illegal sentences, the defendant's merger claim was waived, and since the sentences imposed were not void, the trial court lacked subject matter jurisdiction over the motion for correction. *Sanders v. State*, 282 Ga. App. 834, 640 S.E.2d 353 (2006).

Because the jury could reasonably have concluded that the victim's first two injuries from two non-fatal shots resulted from a separate offense than the third, the earlier shots were sufficient to support the aggravated assault conviction, separate from the third and fatal shot, and there was no merger of the aggravated assault offense with a separate charge of malice murder. *Parker v. State*, 281 Ga. 490, 640 S.E.2d 44 (2007).

Because separate cruelty to children and aggravated assault counts were based upon acts committed by the defendant on the day preceding the death of the victim, neither of those convictions merged into the felony murder count also filed against the defendant and, accordingly, separate sentences for those crimes were authorized. *Christian v. State*, 281 Ga. 474, 640 S.E.2d 21 (2007).

Defendant's aggravated assault conviction did not merge into a felony murder conviction because neither the murder nor the underlying felony of criminal attempt to commit armed robbery required the state to prove the element of reasonable apprehension of receiving a violent injury, which was a required element of the aggravated assault count as indicted. *Willingham v. State*, 281 Ga. 577, 642 S.E.2d 43 (2007).

Defendant's convictions of involuntary manslaughter while in the commission of a simple battery, aggravated assault, ag-

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gravated battery, cruelty to children, and reckless conduct were not mutually exclusive, and the trial court did not err in not merging the nonhomicide counts upon sentencing. *Waits v. State*, 282 Ga. 1, 644 S.E.2d 127 (2007).

Aggravated assault with a rope and kidnapping with bodily injury offenses did not merge for sentencing purposes as one crime was completed before the other took place, and the crimes were established by separate and distinct facts. *McCaskell v. State*, 285 Ga. App. 592, 646 S.E.2d 761 (2007).

An aggravated assault conviction did not merge as a matter of fact with a murder conviction because the evidence presented at trial showed that the defendant inflicted a severe, but non-fatal, beating upon the victim that was separate and distinct from the choking and strangling which resulted in the victim's death. *Starks v. State*, 283 Ga. 164, 656 S.E.2d 518 (2008).

Because the evidence presented against the defendant showed two distinct acts of aggravated assault, separated by time and motive, the two offenses did not merge. *Boyd v. State*, 289 Ga. App. 342, 656 S.E.2d 864 (2008), cert. denied, 2008 Ga. LEXIS 498 (Ga. 2008).

Because charges alleging aggravated assault did not amount to lesser-included offenses as a matter of fact of a charge of first-degree criminal damage to property, and the property offense was not a lesser-included offense of any aggravated assault offense, merger of the offenses was unwarranted. *Louis v. State*, 290 Ga. App. 106, 658 S.E.2d 897 (2008).

When a defendant pulled out a gun and demanded money from a cab driver, the offense of criminal attempt armed robbery was complete, and the defendant's subsequent acts, including striking the driver on the head, were not necessary to prove that offense; thus, the attempt offense did not merge with aggravated assault offenses for sentencing purposes. *Duncan v. State*, 290 Ga. App. 32, 658 S.E.2d 780 (2008).

Because: (1) different facts were used to prove an aggravated assault and an

armed robbery, specifically, that the armed robbery was complete after the defendant laid a handgun on the counter in the convenience store, demanded that the victim open the register, and a codefendant took money from the a register; and (2) the separate offense of aggravated assault occurred when the defendant struck the victim in the head with the gun, the offenses did not merge as a matter of fact. Thus, the separate sentences imposed for each offense were upheld, and no double jeopardy violation occurred. *Garibay v. State*, 290 Ga. App. 385, 659 S.E.2d 775 (2008).

As the offense of aggravated assault, O.C.G.A. § 16-5-21(a)(1), required proof of at least one additional fact which the offense of robbery by intimidation, O.C.G.A. § 16-8-41(a), did not, under the "required evidence" test of O.C.G.A. § 16-1-7, a defendant's aggravated assault conviction did not merge into the defendant's robbery by intimidation conviction. *Elamin v. State*, 293 Ga. App. 591, 667 S.E.2d 439 (2008).

Defendant's aggravated assault and aggravated battery convictions under O.C.G.A. §§ 16-5-21(a) and 16-5-24(a) did not merge under O.C.G.A. § 16-1-7(a), although both stemmed from the same act. The aggravated assault charge required proof that the defendant attempted to commit a violent injury with the intent to murder using a deadly weapon, while the aggravated battery charge required proof that the defendant maliciously caused bodily harm to the victim by rendering a member of the victim's body useless; thus, the offenses were distinct, with each requiring proof of a fact which the other did not. *Robbins v. State*, 293 Ga. App. 584, 667 S.E.2d 684 (2008).

Defendant's aggravated assault convictions under both O.C.G.A. § 16-5-21(a)(1) and (a)(2) did not merge because the state presented evidence that two separate assaults on the victim occurred at separate times and in different ways; from the evidence, the jury could reasonably infer that the defendant used the defendant's hands to choke the victim and that at a separate time and a different location, the defendant also jammed a curling iron down the victim's throat. *Lord v. State*, 297 Ga. App. 88, 676 S.E.2d 404 (2009).

Trial court did not err in refusing to merge six aggravated assault counts into one count or in charging the jury that it could find the defendant guilty on the six separate counts because the act of firing a weapon into a group made each individual in the group a separate victim and justified a separate count of aggravated assault for each victim. *Scott v. State*, 302 Ga. App. 111, 690 S.E.2d 242 (2010).

Defendant's convictions for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) and feticide in violation of O.C.G.A. § 16-5-80(a) did not merge for sentencing purposes because the victim of the aggravated assault was the defendant's girlfriend, while the victim of the feticide was the girlfriend's unborn child; the merger doctrine does not apply if each of the charged crimes was committed against a different victim. *Carmichael v. State*, 305 Ga. App. 651, 700 S.E.2d 650 (2010).

Defendant's guilty pleas for aggravated assault with intent to rape in violation of O.C.G.A. § 16-5-21(a)(1) and kidnapping in violation of O.C.G.A. § 16-5-40(a) were not accepted in violation of the constitutional prohibition against double jeopardy because the offenses did not merge as a matter of law since each of the offenses were separate and required proof of different facts; the state asserted that the defendant had dragged the victim from the front of a laundromat facility into a bathroom in the back of the facility, which formed a basis for the kidnapping charge, and that the defendant had sexually assaulted the victim while holding the victim in the bathroom, which formed a basis for the aggravated assault with the intent to rape charge. *Shelton v. State*, 307 Ga. App. 599, 705 S.E.2d 699 (2011).

**Merger appropriate.** — Two counts of aggravated assault merge since both convictions were based on the same act. *Smith v. State*, 279 Ga. App. 211, 630 S.E.2d 833 (2006).

Upon the concession by the state on appeal, the two aggravated-assault counts the defendant was convicted of should have merged because there was no ensuing interval between the defendant's first act of pointing the gun at the victim's head and the later act of lowering the gun's aim

and shooting that victim in the leg. *Mack v. State*, 283 Ga. App. 172, 641 S.E.2d 194 (2007).

Although an armed robbery served as the predicate felony for one count of felony murder, there was a separate felony murder count predicated on aggravated assault; hence, when the jury found the defendant guilty of both counts, it was within the trial court's discretion to choose to merge the aggravated assault rather than the armed robbery into the felony murder count for which appellant was sentenced. *Hill v. State*, 281 Ga. 795, 642 S.E.2d 64 (2007).

One of defendant's aggravated assault convictions merged as a matter of fact with armed robbery. *Fagan v. State*, 283 Ga. App. 784, 643 S.E.2d 268 (2007).

When the defendant pulled out a gun and demanded money from a cab driver, put the vehicle in park, hit the driver on the head with the gun and shot the gun into the floor, then ordered the driver out of the cab, the offenses of aggravated assault with intent to rob and aggravated assault with a deadly weapon merged as a matter of fact for sentencing purposes, as the evidence did not support a separate conviction for assault with intent to rob; since any reasonable apprehension of receiving a violent or bodily injury related to the threat posed by the gun, not to the actions of putting the vehicle into park and directing the driver out of the cab, no separate aggravated assault occurred. *Duncan v. State*, 290 Ga. App. 32, 658 S.E.2d 780 (2008).

Defendant's aggravated assault convictions were to be merged with armed robbery and kidnapping convictions as the same set of facts were used to prove the offenses. *Lenon v. State*, 290 Ga. App. 626, 660 S.E.2d 16 (2008).

Because a defendant's convictions for armed robbery (O.C.G.A. § 16-8-41(a)) and aggravated assault (O.C.G.A. § 16-5-21(a)) were based on the same conduct—the defendant's pointing a gun at the victim with the intent to rob the victim—merger was required. Therefore, the sentence for the aggravated assault was vacated. *Reed v. State*, 293 Ga. App. 479, 668 S.E.2d 1 (2008).

Trial court erred in failing to merge a

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defendant's offenses of aggravated battery under O.C.G.A. § 16-5-24(a) and aggravated assault under O.C.G.A. § 16-5-21(a), for sentencing purposes, because the assault was a lesser included offense of the battery offense under O.C.G.A. § 16-1-6(1), given the defendant's single attack on the victim with a golf club. *Allen v. State*, 302 Ga. App. 190, 690 S.E.2d 492 (2010).

**Merger with malice murder conviction.** — Trial court did not err in failing to merge the aggravated assault for which the defendant was sentenced into defendant's malice murder conviction because the two crimes were not established by the same conduct; the defendant's conduct did not establish the commission of both the aggravated assault and the murder because the aggravated assault was established by evidence that the defendant and the codefendant beat and strangled the victim, whereas the murder was established by evidence that they killed the victim by stabbing the victim's body. *Hall v. State*, 286 Ga. 358, 687 S.E.2d 819 (2010).

Separate judgments of conviction and sentences for aggravated assault were vacated because the defendant was convicted of and sentenced for both the malice murders of the two victims and the aggravated assaults of those victims, and although there was no merger of those crimes as a matter of law, the record established that the aggravated assault convictions merged into the malice murder convictions as a matter of fact. *Vergara v. State*, 287 Ga. 194, 695 S.E.2d 215 (2010).

Defendant's conviction and sentence for aggravated assault was vacated and the case was remanded to the trial court for resentencing because the aggravated assault conviction merged into the defendant's malice murder conviction as a matter of fact even though there was no merger of those crimes as a matter of law. *Sharpe v. State*, 288 Ga. 565, 707 S.E.2d 338 (2011).

**Aggravated assault did not merge with armed robbery.** — As the armed robberies and aggravated assaults the de-

fendant was charged with were committed against different victims, the crimes did not merge as a matter of law or fact. *Verdree v. State*, 299 Ga. App. 673, 683 S.E.2d 632 (2009).

**Aggravated assault and armed robbery should merge.** — Trial court erred in failing to merge aggravated assault, O.C.G.A. § 16-5-21(a)(2), and armed robbery, O.C.G.A. § 16-8-41, counts because the state relied on the same act of assault to establish defendant's guilt of aggravated assault and armed robbery, and although the state would have been able to indict the defendant for aggravated assault based on conduct separate and distinct from the defendant's act of hitting the victim in the head with a baseball bat, the indictment specifically charged the defendant with the offense of aggravated assault; while armed robbery requires proof of additional facts, like aggravated assault with intent to rob, aggravated assault under § 16-5-21(a)(2) does not require proof of a fact not required to establish armed robbery. *Taylor v. State*, 304 Ga. App. 395, 696 S.E.2d 686 (2010).

**Aggravated assault offense did not merge with kidnapping charge.** — Defendant's conviction for aggravated assault, which was based on the defendant's striking the victim with a pistol, did not merge with the defendant's kidnapping conviction, which was based on the defendant's forcing the victim upstairs, because the assault occurred prior to the kidnapping and was not necessary to accomplish the kidnapping. *Williams v. State*, 295 Ga. App. 9, 670 S.E.2d 828 (2008).

Trial court did not err under O.C.G.A. § 16-1-7 in failing to merge convictions for aggravated assault and aggravated battery with a conviction for kidnapping with bodily injury, as each crime required proof of at least one different element, and the state presented independent evidence to prove each individual crime as set out in the indictment. Evidence that the defendant pointed a gun at the victim and fired the gun at the floor near the victim, that the defendant used a wooden stick resembling a baseball bat to repeatedly hit the victim, and that the defendant hit and kicked the victim while the victim was tied up supported the three aggravated

assault counts; aggravated battery was established by evidence that the defendant broke the victim's nose, wrist, and shoulder and knocked out two teeth and by evidence that the defendant burned the victim's hand and caused the victim to be bitten by fire ants; and kidnapping with bodily injury was proven by evidence of injuries to the victim due to being bound by rope. *Rouse v. State*, 295 Ga. App. 61, 670 S.E.2d 869 (2008).

Trial court correctly sentenced the defendant for both aggravated assault, O.C.G.A. § 16-5-21, and kidnapping with bodily injury, O.C.G.A. § 16-5-40, because the crimes did not merge since each of the two crimes required proof of at least one fact that the other did not, and the state provided such proof. Kidnapping required proof of asportation, holding the victim against the victim's will, and bodily injury, which was not required to prove aggravated assault; and aggravated assault required proof that the defendant used the defendant's hands, with either the intent to cause a violent injury or which placed the victim in reasonable fear of receiving a violent injury, but the kidnapping charge did not require such proof. *Mayberry v. State*, 301 Ga. App. 503, 687 S.E.2d 893 (2009).

Convictions for aggravated assault, under O.C.G.A. § 16-5-21(a)(2), and kidnapping, under O.C.G.A. § 16-5-40, did not merge because the aggravated assault was completed when the defendant pointed a gun at the victim and grabbed the victim around the neck, while the asportation for the kidnapping occurred when the defendant then dragged the victim into another room. The movement of the victim from one room to another within the hotel room, even though of minimal duration, created an additional danger to the victim by enhancing the defendant's control over the victim, and it was not an inherent part of the aggravated assault. *Williams v. State*, 307 Ga. App. 675, 705 S.E.2d 906 (2011).

**Merger with involuntary manslaughter.** — Defendant's sufficiency challenge became moot on appeal as the trial court merged the involuntary manslaughter count into the aggravated assault count for sentencing purposes.

*Ramirez v. State*, 288 Ga. App. 249, 653 S.E.2d 837 (2007).

**Merger with voluntary manslaughter.** — Trial court erred in entering a judgment of conviction against the defendant for aggravated assault, O.C.G.A. § 16-5-21(a)(2), because that conviction should have been merged into the defendant's conviction for voluntary manslaughter, O.C.G.A. § 16-5-2(a); the defendant was charged in the indictment with voluntary manslaughter and aggravated assault for the stabbing of the victim, and the undisputed evidence at trial showed that the victim was stabbed one time in the chest, causing the victim's death. *Muckle v. State*, 307 Ga. App. 634, 705 S.E.2d 721 (2011).

**Corroborating accomplice testimony sufficient to support conviction.** — Because defendant's four accomplices in commission of multiple armed robberies and aggravated assaults corroborated each other as to defendant's participation in the crimes, convictions on those offenses were upheld on appeal. *Hawkins v. State*, 290 Ga. App. 686, 660 S.E.2d 474 (2008).

Because of the corroborating testimony from the defendant's two accomplices, the accomplice testimony was admissible to support the defendant's conviction for aggravated assault, O.C.G.A. § 16-5-21(a)(3), and aggravated battery, O.C.G.A. § 16-5-24(a). *Scott v. State*, 302 Ga. App. 111, 690 S.E.2d 242 (2010).

There was sufficient corroboration of the defendant as a perpetrator of the principal crime, and, ultimately, sufficient evidence to support the defendant's convictions for armed robbery, aggravated assault, false imprisonment, possession of a firearm during the commission of a felony, and burglary because there was circumstantial evidence to show that the defendant committed a similar transaction after the first incident, that the same gun an accomplice bought and used in the first crime was used in the second crime and ended up in a car at the house of the defendant's mother afterwards, and that the defendant was nervous and felt guilty about events that the defendant participated in with the accomplice, whom the defendant had only known a short time;

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that corroborative evidence connected the accomplice to the crimes. *Ward v. State*, 304 Ga. App. 517, 696 S.E.2d 471 (2010).

Evidence was sufficient to support the defendant's convictions for armed robbery, burglary, aggravated assault, criminal attempt to commit armed robbery, criminal attempt to commit burglary, and sexual battery because two codefendant's testified that the defendant participated in the home invasion, and that testimony was sufficient to sustain the defendant's conviction for the crimes committed at the home. *Martinez v. State*, 306 Ga. App. 512, 702 S.E.2d 747 (2010).

Evidence was sufficient to authorize a rational trier of fact to find the defendants guilty beyond a reasonable doubt of malice murder and aggravated assault because the independent corroborating evidence in the case was substantial; an accomplice's testimony implicating the defendants was corroborated by the aggravated assault victim, who positively identified one of the defendants, that defendant's own admission to a woman in the defendant's apartment, evidence that the second defendant had sustained shotgun wounds on the evening of the crimes, ballistics evidence tying that defendant to the crime scene, and the presence of that defendant's blood on the first defendant's clothing and in the getaway vehicle. *Ward v. State*, 288 Ga. 641, 706 S.E.2d 430 (2011).

Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault with a deadly weapon, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon beyond a reasonable doubt, and the trial court properly denied the defendant's motions for directed verdict and new trial because the jury could have determined that a witness's testimony provided corroboration for the codefendant's identification of the defendant; further, corroboration for the testimony of the witness and the codefendant was provided by a neighbors' description of the robbery and shooting, by the description of the codefendant's wife of the codefendant's demeanor and behavior that day, and by physical evidence found

at the scene. *Williamson v. State*, 308 Ga. App. 473, 708 S.E.2d 57 (2011).

**Parties to crime.** — Evidence was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that defendants were parties to the aggravated assault because the defendants supplied the shooter with the weapons and the bullets knowing that the shooter intended to use those items for a personal avengance against the intended victim and the shooter also attempted to fire at the occupants of the van. *Cammon v. State*, 269 Ga. 470, 500 S.E.2d 329 (1998).

Evidence that the defendant was seen making notes at the crime scene the day of the shooting, that the defendant accompanied the coconspirator knowing that the coconspirator intended to rob a cab driver, and that the defendant drove the coconspirator away after the shooting of the cab driver authorized the jury to find the defendant was a party to the crime of aggravated assault committed with a deadly weapon, and hence to felony murder. *Brown v. State*, 278 Ga. 724, 609 S.E.2d 312 (2004).

Evidence was sufficient to show that a juvenile was a party to aggravated assault on the victim when the defendant and three other men approached the victim with guns, placing the victim in reasonable apprehension of immediate injury, and the victim identified the juvenile to police as one of the men. In the Interest of M.D.L., 271 Ga. App. 738, 610 S.E.2d 687 (2005).

Despite the defendant's claim of innocence, convictions for armed robbery and two counts of aggravated assault were upheld on appeal, given sufficient evidence showing that the defendant waited at the scene of the robbery and then assisted the codefendants in an attempted escape; hence, the defendant was not entitled to a directed verdict of acquittal and the state was not required to exclude every reasonable hypothesis except guilt as required by O.C.G.A. § 24-4-6. *Jordan v. State*, 281 Ga. App. 419, 636 S.E.2d 151 (2006).

Defendant's aggravated assault and robbery convictions were upheld on appeal, as evidence including the defendant's admission and flight from the scene

authorized the jury to conclude that the defendant went to an apartment complex intending to participate in the robbery, and in fact participated in the robbery by acting as a lookout and an additional show of force; hence, the jury was authorized to infer criminal intent from the defendant's conduct before, during, and after the commission of the crime. *Millender v. State*, 286 Ga. App. 331, 648 S.E.2d 777 (2007), cert. denied, No. S07C1717, 2008 Ga. LEXIS 80 (Ga. 2008).

Evidence supported a conviction of aggravated assault with a knife when two codefendants repeatedly struck the victim, the defendant struck the victim and threatened the victim's life, the defendant and the first codefendant entered a pharmacy to buy duct tape, and while alone with the victim, the second codefendant held a knife on the victim where the second codefendant could reach the knife and where the victim could see the knife; this authorized the conclusion that the second codefendant committed aggravated assault and that the defendant was a party. *Rhines v. State*, 288 Ga. App. 128, 653 S.E.2d 500 (2007).

Evidence established more than the mere presence of the defendant during the commission of the offense of aggravated assault and felony murder predicated on aggravated assault: (1) the defendant assaulted the victim during the drive to the murder scene; (2) the defendant participated in a plot to burn the victim's body and stood lookout while the body was buried; (3) the defendant did not attempt to report the crime; and (4) the defendant watched as another person stabbed the victim before attempting to intervene. *Navarrete v. State*, 283 Ga. 156, 656 S.E.2d 814 (2008), cert. denied, 129 S. Ct. 104, 172 L.Ed.2d 33 (2008).

Evidence that the defendant drove a codefendant away from the crime scene in a subdivision after the codefendant shot the victim and that a box of bullets was found in the defendant's car when the defendant was later arrested did not support the defendant's convictions of aggravated assault and of possession of a firearm during the commission of a felony. The defendant's possession of a box of bullets of the same caliber as those used in

the murder weapon in no way proved the defendant's possession of the weapon during the commission of the assault; driving the codefendant away with knowledge that the codefendant had committed the crime did not, in and of itself, render the defendant guilty as a party to the crime under O.C.G.A. § 16-2-20; and to the extent that the evidence that the defendant's car had been parked at some point with the car's front end facing in the direction going out of the subdivision constituted circumstantial evidence of guilt, the evidence did not exclude every other reasonable hypothesis, as required by O.C.G.A. § 24-4-6. *Ratana v. State*, 297 Ga. App. 747, 678 S.E.2d 193 (2009).

Evidence was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty as a party to malice murder, aggravated assault, possession of a firearm during the commission of a crime, and tampering with evidence because the evidence showed that before, during, and after the commission of the crimes, the defendant was present and shared companionship with the defendant's brothers; the state's evidence authorized the inferences that the defendant, who had assisted the defendant's brothers in attacking the cousin of one of the victims, was not an innocent bystander; that the defendant drove the defendant's brothers to the crime scene knowing that one of the brothers was armed, that the defendant willingly stayed with the defendant's brothers while the brothers tried to start a fight and threatened to kill someone, and that the defendant ran to the defendant's car and drove the brothers away immediately after the brothers had shot one of the victims. *Teasley v. State*, 288 Ga. 468, 704 S.E.2d 800 (2010).

**Coercion defense rejected.** — In a bench trial for armed robbery and aggravated assault, the evidence authorized the trial court to conclude that the state had sufficiently disproved the defendant's defense that the defendant had been coerced by one of the defendant's companions into committing the crimes; the defendant had not mentioned coercion in either of the defendant's two statements to police, one in which the defendant had admitted to

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committing the crimes, and it was not until trial that the defendant claimed coercion. *Edwards v. State*, 285 Ga. App. 227, 645 S.E.2d 699 (2007).

**Identification of defendant.** — Evidence was sufficient to support defendant's conviction of aggravated assault, as defendant's challenge to that conviction was meritless; defendant's contention that the evidence was insufficient had to be rejected because it was premised on the argument that the victims' identification of defendant as a perpetrator was tainted by an impermissibly suggestive photographic lineup and the photographic lineup procedure was not impermissibly suggestive. *Evans v. State*, 261 Ga. App. 22, 581 S.E.2d 676 (2003).

Because a burglary victim recognized the defendant before a photographic lineup was introduced, the defendant did not show deficient performance or prejudice based on trial counsel's failure to object to the lineup; in any event, the evidence was sufficient to sustain the convictions for armed robbery, aggravated assault, burglary, making terroristic threats, and possession of a firearm during the commission of the felonies under O.C.G.A. §§ 16-5-21(a)(1), (a)(2), 16-7-1(a), 16-8-41(a), 16-11-37(a), and 16-11-106(b)(1). *Williams v. State*, 270 Ga. App. 845, 608 S.E.2d 310 (2004).

Sufficient evidence supported convictions for aggravated assault, kidnapping, armed robbery, and possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106, even though none of the victims could identify the defendant as the gunman in the robbery due to the fact that the defendant wore a mask, because defendant was found shortly after the robbery with cash, weapons, a ski mask, a car and clothing matching the victims' description; surveillance videotape of the robbery was shown to the jury to determine whether defendant was the person on the videotape. *Johnson v. State*, 277 Ga. App. 41, 625 S.E.2d 411 (2005).

Defendant's aggravated assault conviction was upheld on appeal, as the victim's identification of the defendant as the per-

petrator of the aggravated assault, both during and after the altercation, was sufficient evidence to uphold the conviction, and evidence of a subsequent altercation between the two, like evidence of a prior difficulty, was probative evidence that the victim immediately identified the defendant to police on the day of the incident. *Bond v. State*, 283 Ga. App. 620, 642 S.E.2d 223 (2007).

Because the evidence showed that the victim sufficiently identified the defendant as the perpetrator of an aggravated assault and armed robbery (1) to officers at the scene; (2) by means of a photographic lineup; and (3) at trial, the appeals court rejected the defendant's sufficiency challenge as to that element. *Wallace v. State*, 289 Ga. App. 497, 657 S.E.2d 874 (2008).

Sufficient evidence supported the defendant's convictions of armed robbery, O.C.G.A. § 16-8-41(a), rape, O.C.G.A. § 16-6-1(a)(1), aggravated assault, O.C.G.A. § 16-5-21(a)(2), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), kidnapping, O.C.G.A. § 16-5-40(a), and aggravated sodomy, O.C.G.A. § 16-6-2(a)(2), involving four different victims on three separate dates; both the husband and the wife, the victims in the first criminal incident, identified the defendant in court as the perpetrator of the crimes. Two separate DNA analyses testified to by two forensic biologists showed that the defendant's sperm was present in the vaginas of the other two female victims. *Robins v. State*, 298 Ga. App. 70, 679 S.E.2d 92 (2009).

Trial court did not err in denying the defendant's motion for new trial under O.C.G.A. § 5-5-21 after a jury convicted the defendant of kidnapping with bodily injury, aggravated assault, and false imprisonment because the evidence was legally sufficient to support the crimes of which the defendant was convicted; the victim was shown a photo array containing six photographs and immediately picked the defendant's photo as the man who held a gun to the victim's head during the incident, and the victim also identified the defendant in court. *Delgiudice v. State*, 308 Ga. App. 397, 707 S.E.2d 603 (2011).

**Trial court authorized to find defendant guilty beyond reasonable doubt.** — See *McKinney v. State*, 166 Ga. App. 718, 305 S.E.2d 446 (1983).

**Defendant's admission sufficient.** — Defendant's recorded admission to a co-worker that the defendant killed the victim with the assistance of a codefendant was sufficient to support a convictions for murder and aggravated assault. *Williams v. State*, 280 Ga. 539, 630 S.E.2d 410 (2006).

**Evidence sufficient for conviction.** — See *Carter v. State*, 168 Ga. App. 177, 308 S.E.2d 438 (1983); *Davis v. State*, 168 Ga. App. 272, 308 S.E.2d 602 (1983); *Hall v. State*, 172 Ga. App. 371, 323 S.E.2d 261 (1984); *Hambrick v. State*, 174 Ga. App. 444, 330 S.E.2d 383 (1985); *Lucas v. State*, 174 Ga. App. 580, 330 S.E.2d 792 (1985); *Rucker v. State*, 177 Ga. App. 779, 341 S.E.2d 228 (1986); *Maxwell v. State*, 178 Ga. App. 20, 342 S.E.2d 8 (1986); *Gilstrop v. State*, 256 Ga. 20, 342 S.E.2d 667 (1986); *Laidler v. State*, 180 Ga. App. 213, 348 S.E.2d 739 (1986); *Roberson v. State*, 180 Ga. App. 406, 349 S.E.2d 39 (1986); *Hall v. State*, 180 Ga. App. 366, 349 S.E.2d 255 (1986); *Nelson v. State*, 181 Ga. App. 455, 352 S.E.2d 636 (1987); *Hanvey v. State*, 186 Ga. App. 690, 368 S.E.2d 357 (1988); *Conley v. State*, 258 Ga. 339, 368 S.E.2d 502 (1988); *Mapp v. State*, 258 Ga. 273, 368 S.E.2d 511 (1988); *Beal v. State*, 186 Ga. App. 806, 368 S.E.2d 567 (1988); *Roberson v. State*, 186 Ga. App. 808, 368 S.E.2d 568 (1988); *Jackson v. State*, 258 Ga. 322, 368 S.E.2d 771 (1988); *Walker v. State*, 258 Ga. 443, 370 S.E.2d 149 (1988); *Adams v. State*, 187 Ga. App. 340, 370 S.E.2d 197 (1988); *McKenzie v. State*, 187 Ga. App. 840, 371 S.E.2d 869 (1988); *Young v. State*, 188 Ga. App. 601, 373 S.E.2d 837 (1988); *Fowler v. State*, 188 Ga. App. 873, 374 S.E.2d 805 (1988); *Benford v. State*, 189 Ga. App. 761, 377 S.E.2d 530 (1989); *Seagraves v. State*, 191 Ga. App. 207, 381 S.E.2d 523 (1989); *Davis v. State*, 192 Ga. App. 47, 383 S.E.2d 615 (1989); *Arnold v. State*, 193 Ga. App. 206, 387 S.E.2d 417 (1989); *Henderson v. State*, 200 Ga. App. 200, 407 S.E.2d 448 (1991); *Brown v. State*, 200 Ga. App. 537, 408 S.E.2d 836 (1991); *Turner v. State*, 205 Ga. App. 745, 423 S.E.2d 439 (1992);

*In re J.K.D.*, 211 Ga. App. 776, 440 S.E.2d 524 (1994); *Brown v. State*, 215 Ga. App. 544, 451 S.E.2d 787 (1994); *Adside v. State*, 216 Ga. App. 129, 453 S.E.2d 139 (1995); *Humphrey v. State*, 218 Ga. App. 574, 462 S.E.2d 641 (1995); *Durden v. State*, 219 Ga. App. 732, 466 S.E.2d 641 (1995); *Matthews v. State*, 224 Ga. App. 407, 481 S.E.2d 235 (1997); *Dukes v. State*, 224 Ga. App. 305, 480 S.E.2d 340 (1997); *Livingston v. State*, 225 Ga. App. 512, 484 S.E.2d 311 (1997); *Johnson v. State*, 225 Ga. App. 863, 485 S.E.2d 551 (1997); *McSears v. State*, 226 Ga. App. 90, 485 S.E.2d 589 (1997); *Taylor v. State*, 226 Ga. App. 254, 485 S.E.2d 830 (1997); *Miller v. State*, 228 Ga. App. 754, 492 S.E.2d 734 (1997); *Osborne v. State*, 228 Ga. App. 758, 492 S.E.2d 732 (1997), overruled on other grounds, *Dunagan v. State*, 269 Ga. 590, 502 S.E.2d 726 (1998); *Rivers v. State*, 229 Ga. App. 12, 493 S.E.2d 2 (1997); *Hawkins v. State*, 230 Ga. App. 627, 497 S.E.2d 386 (1998); *Louis v. State*, 230 Ga. App. 897, 497 S.E.2d 824 (1998); *In re J.J.K.*, 232 Ga. App. 470, 502 S.E.2d 313 (1998); *Cheney v. State*, 233 Ga. App. 66, 503 S.E.2d 327 (1998); *Vick v. State*, 237 Ga. App. 762, 516 S.E.2d 815 (1999); *Butura v. State*, 239 Ga. App. 132, 519 S.E.2d 18 (1999); *Favors v. State*, 238 Ga. App. 234, 518 S.E.2d 444 (1999); *Anderson v. State*, 238 Ga. App. 866, 519 S.E.2d 463 (1999); *Young v. State*, 238 Ga. App. 555, 519 S.E.2d 481 (1999); *Grant v. State*, 239 Ga. App. 608, 521 S.E.2d 654 (1999); *Wright v. State*, 240 Ga. App. 763, 525 S.E.2d 143 (1999); *Lowery v. State*, 242 Ga. App. 375, 530 S.E.2d 22 (2000); *Carr v. State*, 243 Ga. App. 557, 533 S.E.2d 756 (2000); *Allen v. State*, 243 Ga. App. 730, 534 S.E.2d 190 (2000); *White v. State*, 244 Ga. App. 54, 537 S.E.2d 364 (2000), aff'd, 273 Ga. 787, 546 S.E.2d 514 (2001); *Green v. State*, 244 Ga. App. 697, 536 S.E.2d 565 (2000); *Strange v. State*, 244 Ga. App. 635, 535 S.E.2d 315 (2000); *Self v. State*, 245 Ga. App. 270, 537 S.E.2d 723 (2000); *Shepherd v. State*, 245 Ga. App. 386, 537 S.E.2d 777 (2000); *McLeod v. State*, 245 Ga. App. 668, 538 S.E.2d 759 (2000); *Hodges v. State*, 248 Ga. App. 23, 545 S.E.2d 157 (2000); *Johnson v. State*, 247 Ga. App. 157, 543 S.E.2d 439 (2000); *Young v. State*, 245 Ga. App. 684, 538

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S.E.2d 760 (2000); *Free v. State*, 245 Ga. App. 886, 539 S.E.2d 213 (2000); *Durrance v. State*, 250 Ga. App. 185, 549 S.E.2d 406 (2001); *In re C.A.*, 249 Ga. App. 280, 548 S.E.2d 37 (2001); *Etheridge v. State*, 249 Ga. App. 111, 547 S.E.2d 744 (2001); *Thurman v. State*, 249 Ga. App. 390, 547 S.E.2d 715 (2001); *Davis v. State*, 249 Ga. App. 579, 548 S.E.2d 678 (2001); *Allsup v. State*, 250 Ga. App. 53, 550 S.E.2d 465 (2001); *Hill v. State*, 276 Ga. 220, 576 S.E.2d 886 (2003); *Jackson v. State*, 259 Ga. App. 727, 578 S.E.2d 298 (2003); *Duckett v. State*, 259 Ga. App. 814, 578 S.E.2d 524 (2003); *Rust v. State*, 264 Ga. App. 893, 592 S.E.2d 525 (2003); *Wallace v. State*, 279 Ga. 26, 608 S.E.2d 634 (2005); *Miller v. State*, 271 Ga. App. 524, 610 S.E.2d 156 (2005); *Tiggs v. State*, 287 Ga. App. 291, 651 S.E.2d 209 (2007); *John v. State*, 282 Ga. 792, 653 S.E.2d 435 (2007); *Walker v. State*, 282 Ga. 774, 653 S.E.2d 439 (2007), cert. denied, 129 S. Ct. 481, 172 L.Ed.2d 344 (2008); overruled on other grounds, No. S10P1859, 2011 Ga. LEXIS 267 (Ga. 2011); *Bradley v. State*, 283 Ga. 45, 656 S.E.2d 842 (2008); *McGordon v. State*, 298 Ga. App. 161, 679 S.E.2d 743 (2009); *Hargrove v. State*, 299 Ga. App. 27, 681 S.E.2d 707 (2009); *Clark v. State*, 299 Ga. App. 558, 683 S.E.2d 93 (2009); *In the Interest of J. W.*, 306 Ga. App. 339, 702 S.E.2d 649 (2010).

Evidence was sufficient to find the defendant guilty of aggravated assault when the defendant, a passenger in a taxicab, put a knife to the throat of the driver and forced the driver to a different destination, and a struggle ensued resulting in the driver restraining the defendant. *Fair v. State*, 172 Ga. App. 49, 321 S.E.2d 790 (1984); *Black v. State*, 261 Ga. 791, 410 S.E.2d 740 (1991), cert. denied, 506 U.S. 839, 113 S. Ct. 118, 121 L. Ed. 2d 74 (1992).

When the defendant was found inside his former girlfriend's broken-into apartment, hid in a bathroom enclosure, with a removed kitchen knife and a letter recognizing defendant's own propensity for violence, the evidence was sufficient to authorize the jury to conclude that the defendant was guilty beyond a reasonable

doubt of burglary since there was sufficient evidence that the defendant intended to commit an aggravated assault. *Johnson v. State*, 207 Ga. App. 34, 427 S.E.2d 29 (1993).

Rational trier of fact could have found the defendant guilty of murder, aggravated assault, and possession of a firearm during the commission of a crime beyond a reasonable doubt. *Walden v. State*, 264 Ga. 92, 441 S.E.2d 247 (1994).

In light of the overwhelming evidence produced at trial, even though one victim expressed some uncertainty regarding defendant's identity, a rational trier of fact could determine defendant's guilt beyond a reasonable doubt of armed robbery, aggravated assault, and possession of a firearm by a convicted felon. *Billings v. State*, 212 Ga. App. 125, 441 S.E.2d 262 (1994).

Viewed in a light most favorable to the verdict, evidence that the defendant identified the defendant as the person who shot the victim was sufficient to support a conviction for aggravated assault. *Cyrus v. State*, 231 Ga. App. 71, 498 S.E.2d 554 (1998).

Evidence was sufficient to enable a rational trier of fact to find defendant guilty of aggravated assault beyond a reasonable doubt. *Lattimer v. State*, 231 Ga. App. 594, 499 S.E.2d 671 (1998).

Voice identification testimony, along with circumstantial evidence showing invaders were familiar with the internal operations and layout of the store, allowed the jury to reach the conclusion that defendant was guilty of armed robbery, aggravated assault and possession of a firearm during the commission of a felony. *Whitehead v. State*, 232 Ga. App. 140, 499 S.E.2d 922 (1998).

Evidence was sufficient to convict defendant of robbery, aggravated assault, felony obstruction of a law enforcement officer, attempting to elude a law enforcement officer and driving under the influence of drugs. *Chisholm v. State*, 231 Ga. App. 835, 500 S.E.2d 14 (1998).

Evidence, which included a positive identification by two eyewitnesses who testified that the defendants kicked the victim repeatedly, was sufficient to support the guilty verdicts. *Cox v. State*, 242 Ga. App. 334, 528 S.E.2d 871 (2000).

Evidence was sufficient to convict defendant of malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a crime against a person because: (1) the codefendant jumped out of the car defendant was driving and told the victim and two other men to empty their pockets as the codefendant was robbing the victims and then the codefendant began shooting; and (2) the victim was shot in the head and later died. *Thomas v. State*, 275 Ga. 882, 572 S.E.2d 537 (2002).

Evidence was sufficient to support defendant's conviction for aggravated assault under O.C.G.A. § 16-5-21 where four victims testified that they either saw or heard shots fired from defendant's truck and were frightened as a result. *Tanner v. State*, 259 Ga. App. 94, 576 S.E.2d 71 (2003).

Evidence was sufficient to support convictions for felony murder, aggravated assault, and possession of a firearm during the commission of a crime where the record revealed that the defendant was riding in a car, made a gang sign to some people on the street, and in response to their obscene gesture, the defendant took out a gun and fired at them, killing two people and wounding one; the defendant's contention that the defendant was acting to protect the defendant and others in the car, that the defendant fired into the air, and that the defendant did not mean to hurt anyone was found to lack merit. *Ingram v. State*, 276 Ga. 223, 576 S.E.2d 855 (2003).

Evidence was sufficient to allow a rational trier of fact to find defendant guilty of aggravated assault beyond a reasonable doubt where defendant reached around the victim and cut the victim's throat, and then stabbed the victim twice in the back. *Bell v. State*, 276 Ga. 206, 576 S.E.2d 876 (2003).

Evidence was sufficient to support defendant's conviction of aggravated assault where defendant repeatedly hit the victim with a skillet, and knocked the victim unconscious. *Lord v. State*, 259 Ga. App. 449, 577 S.E.2d 103 (2003).

Evidence, including the victim's unequivocal identification of defendant from a book of 150 pictures and the victim's

identification of defendant at trial, was sufficient to allow a rational trier of fact to find defendant guilty of aggravated assault beyond a reasonable doubt. *Baker v. State*, 259 Ga. App. 433, 577 S.E.2d 282 (2003), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Evidence was sufficient to support the defendant's conviction of malice murder, felony murder, burglary, aggravated assault, kidnapping with bodily injury, and possession of a firearm during the commission of a felony where the defendant: (1) planned the crimes, and was armed with a gun and handcuffs; (2) broke into the defendant's in-laws' house after severing their phone line; (3) shot and killed the defendant's father-in-law and wounded the defendant's mother-in-law while they lay in bed; (4) handcuffed the defendant's bleeding mother-in-law to the mother-in-law's nine-year-old child and left them tethered to a bed rail in a room with the mother-in-law's dead spouse and the defendant's two-year-old child; and (5) abducted the defendant's estranged spouse and the spouse's 17 year-old sibling to a mobile home where the defendant made them take showers while the defendant watched, and then raped them both. *Sallie v. State*, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

Evidence was sufficient to support convictions of aggravated assault with a knife, aggravated assault with defendant's fists and feet, and false imprisonment, where the police found defendant's love interest laying on the floor of a hotel room, bruised, with knives in the hotel room, and the love interest testified that defendant had kicked and hit the love interest. *Banks v. State*, 260 Ga. App. 515, 580 S.E.2d 308 (2003).

Circumstantial evidence supported defendant's convictions for aggravated assault, burglary, armed robbery, cruelty to children, theft by receiving stolen property, and possession of a firearm as: (1) defendant was driving a stolen car that defendant knew was not defendant's own; (2) defendant returned to the victims' house, which defendant had left only a short time before, slowly circling the vic-

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tims' residence, pointing at the house; (3) defendant appeared to let codefendants out of the car for a specific purpose, since defendant saw them enter the victims' home and waited for them, demonstrating that defendant knew they would return shortly; (4) when codefendants ran back to the car and jumped in, defendant drove off in response to their rapid return; and (5) shortly thereafter, defendant abandoned the stolen car. Parnell v. State, 260 Ga. App. 213, 581 S.E.2d 263 (2003).

Evidence that defendant unlawfully entered the victim's residence with intent to commit assault therein and was in possession of a gun was sufficient for conviction. Simmons v. State, 262 Ga. App. 164, 585 S.E.2d 93 (2003).

Defendant was properly found guilty of aggravated assault under O.C.G.A. § 16-5-21, aggravated assault with intent to rob under O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106 where the footprints observed along the path between the crime scene and the area where defendant was apprehended matched the size and soles of defendant's shoes and defendant was identified as the robber based on defendant's clothing, shoes and "build." Mack v. State, 263 Ga. App. 186, 587 S.E.2d 132 (2003).

Even though the store clerk did not testify, the evidence of the store surveillance videotape of defendant waiving a gun at the store clerk was sufficient to support the defendant's conviction for aggravated assault, despite the defendant's contentions that the videotape was ambiguous as the weight and credibility to be assigned to the videotape was solely within the purview of the jury. Cecil v. State, 263 Ga. App. 48, 587 S.E.2d 197 (2003).

Evidence that defendant, who was seated in the passenger seat of an automobile, and the victim, who was standing outside the automobile, argued, that the victim hit defendant, and that defendant then shot the victim, paralyzing the victim, was sufficient to sustain defendant's aggravated assault conviction. Bailey v.

State, 263 Ga. App. 614, 588 S.E.2d 807 (2003).

Defendant was properly convicted of aggravated assault for participating in breaking down the door of an apartment belonging to the victim and the victim's spouse because the spouse was dizzy and crying during the incident in which shots were fired. Meadows v. State, 264 Ga. App. 160, 590 S.E.2d 173 (2003).

Rational trier of fact was authorized to find that both defendants burglarized the victims' residence; that, once inside, they took money, clothing, and other personal property by use of a gun; that the first defendant also committed an aggravated assault on the victim by striking the victim in the head with a handgun and was, therefore, in possession of a firearm during the commission of a crime; and that both defendants, along with their cohorts, had been in possession of the cocaine which was tossed out the vehicle they were riding in and found along the roadway. Davis v. State, 264 Ga. App. 221, 590 S.E.2d 192 (2003).

When defendant robbed victims at gunpoint with two accomplices, the testimony of one accomplice that defendant was involved in the robbery was sufficient to corroborate testimony to the same effect from defendant's other accomplice and sustain defendant's convictions for armed robbery and aggravated assault, under O.C.G.A. §§ 16-8-41(a) and 16-5-21(a)(1), (2). Gallimore v. State, 264 Ga. App. 629, 591 S.E.2d 485 (2003).

Evidence was sufficient to support defendant's conviction for arson, felony murder, and aggravated assault, resulting from a fire set at a residence occupied by defendant's sister-in-law, her four children, and her 12-year-old brother where: (1) defendant confronted defendant's sister-in-law at her home, alleging that she had stolen items from defendant's mobile home; (2) a physical altercation ensued between defendant and the sister-in-law; (3) defendant retrieved a gasoline can from defendant's car, poured gasoline onto the back door of the sister-in-law's home, and ignited it; and (4) the sister-in-law's three-year-old child died from the injuries sustained in the fire. Tarvin v. State, 277 Ga. 509, 591 S.E.2d 777 (2004).

Evidence was sufficient to affirm defendant's aggravated assault conviction; whether defendant engaged in unprovoked attacks, acted in self-defense, or acted in defense of the defendant's love interest was for the jury to resolve, and it obviously resolved the question in defendant's disfavor. *Chalvatzis v. State*, 265 Ga. App. 699, 595 S.E.2d 558 (2004).

Since the jury was to weigh the credibility of the witnesses testimony and was instructed on self defense, accident, and criminal intent, its decision to believe the victim's and the victim's love interest's story regarding how a stabbing occurred instead of defendant's version of the events and its subsequent decision related to defendant's intent in the stabbing, were controlling on appeal and was sufficient for defendant's conviction for aggravated assault. *Hazelwood v. State*, 265 Ga. App. 709, 595 S.E.2d 564 (2004).

Evidence was sufficient to show that defendant committed an aggravated assault against the victims where it showed that after one victim separated defendant and defendant's sibling, who were involved in a minor altercation, defendant left and came back with a gun, which defendant fired into the truck in which the victims were sitting; accordingly, the evidence showed defendant intended to commit violence to the person of another. *Bishop v. State*, 266 Ga. App. 129, 596 S.E.2d 674 (2004).

Evidence of defendant's voluntary and willing participation in the crimes, through providing the use of defendant's car to transport the other three named in the indictment to and from the scene and waiting in the vehicle while two of them committed aggravated assault, burglary, murder, and aggravated robbery, supported defendant's convictions for the same as a co-conspirator. *Silvers v. State*, 278 Ga. 45, 597 S.E.2d 373 (2004).

Evidence was sufficient to sustain defendant's convictions as a party to the offenses of armed robbery, kidnapping, false imprisonment, burglary, and aggravated assault with a deadly weapon, in violation of O.C.G.A. §§ 16-5-21, 16-5-40, 16-5-41, 16-7-1, and 16-8-41, because: (1) defendant received information from the defendant's love interest, about the vic-

tims' house, the location of safes, where money was located, and about the alarm system; (2) the day after the home invasion the love interest saw defendant and defendant showed the love interest a stack of cash, and defendant told the love interest it might be the victim's money; and (3) an FBI informant met with defendant and defendant told the informant that defendant had been shorted money from the robbery, and that defendant got the layout of the house from the former daughter-in-law. *Pope v. State*, 266 Ga. App. 658, 598 S.E.2d 48 (2004).

Victim's testimony that the victim saw defendant remove what the victim thought was a gun from defendant's waistband, heard a clicking noise, and was so afraid that defendant would shoot victim that the victim jumped from a moving car, after which the victim heard what sounded like a shot being fired as the victim jumped, was sufficient to allow a rational jury to convict defendant of aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2). *Jefferies v. State*, 267 Ga. App. 694, 600 S.E.2d 753 (2004).

Defendant's statements to police and the victim's prior inconsistent statements were sufficient to support conviction for aggravated assault, despite the fact that the victim recanted at trial. *Wyche-Hinkle v. State*, 268 Ga. App. 898, 602 S.E.2d 902 (2004).

There was sufficient credible evidence to support a jury's verdict finding the defendant guilty of committing voluntary manslaughter and aggravated assault in violation of O.C.G.A. §§ 16-5-2 and 16-5-21, respectively, because there was testimony from three surviving witnesses that the defendant shot at their car as they drove by, killing one of the occupants; there was further testimony that the parties had a history of disputes between themselves, that the victim's brother had fired a shot at the defendant earlier in the day, and the defendant's claim that the defendant thought that as the car drove by, the victim was reaching for a gun, was not found credible. *Mullins v. State*, 270 Ga. App. 271, 605 S.E.2d 913 (2004).

There was sufficient evidence to support the jury's verdict that the defendant was guilty beyond a reasonable doubt of aggra-

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vated assault in violation of O.C.G.A. § 16-5-21 and of malice murder in violation of O.C.G.A. § 16-5-1, because the defendant saw the victim trying to break up a fight between the victim's sibling and another person, the defendant became angry and followed the victim and the victim's sibling after the fight broke up, the defendant then swore at them and shot at them, and the defendant's claim of self-defense was not found to be credible. *Harris v. State*, 278 Ga. 596, 604 S.E.2d 788 (2004).

Evidence was sufficient to support felony murder and aggravated assault convictions because: (1) defendant, after exchanging blows with the defendant's spouse while in a car, left the area but returned shortly thereafter in the car; (2) one eyewitness saw defendant strike the defendant's spouse with the front of the car, back up striking the defendant's spouse again with the rear of the car, and drive off; (3) other witnesses saw two people brought to the scene by defendant beating and stomping the victim; and (4) the medical examiner testified that the victim died from blunt force head trauma consistent with being struck by a vehicle and that the force of the fatal blow would most likely have left the victim unconscious or unable to walk around. *Rankin v. State*, 278 Ga. 704, 606 S.E.2d 269 (2004).

Sufficient evidence, including testimony from the child victim identifying defendant's vehicle, evidence of defendant's DNA matching that of the victim and expert testimony that the frequency of such occurrence was approximately one in two billion in the Caucasian population, and similar transaction evidence, supported defendant's kidnapping with bodily injury, rape, aggravated sodomy, aggravated child molestation, aggravated assault, and first-degree cruelty to children convictions. *Morita v. State*, 270 Ga. App. 372, 606 S.E.2d 595 (2004).

In addition to the second codefendant's testimony, the state showed that, shortly after the murder, defendant was in possession of the victim's cab, that the victim's blood was found in the vehicle and on defendant, and that defendant made

incriminating admissions to others; thus, the evidence was sufficient to authorize a rational trier of fact to find proof beyond a reasonable doubt of defendant's guilt of malice murder, armed robbery, aggravated assault, hijacking a motor vehicle, and possession of a firearm during the commission of a felony. *Wicks v. State*, 278 Ga. 550, 604 S.E.2d 768 (2004).

Evidence that the defendant's vehicle was seen at the victim's residence around the time the victim was murdered, the defendant's subsequent arrest in a hotel room paid for with the victim's credit card, and the presence of the victim's blood on the defendant's boots when arrested was sufficient to support the defendant's convictions for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony. *Moore v. State*, 279 Ga. 45, 609 S.E.2d 340 (2005).

Defendant's multiple convictions for armed robbery, aggravated assault, kidnapping, possessing a firearm during the commission of a felony, burglary, and kidnapping with bodily injury, were supported by sufficient evidence because defendant and another robbed a store while holding the two owners at gunpoint, the defendant led police on a high-speed car chase, and the defendant broke into and robbed two homes, one of which had an occupant that the defendant beat; only one store owner's testimony was needed to establish the facts to support the aggravated assault conviction. *Owens v. State*, 271 Ga. App. 365, 609 S.E.2d 670 (2005).

Evidence was sufficient to support the defendant's convictions for felony murder, aggravated assault, and giving a false statement when the defendant and the codefendant were arrested when the codefendant sought medical treatment for a gunshot wound sustained in the incident, the codefendant gave police a false name and said the codefendant was shot when someone tried to rob the codefendant, the codefendant told a neighbor who saw the wound that someone else was worse off than the codefendant was, the defendant asked the neighbor's niece to tell police the codefendant was at the niece's house on the night of the crime and was robbed when the codefendant left, and, while in

jail, the defendant told one inmate the defendant shot someone in the incident and told another inmate the defendant was involved in a robbery of this victim that went bad, and that the defendant and the codefendant had been looking for a safe with money and marijuana. *Styles v. State*, 279 Ga. 134, 610 S.E.2d 23 (2005).

Evidence was sufficient to support the defendant's conviction for aggravated assault and burglary, after the defendant threatened and broke a window in the victim's home, reached in and tried to grab the victim, and the victim positively identified the defendant in a show-up identification that was found to be fair under the totality of the circumstances. *Taylor v. State*, 271 Ga. App. 701, 610 S.E.2d 668 (2005).

Sufficient evidence supported aggravated assault conviction because both the victim and another witness testified that defendant stabbed the victim, and a nurse testified that the victim's injury was serious. *Hampton v. State*, 272 Ga. App. 273, 612 S.E.2d 96 (2005).

Defendant's rape conviction was proper, even though defendant was acquitted of kidnapping with bodily injury, false imprisonment, and aggravated assault, as Georgia did not recognize the inconsistent verdict rule; further, the convictions were not necessarily inconsistent as the jury could have found that defendant raped the victim, but did not commit the other crimes. *Stevenson v. State*, 272 Ga. App. 335, 612 S.E.2d 521 (2005).

Because the victim's statement of sexual abuse was sufficient under O.C.G.A. § 24-4-8 to convict defendant of kidnapping with bodily injury, aggravated child molestation, rape, aggravated sodomy, aggravated assault, and possession of a knife during the commission of a crime, the victim's testimony did not have to be corroborated by physical evidence. *Gartrell v. State*, 272 Ga. App. 726, 613 S.E.2d 226 (2005).

There was sufficient evidence to support defendant's conviction for aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), because defendant willingly participated in a gunfight in a crowded parking lot, which resulted in a fatal shooting of an innocent bystander;

the fact that defendant's codefendant was convicted of involuntary manslaughter, based on the underlying crime of reckless conduct, did not provide a basis for defendant's challenge to the conviction, as these were different acts committed by different defendants. *Barber v. State*, 273 Ga. App. 129, 614 S.E.2d 105 (2005).

Evidence supported defendant's conviction for aggravated assault and voluntary manslaughter because: (1) defendant and the victim had threatened to kill each other; (2) the victim died from a gunshot wound inflicted when the victim "stepped in" to a fight between defendant and another; (3) the victim did not have a gun or own a gun; and (4) the fatal head wound was inflicted from at least two-and-a-half to three feet away and rendered the victim unconscious. *Hall v. State*, 273 Ga. App. 203, 614 S.E.2d 844 (2005).

Trial court properly denied defendant's motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, because there was sufficient evidence to support the convictions for aggravated assault and reckless conduct, in violation of O.C.G.A. §§ 16-5-21(a)(2) and 16-5-60(b), respectively; defendant and the codefendants were involved in a physical altercation with two restaurant patrons, and a codefendant's testimony that defendant retrieved a gun and shot the victim was sufficiently repeated by the testimony of other witnesses, who also connected defendant with the shooting pursuant to the corroboration requirement in O.C.G.A. § 24-4-8. *Baker v. State*, 273 Ga. App. 297, 614 S.E.2d 904 (2005).

Evidence was sufficient to support a conviction for felony murder, voluntary manslaughter, and aggravated assault, as an eyewitness testified that the defendant was the only person to pull out a weapon in a confrontation at a nightclub, that the defendant fired a weapon at the victim, who had previously struck the defendant's love interest, and at two other victims who were attempting to leave. *Rodriguez v. State*, 274 Ga. App. 549, 618 S.E.2d 177 (2005).

Because defendant fatally stabbed the estranged spouse's love interest, stabbed the spouse in the head, and then bragged about the actions, the evidence was suffi-

**General Consideration (Cont'd)**

cient to convict defendant of malice murder and aggravated assault. *Henry v. State*, 279 Ga. 615, 619 S.E.2d 609 (2005).

Defendant's convictions for aggravated assault, aggravated battery, kidnapping with bodily injury, and possession of a knife during the commission of a felony, in violation of O.C.G.A. §§ 16-5-21(a)(2), 16-5-24, 16-5-40, and 16-11-106, respectively, were supported by the evidence, as defendant was engaged in a domestic dispute with defendant's spouse and child, wherein defendant argued, threatened to kill them, and locked them in a bathroom, punched and hit the spouse, and stabbed them each multiple times with a decorative sword that defendant had removed from the wall; there was sufficient evidence to show that defendant did not stab them in the midst of a struggle over possession of the sword, but instead, that defendant intended to stab or cut them. *Brown v. State*, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

Defendant's convictions of aggravated stalking, burglary, aggravated assault, and false imprisonment, in violation of O.C.G.A. §§ 16-5-91, 16-7-1, 16-5-21, and 16-5-41, were supported by sufficient evidence because, despite the victim's recantation at trial, the victim stated to police earlier that defendant broke into the victim's apartment, scratched and damaged furniture and other property, tied the victim up, locked the victim in the bedroom for several hours, harmed the victim, threatened that defendant and defendant's friends were going to lock the victim in a basement for a few months, and defendant had been waiting for the victim to arrive home. *Andrews v. State*, 275 Ga. App. 426, 620 S.E.2d 629 (2005).

Evidence was sufficient to support defendant's conviction for felony and malice murder, and aggravated assault, in violation of O.C.G.A. §§ 16-5-1 and 16-5-21, as well as a possession of a firearm conviction, because defendant helped a sibling retaliate against the victim, who had previously sold the sibling fake drugs, by going to the victim's place of work, fatally shooting the victim multiple times, and planting fake drugs on the body; defen-

dant's claim that defendant was in another state at the time of the incident was refuted by a copy of the criminal history which showed that defendant was out on bail just days before the incident, as well as testimony from the victim's roommate. *Copprie v. State*, 279 Ga. 771, 621 S.E.2d 457 (2005).

Evidence was sufficient to support defendant's convictions for malice murder and aggravated assault, in violation of O.C.G.A. §§ 16-5-1 and 16-5-21, respectively, as well as for possession of a firearm during a felony, because defendant was identified by multiple witnesses as having fatally shot the victim; defendant and the friends joined the victim's basketball game and when their team lost, defendant took the bet money, pulled out a gun, and started firing at the victim and the teammates. *Agee v. State*, 279 Ga. 774, 621 S.E.2d 434 (2005).

Circumstantial evidence was sufficient to allow a jury to find defendant committed felony murder and aggravated assault beyond a reasonable doubt when there was testimony that defendant was seen wearing a trench coat, waved down the victim's vehicle, leaned in through an open window in the vehicle, fled after firing two shots, saying, "I believe I shot him," forensic evidence was consistent with this testimony, defendant and a co-defendant were earlier seen trying to sell a gun, a trench coat with missing buttons was found in the codefendant's house, and its buttons matched a button found in the victim's car. *Burns v. State*, 280 Ga. 24, 622 S.E.2d 352 (2005).

Evidence regarding defendant's holding a knife to a love interest's throat and demanding money sustained defendant's conviction for aggravated assault. *Smith v. State*, 276 Ga. App. 41, 622 S.E.2d 413 (2005).

After defendant and the victim were engaged in a heated verbal exchange, defendant went to a room and obtained a serrated knife, returned to where the victim was and stabbed the victim in the chest, which resulted in the victim's heart being punctured, and defendant later admitted to the stabbing, the evidence was sufficient to support the verdict of finding defendant guilty of felony murder and

aggravated assault, in violation of O.C.G.A. §§ 16-5-1 and 16-5-21, as well as possession of a knife during the commission of a felony, the jury was authorized to find defendant's claim of self-defense lacking in credibility. *Delanoval v. State*, 280 Ga. 36, 622 S.E.2d 811 (2005).

Defendant's convictions for felony murder, aggravated assault, and possession of a knife during the commission of a felony were supported by sufficient evidence; while defendant argued that defendant acted in self-defense in stabbing the victim in the chest during a confrontation, the jury was authorized to disbelieve defendant's testimony in favor of the testimony of the state's witnesses. *Delanoval v. State*, 280 Ga. 36, 622 S.E.2d 811 (2005).

Defendant's convictions for malice murder, burglary, robbery, aggravated assault, and concealing the death of another were supported by sufficient evidence because: (1) defendant broke into the office where the victim was living; (2) defendant hit the victim several times on the head and body with a pair of pliers; (3) defendant choked the victim with the defendant's hands and arms, and with the pliers, until the victim was dead; (4) defendant took the victim's credit card and driver's license; and (5) defendant disposed of the victim's body. *Young v. State*, 280 Ga. 65, 623 S.E.2d 491 (2005).

Denial of defendant's motions for a directed verdict and judgment notwithstanding the verdict was proper as the evidence established the essential elements of attempted arson and aggravated assault; the evidence showed that defendant poured gasoline near two ignition sources (a light bulb and hot water heater) in the crawlspace of the estranged love interest's house and then told the estranged love interest's adult children to light the water heater's pilot flame. *McGraw v. State*, 276 Ga. App. 607, 624 S.E.2d 232 (2005).

Convictions of murder, aggravated assault, and possession of a firearm by a convicted felon were supported by sufficient evidence showing that while the victim was in the process of buying drugs from a third party, the defendant approached the driver's side of the victim's car, demanded the victim's money, and

shot the victim several times, killing the victim and injuring a passenger in the car; the seller of the drugs testified that the seller had observed the defendant carrying a gun, and both the codefendant and another witness identified the defendant as the shooter. *Major v. State*, 280 Ga. 746, 632 S.E.2d 661 (2006).

Evidence supported a defendant's conviction for malice murder and aggravated assault as: (1) when a cab driver arrived to pick up a passenger at the defendant's apartment, the defendant was waiting outside and told the cab driver to wait while the defendant returned to the apartment; (2) the cab driver heard several gunshots immediately before the defendant ran to the cab and told the cab driver to "go"; (3) during the ride, the cab driver observed drops of blood on the defendant's clothing and overheard the defendant state in a cell phone call that the defendant "got the guy who owed (the defendant) money"; (4) the police traced the phone call to the defendant's uncle; and (5) the defendant later confided to a friend that the defendant shot and killed someone, that the defendant left in a cab, and that the defendant made a phone call with the cab driver's phone. *Puga-Cerantes v. State*, 281 Ga. 78, 635 S.E.2d 118 (2006).

Sufficient evidence supported the defendant's convictions of two counts of felony murder under O.C.G.A. § 16-5-1, armed robbery under O.C.G.A. § 16-8-41, aggravated assault under O.C.G.A. § 16-5-21, possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106, and possession of a firearm by a first offender probationer under O.C.G.A. § 16-11-131; two witnesses testified that the defendant had told them that the defendant shot the victim, and one of the witnesses testified that the defendant stated that the shooting occurred during a robbery, the defendant discarded a gun that was later found to be the murder weapon while fleeing police on another crime, and the defendant admitted to police that the murder weapon was the defendant's, that the defendant stole \$100 from the victims, and that the defendant shot the murder victim. *Chenoweth v. State*, 281 Ga. 7, 635 S.E.2d 730 (2006).

Evidence that there was an 80 to 90

**General Consideration (Cont'd)**

percent chance that injuries that caused the death of a defendant's 10-month-old child were inflicted within an hour of the child's death, that the defendant left the apartment at 4:10 P.M., that an attending physician was called to the emergency room at 5:46 P.M., and that the child was dead on arrival at the emergency room was sufficient to support the defendant's convictions for felony murder while in commission of cruelty to a child in the second degree, aggravated assault, and cruelty to a child in the first degree; the evidence permitted the jury to conclude that the time frame in which the child's injuries were inflicted included the time before the defendant left for work, there was evidence concerning the defendant's actions before and after the child's death that indicated the defendant's guilt, and the jury was not required to accept the defendant's version of events. *White v. State*, 281 Ga. 276, 637 S.E.2d 645 (2006).

Aggravated assault conviction was upheld, as supported by sufficient evidence, including: (1) properly admitted similar transaction evidence; (2) the indictment charging the defendant was not defective; (3) the court's slip of the tongue did not mislead or confuse the jury; (4) a justification instruction was not warranted; and (5) the defendant failed to support an ineffective assistance of counsel claim. *Scott v. State*, 281 Ga. App. 813, 637 S.E.2d 751 (2006).

Because the state showed that the victim had an apprehension, reasonable under the circumstances, of immediately receiving a violent injury, this testimony, if believed, together with a finding that the defendant intended to drive rapidly out of the car wash while dragging the victim, was sufficient to authorize the jury to find the defendant guilty of aggravated assault; further, an assault under O.C.G.A. § 16-5-20(a)(2) did not require that a defendant act with criminal intent in regard to the victim, but did require that an intentional act be shown. *Kirkland v. State*, 282 Ga. App. 331, 638 S.E.2d 784 (2006).

Because conflicts and inconsistencies in the testimony of the witnesses, including

the state's witness, were a matter of credibility for the jury to decide, and because the defendant cited no authority suggesting that the instructions in question were incorrect statements of the law, and did not explain an assertion that they were confusing, convictions armed robbery, aggravated assault, and possession of a firearm during the commission of a felony were upheld on appeal as supported by sufficient evidence. *Lattimore v. State*, 282 Ga. App. 435, 638 S.E.2d 848 (2006).

Because the victim's testimony, standing alone, was sufficient to establish the defendant's guilt beyond a reasonable doubt, when said evidence showed: (1) two separate aggravated assaults, one with a knife and one with a hammer; (2) two separate instances of simple battery; and (3) a hours-long detention of the victim by the defendant, said evidence amply supported the jury's conviction on the charges of false imprisonment, aggravated assault, and simple battery. *Brigman v. State*, 282 Ga. App. 481, 639 S.E.2d 359 (2006).

Even though the victim was the only witness who could testify that the defendant was the perpetrator of the crimes of robbery by force and aggravated assault, said testimony was enough to establish the defendant's identity as one of the assailants; moreover, the lack of corroboration went only to the weight of the evidence and the victim's credibility, matters which were solely within the purview of the jury. *Thomas v. State*, 282 Ga. App. 522, 639 S.E.2d 531 (2006).

Pictures of a defendant withdrawing money from a victim's ATM account and evidence that the defendant repeatedly asked the victim for the PIN number for the victim's ATM card, held a knife to the victim's neck, cut the cord used to tie the victim, and had cash, an ATM receipt, and the victim's car keys when the defendant was arrested were sufficient to support the defendant's convictions for armed robbery, two counts of aggravated assault, kidnapping with bodily injury, and two counts of possessing a knife during the commission of a crime. *Wright v. State*, 282 Ga. App. 649, 639 S.E.2d 581 (2006).

Defendant's convictions for aggravated assault, aggravated battery, and

first-degree child cruelty pursuant to O.C.G.A. §§ 16-5-21(a), 16-5-24(a), and 16-5-70(b) for participating in a drive-by shooting were supported by sufficient evidence because the testimony of a single witness was generally sufficient to establish a fact pursuant to O.C.G.A. § 24-4-8 and it was the function of the jury to evaluate the credibility of witnesses; based on the testimony of the witnesses to the shooting, a reasonable jury could have rejected the defendant's claims and determined that the defendant was a party to each of the crimes. *Hill v. State*, 282 Ga. App. 743, 639 S.E.2d 637 (2006).

There was sufficient evidence to support the defendant's convictions of felony murder and aggravated assault resulting from an incident when shots were fired from a van at the victims, who were riding in a car that had formerly belonged to a drug dealer; the defendant had argued with the drug dealer the day of the shooting, the defendant's wrecked car was found in the same place as the van, the surviving victim identified the defendant as the driver of the van, the van had been traded to the defendant's brother, and even if the defendant did not actually fire the shots, being the driver would authorize the defendant's conviction under O.C.G.A. § 16-2-20(a). *Yancey v. State*, 281 Ga. 664, 641 S.E.2d 524 (2007).

There was sufficient evidence to support the defendant's convictions of malice murder and aggravated assault; after an argument at the victims' house over money, the defendant returned to the house with a concealed pistol, demanded money from the first victim, pulled out the pistol after the first victim said that the first victim was not afraid of the defendant, and shot the two victims. *Shelton v. State*, 281 Ga. 660, 641 S.E.2d 536 (2007).

Given that sufficient evidence was presented that the defendant planned and attempted an armed robbery, and the victim was killed during that attempted robbery with the defendant's gun, when such was coupled with evidence that the defendant threatened the victim with a reasonable apprehension of a violent attack, both an aggravated assault and felony murder conviction were upheld on appeal. *Willingham v. State*, 281 Ga. 577, 642 S.E.2d 43 (2007).

As the evidence provided by the state at defendants' criminal trial demonstrated that based on information from defendant-B regarding a large quantity of marijuana possessed by a victim, defendant-A and another man forcibly entered the victim's residence while defendant-A was armed, pushed the victim to the ground, demanded to know where the marijuana was, and a physical struggle resulted, the evidence supported defendants' convictions for burglary, armed robbery, and aggravated assault; defendant-B was convicted as a party to the crimes under O.C.G.A. § 16-2-20(4). *Garland v. State*, 283 Ga. App. 622, 642 S.E.2d 320 (2007), rev'd on other grounds, 282 Ga. 201, 657 S.E.2d 842 (2008).

When the victim was killed during the theft of the victim's vehicle, the evidence was sufficient for a jury to convict the defendant of felony murder, aggravated assault, and armed robbery; the defendant told others where the vehicle was, then stripped the vehicle; a call was placed from the victim's cell phone to the house of one of the defendant's grandparents; police found some of the victim's belongings at the home of the defendant's cousin; and a witness and two cousins of the defendant stated that the defendant admitted shooting the victim. *Paige v. State*, 281 Ga. 504, 639 S.E.2d 478 (2007).

Defendant's felony murder and aggravated assault convictions were both upheld on appeal as evidence of the victim's prior violent acts was properly excluded given that at the time of the confrontation with the defendant, the victim was no longer the aggressor, and the defendant failed to show prejudice resulting from the admission of a knife that was not used in the altercation, into evidence, and in fact, the knife had been removed from the scene by police before the incident involving the defendant and the victim occurred. *Milner v. State*, 281 Ga. 612, 641 S.E.2d 517 (2007).

Evidence of a prior aggravated assault conviction was sufficiently similar to be admissible to show a defendant's bent of mind in initiating the stabbing of a victim and to rebut the defendant's assertion of self-defense. *Cockrell v. State*, 281 Ga. 536, 640 S.E.2d 262 (2007).

**General Consideration (Cont'd)**

When the unarmed victim advanced on the defendant, who had a baseball bat, and the defendant swung twice at the victim, then hit the victim on the head with the bat after the victim lost the victim's balance, the jury at the defendant's aggravated assault trial was entitled to conclude that the defendant was not justified in using force greater than that necessary for self-defense; the evidence, including the defendant's bragging at a party that night about the incident and telling an acquaintance a few days later that the acquaintance was "riding with a murderer," supported the conviction. *Fields v. State*, 285 Ga. App. 345, 646 S.E.2d 326 (2007).

Upon the overwhelming evidence of the defendant's guilt provided by the victim supporting a charge of aggravated assault, despite the trial court's erroneous act requiring the defendant to introduce a certified copy of the victim's prior conviction to impeach, the defendant's aggravated assault conviction was upheld; moreover, the evidence in the record revealed that the jury chose to believe the victim, despite the issues involving the victim's prior record. *Johnson v. State*, 284 Ga. App. 724, 644 S.E.2d 544 (2007), cert. denied, 2007 Ga. LEXIS 538 (Ga. 2007).

Evidence supported the defendant's convictions of aggravated assault, aggravated battery, cruelty to children, and reckless conduct in connection with the death of the 16-month-old victim since: the defendant repeatedly fed the victim tomatoes despite the victim's allergic reactions to the tomatoes; two days before the victim's fatal injuries, the victim had numerous bruises, a black eye, and a split bottom lip; while the victim was in the hospital for the fatal injuries, the defendant repeatedly asked a babysitter to persuade the defendant's five-year-old child to say that the child had taken the victim out of the bathtub; the defendant asked medical personnel whether it could be proven that the victim was shaken; and medical evidence showed that the victim's death was consistent with violent shaking by a person of adult strength. *Waits v. State*, 282 Ga. 1, 644 S.E.2d 127 (2007).

Defendant's claim on appeal that convictions for aggravated assault and kidnapping had to be reversed because the victim's testimony was unworthy of belief lacked merit as it was the role of the fact finder, not the appellate court, to determine whether a witness was credible; moreover, the testimony of the victim alone was sufficient to support a finding of guilt. *Bragg v. State*, 285 Ga. App. 408, 646 S.E.2d 508 (2007).

There was sufficient evidence to support the defendant's convictions of child molestation, kidnapping with bodily injury, kidnapping, and aggravated assault when the defendant, who lived with an ex-girlfriend and her teenage daughter, called them into a bedroom and bound the ex-girlfriend's arms, legs, and mouth with duct tape, threatened the women with a hatchet, and led the daughter to another bedroom where the defendant duct-taped her hands and feet and forced her to have intercourse with him. *Phillips v. State*, 284 Ga. App. 683, 644 S.E.2d 535 (2007).

Evidence was sufficient to support the three defendants' convictions of malice murder, aggravated assault, and possession of a firearm during the commission of a felony after: the victims were shot from a gold SUV and the first defendant owned a gold SUV; the first defendant, who had been robbed the day before, stated that the first defendant "wanted to straighten about the money"; the third defendant met the first two defendants at a hotel and transferred weapons into the gold SUV; the first defendant pointed to a person outside the hotel and said "Let him have it"; and the third defendant later wondered if one of the victims was dead. *Stokes v. State*, 281 Ga. 875, 644 S.E.2d 116 (2007).

Because the testimony from the aggravated assault victim's girlfriend about observing the defendant stab the victim was sufficient, standing alone, to support an aggravated assault conviction, the conviction was upheld on appeal. *Diop v. State*, 285 Ga. App. 312, 645 S.E.2d 756 (2007).

In a case when a defendant was adjudicated delinquent based on aggravated assault, the court rejected the defendant's argument that the evidence was insufficient to support the finding that the de-

fendant was the one who shot the victim because the victim was unable to identify the defendant after the incident and because the defendant's gunshot residue test came back negative; an officer testified that the victim's failure to identify the defendant after the shooting was likely due to the victim's medical condition at the time, and the victim identified the defendant as the shooter at the hearing. *In the Interest of B.S.*, 284 Ga. App. 680, 644 S.E.2d 527 (2007).

Given that the circumstantial evidence presented against the defendant sufficiently showed that: (1) the victim shot one of the intruders who committed the burglary; (2) shortly after the burglary, the defendant was treated for a gunshot wound and arrived at the hospital in a vehicle matching the description of the automobile seen leaving the crime scene; (3) the DNA evidence on ski masks found at the scene matched that of the owner of the car and the other passenger, who was also the defendant's brother; and (4) according to the defendant's brother, the driver of the car admitted to shooting the victim, the defendant's convictions for aggravated assault, burglary, and possession of a firearm during the commission of a felony were affirmed on appeal. *Sherman v. State*, 284 Ga. App. 809, 644 S.E.2d 901 (2007).

Evidence supported the defendant's convictions of malice murder, felony murder, armed robbery, aggravated assault, and possession of a firearm during the commission of a felony after the defendant went to the victim's laundromat and waited until the victim opened a change machine, pointed a gun at the victim's head and ordered the victim to put the money in a bag, told the victim, "Hell, yeah, I'll kill you," and shot the victim multiple times; eyewitnesses, including two who knew the defendant, identified the defendant as the perpetrator. *Cooper v. State*, 281 Ga. 760, 642 S.E.2d 817 (2007).

Evidence supported the defendant's conviction of aggravated assault even though the defendant claimed that the defendant merely accidentally fired a gun at the victim, the evidence indicated that the defendant intentionally fired at and

struck the victim. *Winfrey v. State*, 286 Ga. App. 450, 649 S.E.2d 561 (2007).

Because sufficient evidence was presented consisting of the victim's identification of the defendant as the perpetrator of a burglary, who threatened the victim with a sharp, knife-like letter opener, forcing the victim into a closet, and stealing the victim's camera upon fleeing, sufficient evidence supported the defendant's burglary, armed robbery, aggravated assault, and kidnapping convictions. *Bryant v. State*, 286 Ga. App. 493, 649 S.E.2d 597 (2007).

There was sufficient evidence to convict the defendant of aggravated assault when after the victim flicked a cigarette that landed on the defendant's car seat, the defendant said "I'll shoot you," and pointed a gun at the victim; although the defendant claimed that the defendant and the victim were just joking around, the evidence presented was sufficient to support a finding that the defendant's act placed the victim in reasonable apprehension of immediately receiving a violent injury under O.C.G.A. § 16-5-20(a)(2). *Moore v. State*, 286 Ga. App. 313, 649 S.E.2d 337 (2007).

There was sufficient evidence to support the defendant's conviction of aggravated assault when about 15 minutes after arguing with the victim, the defendant returned and shot the victim after the defendant's companion tried to hit the victim with a car; the victim, who had previously known the defendant, picked the defendant's picture from a photographic lineup, and the defendant admitted shooting at the victim. *Winfrey v. State*, 286 Ga. App. 718, 650 S.E.2d 262 (2007).

There was sufficient evidence to support the defendant's convictions of felony murder, aggravated assault, and possession of a firearm during the commission of a felony, and the jury was entitled to disbelieve family members who testified that the defendant was out of state when the crimes occurred; the defendant pointed a handgun at the two victims and told the victims to give the defendant the keys to the van in which the victims were loading scooters, shot one victim in the chest, and ran away, after which the defendant's companions drove the van after the defen-

**General Consideration (Cont'd)**

dant. Edwards v. State, 282 Ga. 259, 646 S.E.2d 663 (2007).

There was sufficient evidence to support an adjudication of juvenile delinquency based on convictions of aggravated assault and of felony and misdemeanor obstruction of an officer; after threatening to slash the victim's throat, the defendant produced a knife and opened the blade, and when officers arrived at the defendant's residence to arrest the defendant, the defendant screamed obscenities and fled to another home before assuming a "fighting stance," placing the defendant's fists in front of the defendant's face, and yelling obscenities at officers while refusing to obey the officers' commands. In the Interest of D.D., 287 Ga. App. 512, 651 S.E.2d 817 (2007).

Evidence was sufficient to support a conviction of aggravated assault based on the defendant's attack on a fellow prison inmate when, although an officer who allegedly witnessed the attack was not called as a witness, both the victim and another eyewitness testified that the defendant attacked the victim; even without the actual weapon being introduced into evidence, the testimony that the defendant used a metal knife or shank to stab the victim was sufficient to support the conviction and the jury was authorized to conclude that defendant's alibi witnesses, who gave inconsistent alibis for the defendant and who all had felony convictions, were not credible. Cail v. State, 287 Ga. App. 547, 652 S.E.2d 190 (2007).

Evidence from eyewitnesses that the defendant had been in a heated argument with the victim, the defendant left the scene and returned with a gun, the defendant again argued with the victim, pulling out the gun and shooting the victim three times, and that the bullets recovered from the victim confirmed that the bullets were fired from the defendant's weapon, was sufficient to enable a rational trier of fact to reject the defendant's self-defense claim and to support the defendant's convictions for felony murder, aggravated assault, and possession of a firearm during the commission of a felony. Bolston v. State, 282 Ga. 400, 651 S.E.2d 19 (2007).

Evidence supported the defendant's aggravated assault conviction when the defendant came to a married couple's home, grabbed the wife and threatened to cut her throat, then struggled with the husband over a gun and tried to shoot the husband and both the husband and the wife identified the defendant as the perpetrator in separate photo lineups and at trial; discrepancies regarding the clothes that the perpetrator was wearing and what the defendant was wearing when the defendant was apprehended were for the jury to resolve, and inconsistencies in a witness's statement regarding time were for the jury to resolve and did not make it impossible that the defendant could have been at the crime scene. Brown v. State, 287 Ga. App. 115, 650 S.E.2d 780 (2007).

Victim's testimony that the defendant forcibly entered the victim's house and accused the victim of sexually assaulting a sibling of the defendant, then beat the victim with a bat and kicked the victim, established the essential elements of aggravated assault and burglary; a single witness's testimony was generally sufficient to establish a fact. Gonzales v. State, 286 Ga. App. 821, 650 S.E.2d 401 (2007), cert. denied, No. S07C1765, 2008 Ga. LEXIS 70 (Ga. 2008).

Evidence supported the defendant's convictions of malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony; the two surviving victims testified that the defendant began shooting at the victims after arriving at an apartment, and the testimony of the victims, the location of shell casings, and the evidence showing that the deceased victim was shot from a distance of over three feet, significantly refuted the defendant's claim of self-defense. Jackson v. State, 282 Ga. 494, 651 S.E.2d 702 (2007).

In a case involving a defendant's cohort shooting a man at a gas station, the evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt as a party to the crime of aggravated assault with a deadly weapon and possession of a firearm during the commission of a felony, since the evidence showed that the defendant willingly drove the cohort to the gas station, waited in a

stolen truck while armed with an assault rifle as the cohort pulled the victim out of the victim's car and then shot the victim, and then rescued the injured cohort and fled the police; the defendant's criminal intent was properly inferred from the defendant's conduct before, during, and after the commission of the crime. *McClelland v. State*, 287 Ga. App. 238, 651 S.E.2d 165 (2007).

Defendant retrieved a loaded pistol from defendant's apartment and returned to the parking lot where defendant pointed the pistol at the boyfriend's head. A bystander then told the defendant to put the gun down, at which point the defendant pointed the gun at the bystander, and the boyfriend snatched the gun from the defendant. These two acts were sufficient to allow a jury to convict defendant of two counts of aggravated assault. *Gaines v. State*, 289 Ga. App. 339, 656 S.E.2d 871 (2008), cert. denied, 2008 Ga. LEXIS 379 (Ga. 2008).

Because sufficient evidence was presented showing that the defendant cut a correctional officer's face with either a razor blade or other sharp object, requiring more than 150 stitches and cosmetic surgery to repair, the defendant's convictions of aggravated assault and aggravated battery upon a correctional officer were upheld on appeal. *White v. State*, 289 Ga. App. 224, 656 S.E.2d 567 (2008).

Testimony of both an aggravated assault victim and another witness, which demonstrated that the defendant shot the victim in the leg, coupled with the defendant's flight after the incident, was sufficient to support the defendant's aggravated assault conviction and, furthermore, defendant was subject to an enhanced sentence under the family violence provision of the aggravated assault statute, O.C.G.A. § 16-5-21(j), since the crime was committed between persons "living or formerly living in the same household." *Jones v. State*, 289 Ga. App. 219, 656 S.E.2d 556 (2008), cert. denied, 2008 Ga. LEXIS 381 (Ga. 2008).

Sufficient evidence supported the defendant's convictions of aggravated assault, two counts of aggravated battery, and possessing a firearm during the commission of a felony; the defendant told the victim,

who had walked into a common hallway in the defendant's apartment building, to leave, went inside, retrieved a gun, and shot the victim twice after the victim refused to leave, and then shot at the victim while the victim was fleeing. *Johnson v. State*, 289 Ga. App. 435, 657 S.E.2d 333 (2008).

Evidence supported defendant's convictions of malice murder and two counts of aggravated assault; witnesses testified that a person wearing a red bandana went into a bar, pointed a pistol at one victim, left, and later returned and began shooting, and other witnesses testified that defendant was the shooter and that defendant was wearing a red bandana. *Felton v. State*, 283 Ga. 242, 657 S.E.2d 850 (2008).

Evidence supported defendant's convictions of felony murder, aggravated assault, and possession of a firearm during the commission of a felony. Witnesses saw the defendant walk with the victim from a store to the victim's car and later run from the scene following the sounds of a gunshot and a car crash, and the defendant admitted pulling a gun on the victim and said that the gun had gone off during a struggle, after which the victim tried to drive away. *Petty v. State*, 283 Ga. 268, 658 S.E.2d 599 (2008).

Evidence supported convictions of malice murder, aggravated assault, burglary, and possession of a firearm during the commission of a crime. The victim was struck twice in the head with a pistol, strangled, and shot twice in the head; the victim's wallet and keys were missing; and the defendant, who told police where the wallet could be found, admitted shooting the victim and claimed that the defendant had done so after the victim tried to hug and kiss the defendant and things got "ugly." *Brown v. State*, 283 Ga. 327, 658 S.E.2d 740 (2008).

Evidence supported the defendant's convictions for malice murder, felony murder, aggravated assault, armed robbery, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime. The four victims were found dead in two hotel rooms from gunshot wounds to the back of their heads; identification documents belonging to the four victims were found in the

**General Consideration (Cont'd)**

defendant's car; there was expert testimony that the defendant's gun had been used to kill the victims; the defendant's baseball cap contained one victim's deoxyribonucleic acid; there was evidence that the defendant and two friends used three victims' tickets to attend a football game after the victims were murdered; the defendant was identified as being in an elevator with one victim; the defendant was seen leaving the hotel with one victim's cooler; and a duffle bag belonging to one victim was in the defendant's car when the defendant was arrested on weapons charges. *Dawson v. State*, 283 Ga. 315, 658 S.E.2d 755 (2008), cert. denied, 129 S. Ct. 169, 172 L.Ed.2d 122 (2008).

Evidence was sufficient to support the defendant's convictions of armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and kidnapping under O.C.G.A. §§ 16-5-21, 16-5-40, 16-8-41, and 16-11-106 as: (1) a robber ordered two store employees at gunpoint to give the robber money, then ordered the employees to go into a back room; (2) the employees described the robber and the robber's vehicle in detail; (3) the employees positively identified the defendant as the robber 15 to 20 minutes after the crime following a pursuit during which the defendant fled from police first in the defendant's vehicle, then on foot; and (4) the defendant had \$281 in a pocket at the time of arrest. *Lenon v. State*, 290 Ga. App. 626, 660 S.E.2d 16 (2008).

Evidence supported defendant's convictions of felony murder during commission of aggravated assault and of possessing a firearm while committing the murder; after defendant argued with the victim and hit the victim while they were riding in a car, defendant and the victim got out of the car where defendant shot at the victim multiple times, defendant fled the scene but later surrendered to authorities and stated that defendant had murdered the victim, and at trial defendant claimed that the gun accidentally discharged when defendant was trying to return the gun to the victim. *Lashley v. State*, 283 Ga. 465, 660 S.E.2d 370 (2008).

Evidence supported convictions on three counts of aggravated assault when the first victim testified that after the first victim and the second victim chased defendant, defendant began firing at them, eyewitness testified that defendant was shooting at the two victims' vehicle, and there was testimony that a bystander was hit at the scene where defendant was the shooter. *Burden v. State*, 290 Ga. App. 734, 660 S.E.2d 481 (2008).

Although victim gave statements that conflicted with victim's own statements and those of others involving a shooting in a parking lot, gunshot residue tests were inconclusive, bystanders each testified that defendant was standing at a different location, and no specific weapon was traced to any participant, evidence was sufficient to support a conviction of aggravated assault when the victim testified that defendant shot the victim in the foot, two bystanders testified that defendant shot at the victim, and a third bystander testified that defendant admitted to having a gun at the time of the incident. *Banks v. State*, 290 Ga. App. 887, 660 S.E.2d 873 (2008).

Sufficient evidence supported convictions of aggravated assault, aggravated assault on a peace officer, obstruction of a law enforcement officer, interference with government property, and criminal trespass when defendant admitted obstructing officers and damaging a patrol car and the victim's vehicle; although the defendant denied assaulting the victim and responding officer, the jury was authorized to reject the defendant's testimony in favor of theirs. *Gartrell v. State*, 291 Ga. App. 21, 660 S.E.2d 886 (2008).

Under O.C.G.A. § 24-4-8, the victim's testimony that the defendant pulled a knife out of the defendant's pocket with the defendant's right hand and lunged at the victim was sufficient in itself to support convictions for aggravated assault and carrying a concealed weapon under O.C.G.A. §§ 16-5-21 and 16-11-126. Testimony that the defendant had arthritis in the right hand at most created a conflict in the evidence, as there was also testimony that the defendant, a carpenter, used both hands in the defendant's trade. *Carder v. State*, 291 Ga. App. 265, 661 S.E.2d 632 (2008).

There was sufficient evidence to support armed robbery and aggravated assault convictions. Two masked persons entered a restaurant, pointed a gun at the employees, forced the manager to give the persons money, including rolls of change, ordered everyone to get on the floor, and then fled; an officer saw two people running, including the defendant, who were wearing the type of boots worn by the robbers; the defendant had a BB gun and \$201 in cash, including several rolls of quarters; two restaurant employees identified the gun as the weapon used in the robbery; and a detective testified that when the defendant was arrested, the defendant was wearing the jacket and boots depicted on the surveillance videotape played for the jury. *Williams v. State*, 291 Ga. App. 279, 661 S.E.2d 658 (2008).

There was sufficient evidence to support an aggravated assault conviction when after the defendant and the victim got into an argument that escalated into a fistfight, paramedics found that the victim had five elongated, open wounds that appeared to be stab wounds, bruises, and a bite mark on the shoulder and that one of the victim's lungs had been punctured. *Jackson v. State*, 291 Ga. App. 287, 661 S.E.2d 665 (2008).

There was sufficient evidence to support convictions for aggravated assault, aggravated battery, and burglary when the victim unhesitatingly identified the defendant as one of the people who attacked the victim with a bat or a pipe; the victim's roommate was about "70 percent sure" that the defendant was one of the attackers; the defendant came to the victim's door earlier in the evening and told someone in the street, "Oh no, not now"; one of the attackers threatened the victim because the victim befriended the attacker's paramour; the paramour, who was a friend of the defendant and who had called the victim to the victim's door before the attack, knew that the victim had come into some cash; and the parent of the defendant's child testified that the defendant and others left the house saying that they were going to get into a fight. Furthermore, the victim sustained a stab wound in the liver, a shattered jaw, a broken foot, a stab to the elbow, damage to

the facial nerves, and a double hernia and was in constant pain and could not work. *Drew v. State*, 291 Ga. App. 306, 661 S.E.2d 675 (2008).

There was sufficient evidence to support convictions of aggravated assault under O.C.G.A. § 16-5-21 and of third-degree cruelty to children under O.C.G.A. § 16-5-70. The victim, who had formerly been romantically involved with the defendant, was leaving a motel with the victim's two children, three other children, and two friends when the defendant approached the victim from behind, put a gun to the victim's head, and told the victim that when the defendant did not care about the children anymore, the defendant was going to kill the victim, and the state introduced prior difficulties evidence about an earlier incident where the victim was asleep at a parent's house when the victim woke up to a punch in the face and saw the defendant running out the front door. *McCullors v. State*, 291 Ga. App. 393, 662 S.E.2d 197 (2008).

Evidence supported the defendant's convictions of burglary, kidnapping with bodily injury, rape, aggravated assault, robbery, and theft by taking when a treating physician stated that the 86-year-old victim's injuries, including blood inside her vagina and bruises and contusions on her vagina, were consistent with forcible penetration; when the defendant admitted entering the victim's home, removing her clothing, restraining her with electrical cords, hitting her, putting a plastic bag over her head, forcing her from one room to another, and taking her money and her car; and when DNA from the defendant matched the DNA of two hair roots found on the victim's living room floor. *Smith v. State*, 291 Ga. App. 545, 662 S.E.2d 323 (2008).

Evidence was sufficient to sustain a defendant's convictions of two counts of aggravated assault and two counts of possession of a firearm during the commission of a crime in violation of O.C.G.A. §§ 16-5-21 and 16-11-106 because the defendant's admission that defendant was holding a rifle throughout the crimes' commission, along with evidence of the defendant's flight, authorized the jury to conclude that the defendant participated in

**General Consideration (Cont'd)**

the crimes by acting as a lookout. *Gant v. State*, 291 Ga. App. 823, 662 S.E.2d 895 (2008).

Defendant's convictions on charges of malice murder, aggravated assault, and obstruction were supported by evidence that showed, *inter alia*, that the defendant was upset because the victim owed the defendant money, that the defendant got into an argument with the victim that culminated in the defendant shooting the victim, that a shell casing from the gun used to shoot the victim was found in the defendant's room, and that when the defendant was arrested, the defendant lied about the defendant's identity. *Williams v. State*, 284 Ga. 94, 663 S.E.2d 179 (2008).

Evidence was legally sufficient to convict a defendant on charges of armed robbery, aggravated assault, false imprisonment, and possession of a firearm during the commission of a crime; the testimony of one of the defendant's accomplices, which implicated the defendant in the crimes, was corroborated by evidence that the defendant was captured with the two accomplices shortly after the robbery, that defendant had a large amount of cash, a gun, and a roll of duct tape, and that the victim was able to identify all three men as the ones who robbed and assaulted the victim. *Spragg v. State*, 292 Ga. App. 37, 663 S.E.2d 389 (2008).

Evidence was sufficient to convict a defendant on a charge of aggravated assault since the defendant failed to carry the initial burden of establishing by a preponderance of the evidence that the defendant was involuntarily intoxicated at the time of the aggravated assault, and there was at least some evidence before the jury of each element of aggravated assault that the state was required to prove. *Stewart v. State*, 291 Ga. App. 846, 663 S.E.2d 278 (2008).

Sufficient evidence supported convictions of aggravated assault and possession of a firearm during commission of a felony under O.C.G.A. §§ 16-5-21 and 16-11-106 when competent evidence showed that the defendant put a gun to the victim's chest and pulled the trigger.

Furthermore, a jury could conclude that this was not the result of an accident. *Jones v. State*, 293 Ga. App. 218, 666 S.E.2d 738 (2008).

Testimony from two eyewitnesses that the defendant fatally shot the victim with an assault rifle and aimed the rifle at one of the witnesses, and evidence that the defendant then fled and tried to elude authorities, was sufficient to convict the defendant of felony murder, aggravated assault with a deadly weapon, aggravated assault, and possession of a firearm during the commission of a felony. *McKenzie v. State*, 284 Ga. 342, 667 S.E.2d 43 (2008).

Evidence showed the defendant broke into a victim's home while the victim was asleep and then pulled a knife on the victim in the kitchen and began waving the knife at the victim, who testified that the victim was afraid because the defendant "was looking wild and acting a little wild and I didn't know what he might would do" and that the victim was concerned the victim might get injured. Under these circumstances, there was sufficient evidence for the jury to conclude that the victim had a reasonable apprehension of receiving an immediate, violent injury, to support the defendant's conviction for aggravated assault. *Atwell v. State*, 293 Ga. App. 586, 667 S.E.2d 442 (2008).

Since the evidence established the defendant shot three people and took money from one of them, and two of the people survived and identified the defendant as the shooter, the evidence was sufficient to convict the defendant of two counts of aggravated assault. *Abdullah v. State*, 284 Ga. 399, 667 S.E.2d 584 (2008).

Pursuant to O.C.G.A. § 24-4-8, defendant juvenile's statements to the police corroborated an accomplice's testimony that the juvenile struck a woman unconscious, caused her serious bodily injury, used force to steal her pocketbook, and dragged her down onto her front yard; accordingly, the evidence was sufficient to adjudicate the juvenile delinquent under O.C.G.A. §§ 16-5-21(a)(2), 16-5-40(a), and 16-8-40(a)(1). *In re D. T.*, 294 Ga. App. 486, 669 S.E.2d 471 (2008).

Although the defendant argued that the defendant's conviction for aggravated as-

sault, O.C.G.A. § 16-5-21, was not supported by sufficient evidence, the facts asserted by the defendant in support of this claim were of no consequence on appeal because the appellate court did not speculate as to which evidence the jury chose to believe; thus, the evidence was sufficient to support the conviction. *Jones v. State*, 294 Ga. App. 564, 669 S.E.2d 505 (2008).

Evidence supported convictions for aggravated assault, theft by taking, and felony murder when the evidence showed that the defendant pulled the victim out of the victim's car, beat the victim with a pistol, stole the car, and deliberately backed over the victim; before the crime, the defendant told an eyewitness to those acts that the defendant planned to rob the victim; and the defendant used the victim's phone after the victim's death. *Lupoe v. State*, 284 Ga. 576, 669 S.E.2d 133 (2008).

Defendant's conviction for aggravated assault was proper as several eyewitnesses, including the defendant's sister, testified that the defendant kicked the victim while the victim was lying on the ground. At best, the defendant's arguments were based on disagreement with the credibility determinations made by the trial judge. *McDowell v. State*, 284 Ga. 666, 670 S.E.2d 438 (2008).

There was sufficient evidence to support two juveniles' adjudications of delinquency for the offenses of armed robbery, aggravated assault, and possession of a firearm during the commission of a crime based on the victim identifying the juveniles and the evidence that one of the juveniles used a gun to intimidate the victim into handing over the cash from the register of a gas station, shot the victim in the face causing severe injuries, and possessed a firearm during the commission of the crimes. *In the Interest of R. S.*, 295 Ga. App. 772, 673 S.E.2d 280 (2009).

Evidence that showed that during an argument with the victim, the defendant dragged the victim off a couch by the victim's hair and threw a table at the victim, that the victim fled on foot and attempted to make a 9-1-1 call, that the defendant pursued the victim in the defendant's truck, reached the victim, and

held a knife to the victim, retreating only after another vehicle drove up, was sufficient to convict the defendant of family violence aggravated assault. *Stone v. State*, 296 Ga. App. 305, 674 S.E.2d 31 (2009).

Contrary to a defendant's contention that the state presented only circumstantial evidence under O.C.G.A. § 24-4-6 that did not exclude all reasonable hypotheses except that of the defendant's guilt, the evidence was sufficient to support the conviction for felony murder and aggravated assault; the defendant's infant child died of a massive closed head trauma complicated by blunt force chest trauma, and the defendant had the sole care of the child just before the child suffered rib injuries allegedly due to the defendant pushing on the child's chest while the child was choking and just before the child suffered seizure-like symptoms. *Berryhill v. State*, 285 Ga. 198, 674 S.E.2d 920 (2009).

As the defendant drove a car slowly by a house where rival gang members were while a car passenger repeatedly fired an assault rifle at the house, resulting in the death of two victims and injuries to two others, the defendant's convictions for felony murder, aggravated assault, and possession of a firearm during the commission of a felony were supported by the evidence. *Deleon v. State*, 285 Ga. 306, 676 S.E.2d 184 (2009).

Convictions of two defendants of, inter alia, malice murder, felony murder, and aggravated assault were supported by sufficient evidence because eyewitnesses saw the defendants point guns at the victim, shoot, and flee. *Daniel v. State*, 285 Ga. 406, 677 S.E.2d 120 (2009).

Sufficient evidence was presented to support a defendant's conviction for aggravated assault based on the victim's testimony that the defendant struck the victim in the head, a neighbor's testimony that the defendant stated that the defendant struck the victim in the head for failing to pay the defendant and that the neighbor found the victim lying on the ground, and the fact that, while the defendant claimed self defense, the blow was to the back of the victim's head. *Howard v. State*, 297 Ga. App. 316, 677 S.E.2d 375 (2009).

**General Consideration (Cont'd)**

As the victim testified that "he pointed it at me," and that "he never pointed the gun at my head, but he did point the gun at me," the jury was authorized to find from the evidence that the victim was placed in reasonable apprehension of violent injury and that the defendant was therefore guilty of aggravated assault. *Lewis v. State*, 297 Ga. App. 517, 677 S.E.2d 723 (2009).

Evidence was sufficient to support the defendant's convictions of aggravated assault and aggravated battery. It showed that the defendant and other gang members opened fire on a crowd of rival gang members and that the bullets also wounded two people inside a duplex; the jury chose to disbelieve the defendant's alibi witnesses and to believe that of the eyewitnesses. *Lopez v. State*, 297 Ga. App. 618, 677 S.E.2d 776 (2009), overruled on other grounds, *State v. Gardner*, 286 Ga. 633, 690 S.E.2d 164 (2010).

Evidence supported the defendant's aggravated assault conviction when the defendant confronted the victim while holding a claw hammer and the victim defended the victim's self with a baseball bat based on the victim's fear that the defendant was going to strike the victim. Although the defendant argued that the defendant had no intent of hitting the victim with the hammer and that the victim attacked the defendant, the jury opted to believe the victim; furthermore, it was the victim's reasonable apprehension of injury from an assault by a deadly weapon that established the crime of aggravated assault, not the assailant's intent to injure. *Crane v. State*, 297 Ga. App. 880, 678 S.E.2d 542 (2009).

Defendant's aggravated assault conviction under O.C.G.A. § 16-5-21(a)(2) was supported by evidence that the codefendant took a running kick at the victim's face while the defendant was present and that the defendant kicked the back of the victim's legs. *Wilkinson v. State*, 298 Ga. App. 190, 679 S.E.2d 766 (2009).

Conviction of aggravated assault, O.C.G.A. § 16-5-21(a)(2), was supported by sufficient evidence and the trial court did not err in denying the defendant's

motion for a directed verdict on this basis under circumstances in which the defendant became angry over some statements the defendant heard about the victim, punched the victim in the face, causing the victim to bleed, and knocked the victim to the ground; as the victim attempted to run, the defendant caught the victim and punched the victim in the side of the face, pulled the victim's hair, drove the victim's face into the defendant's knee, and repeatedly hit the victim in the face with the defendant's fist. The evidence of the extent of the damage inflicted on the victim by the defendant's repeated punches was sufficient to authorize the jury's verdict. *Walker v. State*, 298 Ga. App. 265, 679 S.E.2d 814 (2009).

Sufficient evidence supported the defendant's armed robbery and aggravated assault convictions because the victim recognized the defendant as one of the people who, while armed with a gun, pushed their way into the victim's home, pushed the victim down, and demanded money when a mask the defendant was wearing fell down; the victim also identified the defendant from earlier occasions when the defendant was visiting the victim's neighborhood. *Dubose v. State*, 298 Ga. App. 335, 680 S.E.2d 193 (2009).

Because the evidence was sufficient to authorize a rational trier of fact to find defendant guilty beyond a reasonable doubt as a party to aggravated assault with a deadly weapon under O.C.G.A. § 16-5-21(a)(2), the trial court did not err in failing to direct a verdict of acquittal. *Artis v. State*, 299 Ga. App. 287, 682 S.E.2d 375 (2009).

Evidence was sufficient to support convictions for aggravated assault, aggravated battery, armed robbery, and kidnapping. The victims' in-court identifications of the defendant and the codefendant were buttressed by the evidence that a cell phone in the defendants' possession matched that taken from the victims, that a car of the type used by the robbers contained guns similar to those used in the robbery, and the fact that the codefendant had a key to that car. *Wright v. State*, 300 Ga. App. 32, 684 S.E.2d 102 (2009).

Evidence supported the jury's determination that the defendant was guilty be-

yond a reasonable doubt of aggravated assault and aggravated battery, O.C.G.A. §§ 16-5-21 and 16-5-24, because although the victim was under the influence of alcohol and in severe pain when making statements to the police and the emergency room physician, it was within the jury's province to find the victim's statements more credible than the victim's trial testimony; the victim's statements in a request to dismiss the charges, which acknowledged that the defendant was the individual who attacked the victim, did not occur while the victim was under any physical impairment. *Works v. State*, 301 Ga. App. 108, 686 S.E.2d 863 (2009), cert. denied, No. S10C0458, 2010 Ga. LEXIS 251 (Ga. 2010).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder, aggravated assault, and possession of a firearm during the commission of a crime because a witness identified the defendant as the person the witness saw shooting and running, and witnesses testified that the day of the shooting the defendant told the witnesses that the victim had robbed the defendant; the mother of the defendant's children testified that, on the night of the shooting, the defendant came to her apartment in the same complex where the shooting took place, breathing heavily, and wearing a shirt with bullet holes in the shirt. *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

Evidence that defendant and another person burst into a home after they had lured the victim brandishing an automatic gun and wearing black t-shirts that said "Sheriff," handcuffed the victim, took the victim's money, and forced the victim to write a bill of sale for the victim's motorcycle was sufficient to support convictions for robbery by intimidation, O.C.G.A. § 16-8-41(a), false imprisonment, O.C.G.A. § 16-5-41(a), aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), and impersonating a peace officer, O.C.G.A. § 16-10-23.23. *Powers v. State*, 303 Ga. App. 326, 693 S.E.2d 592 (2010).

Evidence adduced was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the defen-

dant was guilty of felony murder, armed robbery, and aggravated assault for attacking six people in a home because one of the victims stated that the victim saw defendant in the doorway after shots had been fired; whether the deal a codefendant made with the state rendered the codefendant's testimony biased to a degree that left the codefendant less creditworthy was a determination to be made by the jury. *Mikell v. State*, 286 Ga. 434, 689 S.E.2d 286, overruled on other grounds, 287 Ga. 338, 698 S.E.2d 301 (2010).

Because testimony about the circumstances of the victim's visit to a home where defendant was shot was relevant and admissible to explain defendant's motive in shooting the victim, the evidence was sufficient to convict defendant of malice murder, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony. *Taylor v. State*, 287 Ga. 440, 696 S.E.2d 652 (2010).

Defendant's convictions for aggravated child molestation, aggravated assault, enticing a child for an indecent purpose, kidnapping, false imprisonment, cruelty to children, burglary, theft by taking, and striking an unattended vehicle were authorized because at trial, the defendant was positively identified as the perpetrator of the crimes; a nurse and doctor testified that the victim had an injury that was consistent with the molestation allegation, and a videotape depicted the defendant driving a maintenance truck that the defendant did not have authority to take. *Bearfield v. State*, 305 Ga. App. 37, 699 S.E.2d 363 (2010).

Since the victim was cut and hit by a shotgun during a struggle with defendant in defendant's attempt to obtain money for drugs, the evidence was sufficient to sustain defendant's convictions for armed robbery, aggravated assault, and possession of a firearm during the commission of a crime under O.C.G.A. §§ 16-5-21(a)(2), 16-8-41(a), and 16-11-106(b)(1). *Johnson v. State*, 305 Ga. App. 838, 700 S.E.2d 726 (2010).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of murder and aggravated assault because the

**General Consideration (Cont'd)**

defendant's conduct before, during, and after the crimes supported the finding that the defendant was a party thereto, notwithstanding the jury's acquittal of the defendant on three weapons charges. *Allen v. State*, 288 Ga. 263, 702 S.E.2d 869 (2010).

Trial court did not err in determining that the evidence was sufficient to support the defendant's convictions for aggravated assault under O.C.G.A. § 16-5-21(a)(2) because overwhelming evidence adduced at trial showed that the defendant was at the scene, that the defendant had a handgun in the defendant's possession, and that the defendant drew the defendant's handgun and pointed the gun at the victim and the victim's companions as they were sitting in the victim's car, thereby placing them in reasonable apprehension of immediately receiving a violent injury. *White v. State*, 308 Ga. App. 38, 706 S.E.2d 570 (2011).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder, armed robbery, and aggravated assault beyond a reasonable doubt because although the defendant denied to police that the defendant had any contact with the silver car that was connected to the robbery, the defendant's fingerprints were found on the outside of the car, and an eyewitness's physical description of the second gunman from the robbery matched the defendant. *Carter v. State*, No. S10A1999, 2011 Ga. LEXIS 253 (Mar. 18, 2011).

Evidence was sufficient under O.C.G.A. § 24-4-6 to support the defendant's convictions for malice murder, felony murder, aggravated assault, possession of a knife during the commission of a crime, financial transaction card fraud, and recidivism because there was evidence placing the defendant at the victim's home during the time of the murder and evidence of the victim's blood on the defendant's shoes, which the defendant intentionally chose not to wear when being questioned by police; the evidence, together with the defendant's own statements regarding the defendant's use of the victim's debit card, was sufficient to authorize the jury to

determine that the state excluded all reasonable hypotheses save that of the defendant's guilt and to find the defendant guilty beyond a reasonable doubt of the crimes of which the defendant was convicted. *Johnson v. State*, 288 Ga. 771, 707 S.E.2d 92 (2011).

Evidence was sufficient to support the defendant's convictions of armed robbery under O.C.G.A. § 16-8-41(a), aggravated battery under O.C.G.A. § 16-5-24(a), aggravated assault under O.C.G.A. § 16-5-21(a), burglary under O.C.G.A. § 16-7-1(a)(2), possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b), and conspiracy to possess cocaine under O.C.G.A. §§ 16-4-8 and 16-13-30(a) as a conspirator because, while the uncorroborated testimony of one accomplice was insufficient under O.C.G.A. § 24-4-8, the evidence sufficed to sustain defendant's conviction when an additional accomplice provided testimony to corroborate that of the first accomplice. Both co-defendants testified that the defendant was present from the robbery's inception through the robbery's execution, that the defendant was aware of the conspiracy to obtain the victim's money and cocaine by armed robbery, and that the defendant willingly participated in the crimes and shared the criminal intent of those who committed the crimes inside the victim's residence by supplying the defendant's car and acting as a get-away driver. *Watson v. State*, No. A11A0090, 2011 Ga. App. LEXIS 295 (Mar. 28, 2011).

**Slapping is sufficient for aggravated assault.** — Allegation alleged that the defendant committed aggravated assault with intent to rape in that the defendant assaulted the girlfriend's daughter with the intent to rape her when the defendant slapped the daughter across the face with the defendant's hands. The evidence supported this accusation, showing that shortly after 6:30 A.M., the defendant threatened and slapped the daughter on the face as the defendant repeatedly attempted to penetrate the daughter. The defendant's argument on appeal that the slapping of the daughter's face did not constitute an assault is simply wrong. *Boyd v. State*, 289 Ga. App. 342, 656

S.E.2d 864 (2008), cert. denied, 2008 Ga. LEXIS 498 (Ga. 2008).

**Evidence sufficient for conviction of aggravated assault with gun.** — Evidence supported defendant's conviction for aggravated assault because: (1) defendant thrust a handgun in the door of an ex-love interest's apartment, pointed it at the ex-love interest, and asked the ex-love interest if the ex-love interest was going to call the defendant anymore; (2) the ex-love interest said no and shut the door; (3) defendant then shot two rounds through the door; (4) two shell casings were found on the apartment floor; and (5) a matching shell casing and a photograph of defendant with a handgun were found at another love interest's house. Johnson v. State, 274 Ga. App. 641, 618 S.E.2d 716 (2005).

Trial court properly denied defendant's motion for acquittal as a matter of law, pursuant to O.C.G.A. § 17-9-1, as the evidence was sufficient to support defendant's conviction on four counts of assault, in violation of O.C.G.A. §§ 16-5-20 and 16-5-21(a)(2), as defendant and the codefendant committed two home invasions, whereupon the victims therein were fearful, some were harmed, and during the incidents, defendant held a night stick and instructed the victims to cooperate with the codefendant, who brandished a handgun. Moyer v. State, 275 Ga. App. 366, 620 S.E.2d 837 (2005), overruled on other grounds, Vergara v. State, 283 Ga. 175, 657 S.E.2d 863 (2008).

Because sufficient evidence was presented that the defendant was provoked by an attack on a sibling, and that the defendant had a history of abusive relationships with several men, the voluntary manslaughter of the male victim was supported by the evidence; moreover, evidence of the victim's stabbing and death also supported the jury's verdict with respect to the aggravated assault with a deadly weapon, felony murder, and possession of a knife during the commission of a felony charges. Breland v. State, 285 Ga. App. 251, 648 S.E.2d 389 (2007).

Trial court properly denied the defendant's motion for a new trial, and an aggravated assault conviction was upheld on appeal, as the state was not required to

show that the defendant expressed an intent to rob or declared a purpose to carry that intent into effect, for the jury to arrive at the conclusion that such was the defendant's intent; moreover, the defendant's intention could be gathered from the circumstances of the case as proved, and in seeking the motives of human conduct, inferences and deductions could properly be considered when the inferences and deductions flowed naturally from the facts proved. Squires v. State, 286 Ga. App. 141, 648 S.E.2d 696 (2007).

The O.C.G.A. § 17-10-30(b)(8) statutory aggravating circumstance does not require knowledge on the part of the defendant that the victim was a peace officer or other designated official engaged in the performance of official duties. Fair v. State, 284 Ga. 165, 664 S.E.2d 227 (2008).

Evidence that: (1) a sister of one of two shooting victims described the defendant to police; (2) the defendant admitted having held a gun near the crime scene at the time of the shooting; and (3) a victim, who knew the defendant and had seen the defendant from a distance of three to four feet, identified the defendant as the shooter, was sufficient to sustain the defendant's convictions of two counts of aggravated assault under O.C.G.A. § 16-5-21. Carlos v. State, 292 Ga. App. 419, 664 S.E.2d 808 (2008).

Testimony by a victim that the defendant and an accomplice, armed with handguns, forcibly entered the victim's apartment, raped and sodomized the victim, struck the victim with a gun, stole jewelry, bound the victim, and escaped in a car owned by the victim's prospective spouse, and evidence that 24 fingerprints lifted from the apartment and car matched the defendant's was sufficient to convict the defendant of aggravated assault. Crawford v. State, 292 Ga. App. 463, 664 S.E.2d 820 (2008).

Brandishing a gun, a masked individual moved a wheelchair-bound restaurant manager to a hidden safe and ordered the manager to open the safe. The manager's identification of the perpetrator as the defendant, a former employee, from the defendant's distinctive voice, and the perpetrator's knowledge of the safe's location, authorized the jury to find defendant

**General Consideration (Cont'd)**

guilty of aggravated assault by placing a gun to the victim's head. *Johnson v. State*, 293 Ga. App. 728, 667 S.E.2d 637 (2008).

With regard to a defendant's conviction for aggravated assault, there was sufficient evidence to support the conviction based on the victim's testimony that the defendant was the individual who approached the victim's car with a gun and ordered the victim out, causing the victim to be in fear. *Kashamba v. State*, 295 Ga. App. 540, 672 S.E.2d 512 (2009).

Evidence that the defendant shot the victim at close range; that the victim, who knew the defendant well, identified the defendant from a photo line-up and at trial; and that a witness told police of driving the defendant to find the victim and of witnessing the shooting, was sufficient to convict the defendant of aggravated battery, aggravated assault, and possession of a firearm during the commission of those crimes. *Spencer v. State*, 296 Ga. App. 828, 676 S.E.2d 274 (2009).

Evidence authorized the jury to conclude that the defendant was guilty beyond a reasonable doubt of malice murder, armed robbery, and aggravated assault because defendant and defendant's codefendants entered an apartment masked and armed with an assault rifle, and the defendant fired the rifle at the victim and fatally wounded the victim. *Zackery v. State*, 286 Ga. 399, 688 S.E.2d 354 (2010).

Evidence that a defendant threatened to and then intentionally returned with armed associates to the scene of an unsatisfactory marijuana purchase and participated in a shootout, causing a chest wound to a 16-year-old boy in a nearby house, supported the defendant's conviction for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2). *Dennis v. State*, 304 Ga. App. 510, 696 S.E.2d 333 (2010).

Evidence was sufficient for a rational trier of fact to find the defendant guilty of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) beyond a reasonable doubt because a witness to the incident testified that the defendant intentionally fired the defendant's gun in a guest's direction after the defendant became upset with the guest's jokes; a bullet

hole was also found inside the refrigerator where the guest had been sitting. *Williams v. State*, 307 Ga. App. 577, 705 S.E.2d 332 (2011).

Evidence was sufficient to support the convictions of murder, aggravated assault, and firearm possession in connection with the shooting death of the victim because the evidence showed that: (1) the defendant's teenage children made a cell phone call to the children's parents' home to tell them that the children were being followed by a motorcycle rider; (2) as the children arrived home, the defendant exited from the house with a handgun; (3) the defendant fired two warning shots at the rider when the rider rode past; (4) the rider turned the motorcycle around and when the rider rode past the house again, the defendant fired again as the defendant claimed that the rider swerved toward the defendant; and (5) this shot struck the victim, resulting in the victim's death. *Gear v. State*, 288 Ga. 500, 705 S.E.2d 632 (2011).

**Aggravated assault against grandparents.** — As a victim's grandparent was present in the victim's home when the defendant shot the victim three times, the jury could have inferred that the grandparent reasonably feared suffering a violent injury during the shooting. Therefore, the evidence was sufficient to convict the defendant of aggravated assault under O.C.G.A. § 16-5-21 as to the grandparent. *Hollis v. State*, 295 Ga. App. 529, 672 S.E.2d 487 (2009).

**Evidence sufficient for conviction of aggravated assault upon peace officer.** — See *Brown v. State*, 180 Ga. App. 361, 349 S.E.2d 250 (1986); *Reddin v. State*, 223 Ga. App. 148, 476 S.E.2d 882 (1996).

Defendant committed aggravated assault on a police officer in an offensive manner, resulting in injuries to the officer; it was a jury question as to whether defendant's testimony that defendant intended no harm was believed or not. *Dyer v. State*, 261 Ga. App. 289, 585 S.E.2d 81 (2003).

There was sufficient evidence to support defendant's conviction for aggravated assault on a peace officer in violation of O.C.G.A. § 16-5-21 where deputies testi-

fied that defendant was pointing defendant's pistol at all of them as defendant made defendant's way towards a trailer in defendant's backyard and then ran off into the woods; one deputies conflicting testimony as to whether the officer feared for the officer's life was a matter of credibility that was determined by the jury, and there was evidence that the deputies had identified themselves as peace officers to defendant. *Logan v. State*, 265 Ga. App. 134, 593 S.E.2d 14 (2003).

Evidence was sufficient to show that a juvenile was a party to aggravated assault on a victim when one or more of four gunmen including the juvenile shot into another person's residence because the victim's car was parked; the presence of the victim's car at the house was circumstantial evidence from which the court could find the shooters believed someone was in the house and that they intended to commit a violent injury to the victim by firing their weapons. *In the Interest of M.D.L.*, 271 Ga. App. 738, 610 S.E.2d 687 (2005).

Evidence that defendant, who was driving a vehicle being pursued by law enforcement officers' vehicles, after an officer unsuccessfully attempted to arrest defendant for domestic violence, called the spouse and told the spouse to call off the officers or defendant would try to kill them by colliding the defendant's vehicle with theirs and then tried to run an officer off the road was sufficient to support defendant's conviction for aggravated assault upon a police officer, and any conflict in the testimony was for the jury to resolve. *Razinha v. State*, 273 Ga. App. 583, 615 S.E.2d 649 (2005).

Evidence that a defendant, after bringing the defendant's vehicle to a complete stop and making eye contact with a police officer, accelerated and struck a patrol car, causing damage to the vehicle, supported the defendant's conviction for aggravated assault on a peace officer under O.C.G.A. § 16-5-21(a)(2) and (c). *Branton v. State*, 292 Ga. App. 104, 663 S.E.2d 414 (2008), cert. denied, No. S08C1771, 2008 Ga. LEXIS 873 (Ga. 2008).

On a charge for aggravated assault of a peace officer, the court rejected the defendant's argument that the officer was never

in immediate apprehension of harm. The officer testified that the officer was in fear of receiving a violent injury when the defendant suddenly pulled away from a traffic stop, which was sufficient for the jury to find that the defendant committed aggravated assault. *Little v. State*, 298 Ga. App. 298, 680 S.E.2d 154 (2009).

Evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that the defendant committed an assault upon a corporal with the county sheriff's department with a knife while the corporal was engaged in official duties because, while the defendant cited to testimony implying that a deputy had secured the knife by the time the corporal joined the struggle, other testimony indicated that the corporal was lying on top of the defendant and attempting to restrain the defendant while the defendant continued to wield the knife against police officers; even if the Court of Appeals considered the testimony the police officers provided to be inconsistent, conflict in the testimony of witnesses was for resolution by the jury and not the Court of Appeals. *Dobbs v. State*, 302 Ga. App. 628, 691 S.E.2d 387 (2010).

**Knowledge that victim was peace officer as part of jury instruction.** — In a prosecution for aggravated assault upon a police officer, O.C.G.A. § 16-5-21(c), the trial court's instructions regarding the defense of misapprehension of fact, and that intent was an essential element of any crime, were insufficient to convey to the jury the requirement that the defendant had to have known that the victim was a peace officer. The error was not harmless as the entire defense was based on the defendant's alleged lack of knowledge that the defendant's assault victim was a peace officer. *Fedd v. State*, 298 Ga. App. 508, 680 S.E.2d 453 (2009), cert. denied, No. S09C1776, 2009 Ga. LEXIS 793 (Ga. 2009).

**Aggravated assault with intent to rob supported by evidence.** — Identification testimony was sufficient to establish beyond a reasonable doubt that defendant was the perpetrator of the offenses of theft by sudden snatching and aggravated assault with intent to rob. *Tolbert v. State*, 180 Ga. App. 703, 350 S.E.2d 51 (1986).

**General Consideration (Cont'd)**

**Aggravated assault, possession of firearm, and discharge of firearm sufficient to support felony murder conviction.** — Because defendant and an accomplice ordered the victim and another individual against a wall, took the victim's money at gunpoint, and defendant began to point and wave the gun when it fired, resulting in the victim being shot and subsequently dying, the evidence was sufficient for a rational trier of fact to find defendant guilty of felony murder while committing aggravated assault and of possession of a firearm. *Taylor v. State*, 279 Ga. 706, 620 S.E.2d 363 (2005).

**Aggravated assault and felony murder.** — Evidence in support of the state's theory that the defendant killed the victim in an unprovoked aggravated assault, based on expert testimony that the victim died from a deliberate and forceful strike with a knife, and evidence that discounted any possible accident or lack of intent, was sufficient to support the defendant's conviction for felony murder during the commission of an aggravated assault. *Nichols v. State*, 281 Ga. 483, 640 S.E.2d 40 (2007).

**Rule against mutually exclusive verdicts did not apply.** — Rule against mutually exclusive verdicts did not apply to the verdicts returned by the jury of guilty on a charge of malice murder, but not guilty by reason of insanity on a charge of aggravated assault. *Taylor v. State*, 282 Ga. 502, 651 S.E.2d 715 (2007).

**Conviction for multiple felonies appropriate.** — Evidence presented by the prosecution was sufficient to enable any rational trier of fact to find the defendant guilty of armed robbery, kidnapping, and aggravated assault with intent to rob. *Conway v. State*, 183 Ga. App. 573, 359 S.E.2d 438 (1987).

Evidence was sufficient to support convictions of murder, aggravated assault, armed robbery, burglary, and possession of a firearm in the commission of a felony. *Baty v. State*, 257 Ga. 371, 359 S.E.2d 655 (1987).

Evidence was sufficient to enable a rational trier of fact to find the appellant guilty of malice murder, felony murder,

aggravated assault, and possession of a firearm by a convicted felon in the shooting deaths of two victims. *Burts v. State*, 269 Ga. 402, 499 S.E.2d 326 (1998).

Evidence was sufficient to enable a rational trier of fact to find each defendant guilty of malice murder, felony murder predicated on aggravated assault and aggravated assault. *Whitaker v. State*, 269 Ga. 462, 499 S.E.2d 888 (1998).

Trial court did not err in denying defendant's motion to correct illegal sentence, pursuant to O.C.G.A. §§ 16-1-6 and 16-1-7, as defendant's convictions for aggravated assault and kidnapping, in violation of O.C.G.A. §§ 16-5-21 and 16-5-40(a), respectively, did not merge as a matter of law, as only aggravated assault and kidnapping with bodily injury merged as a matter of law; further, the crimes did not merge as a matter of fact, as they were based on separate and distinct facts, and due to the timing of defendant's actions during the incident, the separate convictions were proper. *Walker v. State*, 275 Ga. App. 862, 622 S.E.2d 64 (2005).

**Testimony of a single witness sufficient.** — Testimony of a single witness was sufficient to authorize a jury's verdict that the defendant was guilty beyond a reasonable doubt of committing aggravated assault with a deadly weapon and that the defendant committed simple battery by intentionally kicking the victim on the ankle, causing a bruise. *Ringo v. State*, 236 Ga. App. 38, 510 S.E.2d 893 (1999).

Witness's testimony was sufficient to authorize a factfinder to determine that the witness was not an accomplice, obviating the need for the testimony to be corroborated under O.C.G.A. § 24-4-8, and based on that testimony, a rational trier of fact could have found, beyond a reasonable doubt, that the juvenile had committed the act of aggravated assault. *In re A.Z.*, 301 Ga. App. 524, 687 S.E.2d 887 (2009), cert. denied, No. S10C0492, 2010 Ga. LEXIS 335 (Ga. 2010).

**Prospective juror properly excluded on basis of bias.** — When the defendant was convicted of aggravated assault, the trial court did not err in excusing for cause a prospective juror who was acquainted with defense counsel as

the juror's statement that the juror worked with a criminal defense firm, and could not give the state a fair hearing clearly established a leaning or bias on the part of the juror, which made the juror subject to being excused for cause. *Bell v. State*, 276 Ga. 206, 576 S.E.2d 876 (2003).

**Verdict of guilty but mentally ill supported by evidence.** — When the defendant was indicted for assault with intent to rape and the evidence showed that the defendant was a paranoid schizophrenic with borderline mental retardation at the time of the crime but that the defendant knew the difference between right and wrong at that time, the evidence supported a verdict of guilty but mentally ill. *Jackson v. State*, 166 Ga. App. 477, 304 S.E.2d 560 (1983).

**Inconsistent verdicts.** — Fact that jury acquitted defendant of charges of kidnapping and armed robbery arising out of the same incident in which defendant committed aggravated assault did not mean that the evidence was insufficient to convict defendant of the aggravated assault where the other two alleged offenses occurred before the aggravated assault such that the verdicts were not necessarily inconsistent; in any event, the inconsistent verdict rule does not apply in criminal cases. *Thomas v. State*, 257 Ga. App. 350, 571 S.E.2d 178 (2002).

Jury's verdict finding defendants guilty of reckless conduct against a victim after one of the defendants fired a shot at a car was factually inconsistent with the jury's verdict finding defendants guilty of aggravated assault against the same victim; because the appellate court could not determine if the jury reached inconsistent verdicts, it reversed defendants' convictions for both offenses and remanded the case for a new trial on those charges. *Reddick v. State*, 264 Ga. App. 487, 591 S.E.2d 392 (2003).

Evidence that the defendant fired a gun in the victim's direction from within a vehicle, thereby frightening the victim, was sufficient to sustain a conviction for aggravated assault as defined by O.C.G.A. § 16-5-21(a)(3); the result was not changed by the fact that the defendant was acquitted of aggravated assault under § 16-5-21(a)(2). *Hardeman v. State*, 277 Ga. App. 180, 626 S.E.2d 138 (2006).

There was no merit to a defendant's argument that a guilty verdict on an aggravated assault charge as to one of the victims was inconsistent with a not guilty verdict on an armed robbery charge as to that victim. The inconsistent verdict rule was abolished; moreover, since the crimes had different elements, the jury could have found that the defendant was guilty of assaulting both victims but robbing only one of the victims. *Bethune v. State*, 291 Ga. App. 674, 662 S.E.2d 774 (2008).

**Evidence insufficient for conviction.** — See *Montford v. State*, 254 Ga. App. 524, 564 S.E.2d 216 (2002).

Insufficient evidence supported the defendant's conviction of aggravated assault under O.C.G.A. § 16-5-21(a); in superficially wounding the victim after the fatal stabbing had occurred and after the victim was either dead or unconscious, there was no evidence that the defendant intended to violently injure the victim or that the victim was placed in reasonable apprehension of being violently injured. *Perez v. State*, 281 Ga. 175, 637 S.E.2d 30 (2006).

Convictions of aggravated battery, O.C.G.A. § 16-5-24, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106, were not supported by sufficient evidence because, although the defendant's conduct before the crime was suspicious, the circumstantial evidence against the defendant was insufficient under O.C.G.A. § 24-4-6; the state did not show that the defendant was anywhere near the scene at the time of the shooting, did not present evidence connecting a weapon used in the shooting to the defendant, and, although a witness testified that three days before the shooting, the witness saw the defendant's brother hand the defendant a gun, the witness could not identify the type of gun involved, and this testimony did not connect the defendant with the shooting. The state also failed to adduce evidence that the defendant intentionally aided, abetted, or encouraged the commission of the crimes of which the defendant was convicted. *Gresham v. State*, 298 Ga. App. 136, 679 S.E.2d 344 (2009).

Evidence was insufficient to support a

**General Consideration (Cont'd)**

juvenile's adjudication of delinquency for aggravated assault with the intent to rob under O.C.G.A. § 16-5-21 when the juvenile placed the juvenile's hands in the victim's pockets to see what the victim was carrying. *In the Interest of D.M.*, No. A10A2353, 2011 Ga. App. LEXIS 239 (Mar. 21, 2011).

**Evidence did not support self-defense claim.** — Evidence was sufficient for the jury to reject the defendant's claim of self-defense and to support the defendant's aggravated assault and possession of a firearm during the commission of a crime conviction because, inter alia, two witnesses yelled at the defendant to put the gun away, but the defendant shot the victim a second time, the defendant testified that the defendant believed that the victim was holding a weapon behind the victim's leg when the victim got out of the car and that the defendant heard someone yell "bust," which the defendant understood to mean "shoot," and another witness heard no such statement and did not see anything in the victim's hands when the victim exited the car. *Hill v. State*, 276 Ga. App. 874, 625 S.E.2d 108 (2005).

Felony murder and aggravated assault convictions were upheld on appeal as the defendant's defense of self-defense lacked merit given evidence that any imminent threat posed against the defendant had passed, the victim was shot in the head after the confrontation ended, and the victim retreated to the victim's car and was being driven away at the time the fatal shot was dealt. *Woolfolk v. State*, 282 Ga. 139, 644 S.E.2d 828 (2007).

Despite the defendant's claim that the state failed to disprove a claim of self-defense, the appeals court upheld the defendant's aggravated assault conviction, because sufficient evidence was presented to allow the jury to decide that the defendant's act of stabbing the weaponless victim amounted to excessive force. Thus, the defendant's motion for a new trial on the issue was properly denied. *Richards v. State*, 288 Ga. App. 814, 655 S.E.2d 690 (2007).

**Justification defense.** — In defendant's trial on a charge of aggravated

assault under O.C.G.A. § 16-5-21(a), the trial court did not err under O.C.G.A. § 24-9-64 in precluding the defendant from cross-examining the victim about what the victim meant when the victim said that there was tension in the victim's relationship with the defendant and that the victim was going through a transitional period in the victim's life; while the defendant contended that the defendant wanted to examine the victim about the victim's failure to comply with a drug rehabilitation program in which the victim was enrolled and that the defendant was upset about the possibility that the victim would leave Georgia if the victim failed to complete the program, thereby ending the relationship, such evidence was irrelevant to the defendant's justification defense because it was not evidence either of the victim's general reputation for violence or of specific acts of violence perpetrated by the victim. Evidence about the status of the couple's relationship and the nature of the couple's arguments in the week leading up to their fight would not have shed any light on whether the defendant was in reasonable fear of suffering immediate serious harm personally when the defendant choked the victim and threatened to kill the victim. As such, the trial court did not err in ruling that the evidence was irrelevant. *Chambers v. State*, No. A11A0034, 2011 Ga. App. LEXIS 272 (Mar. 24, 2011).

**Improper comment on evidence by court was reversible error.** — On appeal from an aggravated assault conviction, because the trial judge improperly commented on the evidence in violation of O.C.G.A. § 17-8-57 by telling the jury that the parties agreed that there was no gun involved in the incident, the comment amounted to reversible error entitling the defendant to a new trial. *Brimidge v. State*, 287 Ga. App. 23, 651 S.E.2d 344 (2007).

**Claim of error waived on appeal when exclusion of evidence not raised at trial.** — On appeal from convictions for murder and aggravated assault, the defendant waived any error regarding the exclusion of a videotaped statement on appeal, which the defendant claimed would have supported a voluntary man-

slaughter theory, by failing to raise the claim specifically at trial. *Johnson v. State*, 282 Ga. 96, 646 S.E.2d 216 (2007).

**Withdrawal of guilty pleas properly denied.** — Because: (1) the facts of the case as narrated by the prosecutor presented a sufficient factual basis for the defendant's pleas to both aggravated assault and two battery counts; (2) the trial court informed the defendant of the consequences of the guilty pleas, waiver of certain constitutional and statutory rights, and the minimum and maximum possible sentences for the crimes charged; and (3) the defendant admitted guilt and to entering the guilty plea freely and voluntarily, the trial court did not abuse its discretion in denying withdrawal of the pleas. *Foster v. State*, 281 Ga. App. 584, 636 S.E.2d 759 (2006).

Defendant's motion to withdraw the defendant's guilty plea was properly denied as withdrawal of the plea was not necessary to correct a manifest injustice since: (1) the defense counsel was not ineffective; (2) the state showed that the defendant's plea was knowing, intelligent, and voluntary; (3) the trial court was entitled to discredit contradictory testimony given by the defendant at the motion to withdraw the plea hearing; and (4) the defendant's claim that the defendant had nothing to gain by entering a "blind" plea failed as even assuming, that an aggravated assault conviction would have merged with an armed robbery conviction and that five convictions of possession of a firearm during the commission of a crime would have merged with each other for sentencing purposes, the defendant still would have faced an additional five years' to serve if the defendant had not pled guilty. *Brown v. State*, 280 Ga. App. 767, 634 S.E.2d 875 (2006).

**Sentencing.** — When defendant was convicted of aggravated assault, defendant's prior convictions for aggravated assault and criminal damage to property, which had been used during the guilt-innocence phase of defendant's trial for impeachment purposes, could be used at sentencing because a repeat offender convicted of aggravated assault could be sentenced as a recidivist, under O.C.G.A. § 17-10-7(a), and there was no restriction

in the aggravated assault statute, O.C.G.A. § 16-5-21, that limited the use of prior convictions to the guilt-innocence phase of trial such that they could not be used again at the sentencing phase of trial. *Carswell v. State*, 263 Ga. App. 833, 589 S.E.2d 605 (2003).

Trial court did not err in sentencing defendant because the sentence it imposed on defendant was 10 years in prison and 10 years probation for aggravated assault, 10 years in prison to run concurrently for aggravated battery, and five years confinement to run consecutively for possession of a firearm during the commission of a crime, as each part of defendant's sentence was well within the statutory limits for the respective crime involved; accordingly, defendant's sentences would not be modified on appeal. *King v. State*, 269 Ga. App. 658, 605 S.E.2d 63 (2004).

Because the trial court set aside the defendant's aggravated assault conviction, a claim that the trial court erred in failing to merge the aggravated assault with an armed robbery conviction for sentencing purposes, lacked merit. *Lawrence v. State*, 289 Ga. App. 163, 657 S.E.2d 250 (2008).

Because the Supreme Court of Georgia had already affirmed the defendant's convictions and sentences for felony murder predicated on aggravated assault by striking the victim with a gun with the intent to rob and felony murder predicated on aggravated assault by striking the victim with a gun, an instrument when used offensively against a person is likely to result in serious bodily injury, the trial court properly denied a subsequent pro se motion to correct an illegal sentence. *Brady v. State*, 283 Ga. 359, 659 S.E.2d 368 (2008).

As the defendant was not sentenced as a recidivist under O.C.G.A. § 17-10-7(c) or to the maximum term pursuant to § 17-10-7(a) for a conviction of aggravated assault, in violation of O.C.G.A. § 16-5-21(b), the defendant's claim that the sentencing imposed was improper lacked merit. *Tatum v. State*, 297 Ga. App. 550, 677 S.E.2d 740 (2009).

Trial court did not impose an unjustifiably lengthy sentence merely because a

**General Consideration (Cont'd)**

defendant chose to require the prosecution to prove the defendant's guilt at trial rather than to enter a plea of guilty because the trial court sentenced defendant to the maximum term of 20 years in prison for kidnapping and on each of the aggravated assault counts, the trial court also exercised the court's discretion to run all of the counts concurrently instead of consecutively; the defendant's claim that the trial court punished the defendant for exercising the defendant's right to a jury trial was not supported by the transcript, which revealed that the sentence imposed by the trial court was based on the defendant's lack of remorse. *Brown v. State*, 299 Ga. App. 782, 683 S.E.2d 874 (2009).

Defendant's sentence of 20 years to serve for armed robbery, 20 years probation for aggravated assault, and 5 years probation for possession of a firearm during the commission of a felony, each to run consecutively, did not constitute cruel and unusual punishment in violation of the Eighth Amendment because the trial court's sentence fell within the statutory range of punishment, O.C.G.A. §§ 16-5-21(b), 16-8-41(b), and 16-11-106(b); under O.C.G.A. § 17-10-10(a), it was within the trial court's discretion to order that the defendant's sentences on armed robbery and aggravated assault run consecutively. *McKenzie v. State*, 302 Ga. App. 538, 691 S.E.2d 352 (2010).

**Sentence improper.** — Trial court erred in sentencing the defendant on the count of the indictment charging the defendant with making an assault upon the victim with intent to murder in violation of O.C.G.A. § 16-5-21(a) after sentencing the defendant to life in prison for malice murder because the aggravated assault upon the victim and the murder of the victim occurred simultaneously; thus, the evidence used to prove the aggravated assault offense was established by the same, but not all, of the facts required to prove malice murder. *Gresham v. State*, No. S11A0382, 2011 Ga. LEXIS 291 (Apr. 18, 2011).

**Conduct sufficient for sentence enhancement.** — Four-level enhancement

under U.S. Sentencing Guidelines Manual § 2K2.1(b)(6) was proper because the district court found that the defendant shot at people allegedly intending to rob the defendant's store, the act constituted the felony offense of aggravated assault under O.C.G.A. § 16-5-21, and the discharge of the gun was relevant conduct under U.S. Sentencing Guidelines Manual § 1B1.3(a)(1) because the discharge occurred during the commission of the offense of conviction under 18 U.S.C. § 922. *United States v. Sako*, No. 07-12834, 2008 U.S. App. LEXIS 7449 (11th Cir. Apr. 2, 2008) (Unpublished).

**Sufficient findings warranting restrictive custody for juvenile.** — Juvenile court did not err in determining that a defendant juvenile was in need of restrictive custody with thirty months of confinement in a youth detention center because: (1) the court complied with O.C.G.A. § 15-11-63(c) by making specific written findings of fact as to each of the statutory elements; (2) the court's findings analyzed the defendant's needs and best interest; and (3) the court properly considered the report of a psychological evaluation performed on the defendant, along with the defendant's background and prior juvenile history, in making the court's determination that the defendant's needs would be better served with restrictive custody; the juvenile court's findings accurately reflected the nature and circumstances of the aggravated assault the defendant committed, including the facts that the victim did receive a serious injury when the defendant shot her in the head and that she had to receive medical treatment for her head injury, and the juvenile court's findings as to those basic facts were supported by the trial evidence and showed circumstances that authorized the order for restrictive custody. *In the Interest of I.C.*, 300 Ga. App. 683, 686 S.E.2d 279 (2009).

**Ineffective counsel not established.** — In a prosecution for aggravated assault, despite the fact that defendant failed to satisfy defendant's responsibility under the Rules of the Georgia Court of Appeals, after a review of the record in the appellate court's discretion, defendant's claim of ineffective assistance of counsel failed, as

defendant's trial counsel's stipulation to a witness' prior testimony, made under oath, before the judge, and subject to trial counsel's searching cross-examination on defendant's behalf regarding this same case, did not constitute an unreasonable or incompetent strategy. *Stuart v. State*, 274 Ga. App. 120, 616 S.E.2d 855 (2005).

Given the overwhelming evidence of the defendant's guilt with respect to an aggravated assault charge, and because no reasonable probability existed that the outcome of the trial with respect to that charge would have been different had the jury not been presented evidence of the temporary protective order, and the result would not have changed even if trial counsel had stipulated to the existence of the temporary protective order to avoid its presentment to the jury, trial counsel did not provide ineffective assistance of counsel in defending the charge. *Ford v. State*, 283 Ga. App. 460, 641 S.E.2d 671 (2007).

Because defense counsel was not ineffective in: (1) failing to investigate the victim's reputation for violence and introduce evidence of that victim's prior violent acts; (2) failing to investigate the defendant's medical records; (3) failing to investigate a state witness's convictions for crimes of moral turpitude and request an impeachment charge concerning that witness; (4) advising defendant not to testify; and (5) failing to present evidence or argument at sentencing, the defendant's motion for a new trial was properly denied and the aggravated assault conviction was upheld. *Cross v. State*, 285 Ga. App. 518, 646 S.E.2d 723 (2007), cert. denied, 2007 Ga. LEXIS 680 (Ga. 2007).

**Ineffective counsel established as to aggravated assault but not as to other charge.** — Because the defendant presented sufficient evidence to show that trial counsel was ineffective in failing to stipulate to the defendant's felon status or to obtain a jury charge limiting the jury's consideration of the defendant's criminal history, such failures prejudiced the defendant's defense sufficiently to require a new trial on a charge of aggravated assault; however, given the defendant's admission to possessing a gun at the time of the altercation, no prejudice resulted to warrant reversal and a new trial on the

possession of a firearm by a convicted felon conviction. *Starling v. State*, 285 Ga. App. 474, 646 S.E.2d 695 (2007).

Cited in *Middlebrooks v. State*, 107 Ga. App. 587, 130 S.E.2d 798 (1963); *Vanleeward v. Rutledge*, 369 F.2d 584 (5th Cir. 1966); *Lingo v. State*, 226 Ga. 496, 175 S.E.2d 657 (1970); *Teal v. State*, 122 Ga. App. 532, 177 S.E.2d 840 (1970); *Barrett v. State*, 123 Ga. App. 210, 180 S.E.2d 271 (1971); *Summerour v. State*, 124 Ga. App. 484, 184 S.E.2d 365 (1971); *Hobbs v. State*, 229 Ga. 556, 192 S.E.2d 903 (1972); *Hewitt v. State*, 127 Ga. App. 180, 193 S.E.2d 47 (1972); *Smith v. State*, 127 Ga. App. 468, 193 S.E.2d 921 (1972); *Collins v. State*, 129 Ga. App. 87, 198 S.E.2d 707 (1973); *Ward v. State*, 231 Ga. 484, 202 S.E.2d 421 (1973); *Cain v. State*, 232 Ga. 804, 209 S.E.2d 158 (1974); *Harvey v. State*, 233 Ga. 41, 209 S.E.2d 587 (1974); *Lowe v. State*, 133 Ga. App. 420, 210 S.E.2d 869 (1974); *Barker v. State*, 233 Ga. 781, 213 S.E.2d 624 (1975); *Long v. State*, 233 Ga. 926, 213 S.E.2d 853 (1975); *Chappell v. State*, 134 Ga. App. 375, 214 S.E.2d 392 (1975); *Jackson v. State*, 234 Ga. 549, 216 S.E.2d 834 (1975); *Jones v. State*, 234 Ga. 648, 217 S.E.2d 597 (1975); *Hale v. State*, 135 Ga. App. 625, 218 S.E.2d 643 (1975); *Davis v. State*, 136 Ga. App. 749, 222 S.E.2d 188 (1975); *Baker v. State*, 236 Ga. 754, 225 S.E.2d 269 (1976); *Spriggs v. State*, 139 Ga. App. 586, 228 S.E.2d 727 (1976); *Ledford v. State*, 237 Ga. 628, 229 S.E.2d 403 (1976); *Fountain v. York*, 237 Ga. 784, 229 S.E.2d 629 (1976); *Smith v. State*, 140 Ga. App. 395, 231 S.E.2d 143 (1976); *Gillespie v. State*, 140 Ga. App. 408, 231 S.E.2d 154 (1976); *Robertson v. State*, 140 Ga. App. 506, 231 S.E.2d 367 (1976); *Bruce v. State*, 142 Ga. App. 211, 235 S.E.2d 606 (1977); *Carroll v. State*, 143 Ga. App. 230, 237 S.E.2d 703 (1977); *Leach v. State*, 143 Ga. App. 598, 239 S.E.2d 177 (1977); *Braxton v. State*, 240 Ga. 10, 239 S.E.2d 339 (1977); *Tucker v. State*, 144 Ga. App. 30, 240 S.E.2d 304 (1977); *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977); *Smith v. State*, 144 Ga. App. 785, 242 S.E.2d 376 (1978); *Rush v. State*, 145 Ga. App. 745, 245 S.E.2d 34 (1978); *Murphy v. State*, 146 Ga. App. 721, 247 S.E.2d 186 (1978); *White v. State*, 147 Ga. App. 260, 248 S.E.2d 540 (1978);

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Webster v. State, 147 Ga. App. 322, 248 S.E.2d 697 (1978); Peterkin v. State, 147 Ga. App. 437, 249 S.E.2d 152 (1978); Garrett v. State, 147 Ga. App. 500, 249 S.E.2d 315 (1978); Sprouse v. State, 242 Ga. 831, 252 S.E.2d 173 (1979); Ballard v. State, 150 Ga. App. 704, 258 S.E.2d 331 (1979); Martin v. State, 151 Ga. App. 9, 258 S.E.2d 711 (1979); Savage v. State, 152 Ga. App. 392, 263 S.E.2d 218 (1979); Bill v. State, 153 Ga. App. 131, 264 S.E.2d 582 (1980); Dean v. State, 245 Ga. 503, 265 S.E.2d 805 (1980); Henderson v. State, 153 Ga. App. 801, 266 S.E.2d 522 (1980); Marable v. State, 154 Ga. App. 115, 267 S.E.2d 837 (1980); Hayslip v. State, 154 Ga. App. 835, 270 S.E.2d 61 (1980); Johnson v. State, 156 Ga. App. 411, 274 S.E.2d 778 (1980); State v. Williams, 247 Ga. 200, 275 S.E.2d 62 (1981); McMillan v. State, 157 Ga. App. 694, 278 S.E.2d 478 (1981); Delano v. State, 158 Ga. App. 296, 279 S.E.2d 743 (1981); Craft v. State, 158 Ga. App. 745, 282 S.E.2d 203 (1981); Garard v. State, 159 Ga. App. 248, 283 S.E.2d 27 (1981); Jackson v. State, 248 Ga. 480, 284 S.E.2d 267 (1981); Fletcher v. State, 159 Ga. App. 789, 285 S.E.2d 762 (1981); Bundren v. State, 160 Ga. App. 367, 287 S.E.2d 248 (1981); Goodman v. Davis, 249 Ga. 11, 287 S.E.2d 26 (1982); Shelton v. State, 161 Ga. App. 524, 289 S.E.2d 768 (1982); Carter v. State, 162 Ga. App. 44, 290 S.E.2d 143 (1982); Miller v. State, 162 Ga. App. 759, 292 S.E.2d 481 (1982); Dunbar v. State, 163 Ga. App. 243, 292 S.E.2d 897 (1982); Merrell v. State, 162 Ga. App. 886, 293 S.E.2d 474 (1982); Smith v. State, 249 Ga. 801, 294 S.E.2d 525 (1982); Chastain v. State, 163 Ga. App. 678, 296 S.E.2d 69 (1982); Talley v. State, 164 Ga. App. 150, 296 S.E.2d 173 (1982); Jester v. State, 250 Ga. 119, 296 S.E.2d 555 (1982); Simmons v. State, 164 Ga. App. 643, 298 S.E.2d 313 (1982); Richardson v. State, 250 Ga. 506, 299 S.E.2d 715 (1983); Rozier v. State, 165 Ga. App. 178, 300 S.E.2d 194 (1983); Brown v. State, 165 Ga. App. 799, 302 S.E.2d 630 (1983); Bert v. State, 169 Ga. App. 628, 314 S.E.2d 466 (1984); Hartman v. State, 170 Ga. App. 195, 316 S.E.2d 820 (1984); Graham v. State, 171 Ga. App. 242, 319

S.E.2d 484 (1984); Fobbs v. State, 171 Ga. App. 352, 319 S.E.2d 522 (1984); McWilliams v. State, 172 Ga. App. 55, 322 S.E.2d 87 (1984); Lester v. State, 173 Ga. App. 300, 325 S.E.2d 912 (1985); Shepherd v. State, 173 Ga. App. 499, 326 S.E.2d 596 (1985); Howard v. State, 173 Ga. App. 585, 327 S.E.2d 554 (1985); Miller v. State, 174 Ga. App. 703, 331 S.E.2d 616 (1985); Green v. State, 175 Ga. App. 92, 332 S.E.2d 385 (1985); Stevens v. State, 176 Ga. App. 583, 336 S.E.2d 846 (1985); McCrary v. State, 176 Ga. App. 683, 337 S.E.2d 442 (1985); Gabler v. State, 177 Ga. App. 3, 338 S.E.2d 469 (1985); Turner v. State, 178 Ga. App. 274, 342 S.E.2d 759 (1986); Hiers v. State, 179 Ga. App. 181, 345 S.E.2d 900 (1986); Allen v. State, 180 Ga. App. 701, 350 S.E.2d 478 (1986); Parrish v. State, 182 Ga. App. 247, 355 S.E.2d 682 (1987); Johnson v. State, 182 Ga. App. 822, 357 S.E.2d 161 (1987); Jackson v. State, 182 Ga. App. 885, 357 S.E.2d 321 (1987); Allison v. State, 184 Ga. App. 294, 361 S.E.2d 271 (1987); Williams v. State, 185 Ga. App. 633, 365 S.E.2d 491 (1988); Curtis v. State, 190 Ga. App. 173, 378 S.E.2d 516 (1989); Ross v. State, 192 Ga. App. 65, 383 S.E.2d 627 (1989); Lubiano v. State, 192 Ga. App. 272, 384 S.E.2d 410 (1989); Blackmon v. State, 197 Ga. App. 133, 397 S.E.2d 728 (1990); State v. McBride, 261 Ga. 60, 401 S.E.2d 484 (1991); Tate v. State, 198 Ga. App. 276, 401 S.E.2d 549 (1991); Jones v. State, 198 Ga. App. 377, 401 S.E.2d 584 (1991); Strickland v. State, 198 Ga. App. 570, 402 S.E.2d 532 (1991); Brooks v. State, 199 Ga. App. 525, 405 S.E.2d 343 (1991); Moore v. State, 207 Ga. App. 892, 429 S.E.2d 335 (1993); Davis v. State, 209 Ga. App. 187, 433 S.E.2d 366 (1993); Smiley v. State, 263 Ga. 716, 438 S.E.2d 75 (1994); Williams v. State, 214 Ga. App. 834, 449 S.E.2d 532 (1994); Shorter v. State, 270 Ga. 280, 507 S.E.2d 757 (1998); Mangham v. State, 234 Ga. App. 567, 507 S.E.2d 806 (1998); Busch v. State, 234 Ga. App. 766, 507 S.E.2d 868 (1998); Cockrell v. State, 248 Ga. App. 359, 545 S.E.2d 600 (2001); Reyes v. State, 250 Ga. App. 769, 552 S.E.2d 918 (2001); Cannon v. State, 250 Ga. App. 777, 552 S.E.2d 922 (2001); In re A.A., 253 Ga. App. 858, 560 S.E.2d 763 (2002); Montford v. State, 254 Ga. App.

524, 564 S.E.2d 216 (2002); Webb v. State, 256 Ga. App. 653, 569 S.E.2d 596 (2002); Anderson v. State, 257 Ga. App. 602, 571 S.E.2d 815 (2002); Adams v. State, 275 Ga. 867, 572 S.E.2d 545 (2002); Shields v. State, 259 Ga. App. 906, 578 S.E.2d 566 (2003); Jackson v. State, 262 Ga. App. 451, 585 S.E.2d 745 (2003); Eidson v. State, 262 Ga. App. 664, 586 S.E.2d 362 (2003); Hewitt v. State, 277 Ga. 327, 588 S.E.2d 722 (2003); Hill v. State, 268 Ga. App. 642, 602 S.E.2d 348 (2004); Blake v. State, 272 Ga. App. 181, 612 S.E.2d 33 (2005); Price v. State, 281 Ga. App. 844, 637 S.E.2d 468 (2006); Rivera v. State, 282 Ga. 355, 647 S.E.2d 70 (2007); Dalton v. State, 282 Ga. 300, 647 S.E.2d 580 (2007); Spiller v. State, 282 Ga. 351, 647 S.E.2d 64 (2007); Whitaker v. State, 287 Ga. App. 465, 652 S.E.2d 568 (2007); Miller v. Martin, No. 1:04-cv-1120-WSD-JFK, 2007 U.S. Dist. LEXIS 61192 (N.D. Ga. Aug. 20, 2007); Robinson v. State, 288 Ga. App. 219, 653 S.E.2d 810 (2007); Beals v. State, 288 Ga. App. 815, 655 S.E.2d 687 (2007); Grant v. State, 289 Ga. App. 230, 656 S.E.2d 873 (2008); Smith v. State, 289 Ga. App. 742, 658 S.E.2d 156 (2008), cert. denied, 2008 Ga. LEXIS 462 (Ga. 2008); Mitchell v. State, 283 Ga. 341, 659 S.E.2d 356 (2008); Louis v. State, 290 Ga. App. 106, 658 S.E.2d 897 (2008); Hyde v. State, 291 Ga. App. 662, 662 S.E.2d 764 (2008); Sillah v. State, 291 Ga. App. 848, 663 S.E.2d 274 (2008); Lemming v. State, 292 Ga. App. 138, 663 S.E.2d 375 (2008); Jennings v. State, 292 Ga. App. 149, 664 S.E.2d 248 (2008); Moran v. State, 293 Ga. App. 279, 666 S.E.2d 726 (2008); Greene v. State, 295 Ga. App. 803, 673 S.E.2d 292 (2009); Hayes v. State, 298 Ga. App. 338, 680 S.E.2d 182 (2009); Gonzales v. State, 298 Ga. App. 821, 681 S.E.2d 248 (2009); Bonker v. State, 298 Ga. App. 867, 681 S.E.2d 256 (2009); Jacobs v. State, 299 Ga. App. 368, 683 S.E.2d 64 (2009); Crawford v. State, 301 Ga. App. 633, 688 S.E.2d 409 (2009); Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742 (2010); Smith v. State, No. A10A2204, 2011 Ga. App. LEXIS 229 (Mar. 17, 2011).

### Indictment

**Indictment must charge methods conjunctively.** — Although the aggra-

vated assault statute contains disjunctively several methods by which the crime may be committed, proof of any one of which is sufficient to constitute the crime, an indictment must charge such methods conjunctively if it charges more than one of them. Gutierrez v. State, 235 Ga. App. 878, 510 S.E.2d 570 (1998).

**Indictment sufficient to charge aggravated assault.** — Indictment alleging that defendant made “an assault upon the person of Joe Jones, with a handgun, a deadly weapon” was sufficient to charge the crime of aggravated assault. Wallace v. State, 216 Ga. App. 718, 455 S.E.2d 615 (1995); Griffin v. State, 241 Ga. App. 783, 527 S.E.2d 577 (1999).

Indictment charging that defendant’s fists were likely to result in serious bodily injury was sufficient, and no reference to deadly weapons was required. Jay v. State, 232 Ga. App. 661, 503 S.E.2d 563 (1998).

In an indictment alleging that defendant assaulted the victim “by kicking her in the head and shoulder area and by striking her with his hands and feet,” it was unnecessary to further allege that defendant used defendant’s own hands and feet as deadly weapons or that there was intent to injure. Gafford v. State, 240 Ga. App. 251, 523 S.E.2d 336 (1999).

Indictment was sufficient to charge aggravated assault, which stated that defendant “did unlawfully make an assault upon the person of [victim], with a knife, the same being an object which when used offensively against a person is likely to result in serious bodily injury. . . .” Merneigh v. State, 242 Ga. App. 735, 531 S.E.2d 152 (2000).

Indictment which alleged that defendant assaulted another person with a box cutter by chasing the other person with the box cutter was sufficient to apprise defendant of the charge. Hogan v. State, 261 Ga. App. 261, 582 S.E.2d 210 (2003).

Defendant’s conviction for aggravated assault under O.C.G.A. § 16-5-21 was affirmed because the trial court did not err when it instructed the jury on the full definition of aggravated assault under § 16-5-21 and there was no reasonable probability that the jury convicted defendant on a portion of the offense that was

**Indictment** (Cont'd)

not charged in the indictment. *Hughes v. State*, 266 Ga. App. 203, 596 S.E.2d 697 (2004).

Defendant's conviction for aggravated assault was affirmed because the trial court did not err when it denied defendant's motion for a directed verdict on the grounds that there was a fatal variance between the indictment and the proof at trial; under the circumstances the terms "choke" and "strangulation" were synonymous. *Hughes v. State*, 266 Ga. App. 203, 596 S.E.2d 697 (2004).

Indictment charging defendant with "aggravated assault (family violence)" and "family violence battery (felony)" in violation of O.C.G.A. § 16-5-21 was sufficient as it informed defendant of the charges and protected defendant against double jeopardy; it was the description in the indictment that characterized the offense charged, not the name given to the offense in the bill of indictment, and mere surplusage did not vitiate an otherwise sufficient indictment. *State v. Barnett*, 268 Ga. App. 900, 602 S.E.2d 899 (2004).

Because a count in an indictment against the defendant alleged that the defendant assaulted the victim with a handgun, a deadly weapon, by engaging in an exchange of gunfire with a codefendant, which resulted in the victim being shot, such language was sufficient to charge the elements of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2); as such, the defendant's counsel was not ineffective in failing to file a demurrer to challenge that count. *Barber v. State*, 273 Ga. App. 129, 614 S.E.2d 105 (2005).

In two actions charging the defendant with being a party to the crime of aggravated assault allegedly committed with a codefendant, given that the first of two indictments failed to set out the elements of aggravated assault, and the state offered to nolle pros the same, the indictment was properly dismissed; however, a second and superseding indictment survived demurrer, as the elements of aggravated assault were sufficiently set out therein, and the disjunctive way that the offense was charged was not fatally defective as to the defendant, but simply lim-

ited the state's option of proving at trial the manner in which the aggravated assault was committed. *State v. Daniels*, 281 Ga. App. 224, 635 S.E.2d 835 (2006).

Because an indictment, which included charging language that the defendant "unlawfully, and with malice aforethought, caused the death of the victim by striking," placed the defendant on notice of a possible conviction of an assault upon the victim with the intent to murder or commit a violent injury, the defendant could be convicted of aggravated assault as a lesser included crime of malice murder; the only difference was that the malice murder indictment alleged that the defendant actually accomplished the murder, in addition to having intended to accomplish the murder. *Reagan v. State*, 281 Ga. App. 708, 637 S.E.2d 113 (2006).

There was no deficiency in an indictment charging the defendant with aggravated assault by making an assault upon the person of the victim with a certain semiautomatic pistol; the charge of aggravated assault tracked the statutory language of the offense, contained the elements thereof, and gave the defendant sufficient notice of the charge that the defendant needed to be prepared to defend. *Garza v. State*, 285 Ga. App. 902, 648 S.E.2d 84 (2007), vacated, in part, 300 Ga. App. 352, 685 S.E.2d 366 (2009).

Court of appeals rejected the defendant's claim that the indictment filed was fatally defective as the indictment properly charged the defendant with aggravated assault, specifying that the defendant's hands and feet "were likely to result in serious bodily injury." *May v. State*, 287 Ga. App. 407, 651 S.E.2d 510 (2007).

With respect to an aggravated assault conviction, a trial court did not err by denying defendant's motion in arrest of the judgment on the basis that the rule of lenity required that defendant be sentenced to a lesser charge of simple battery as the evidence was sufficient to support the aggravated assault conviction, and the indictment was not void on the indictment's face or otherwise deficient. *Armstrong v. State*, 292 Ga. App. 145, 664 S.E.2d 242 (2008).

As an indictment against the defendant

inmate charged aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), based on the striking of a victim with an object likely to result in serious bodily injury, all of the essential elements were stated and the indictment was not deficient; the indictment was not void for failing to expressly allege the criminal intent. *Powell v. State*, 297 Ga. App. 833, 678 S.E.2d 524 (2009).

Indictment charged the defendant with the aggravated assault of the victim by assaulting the victim with the defendant's hands, which when used offensively against another person was likely to result in serious bodily injury, by striking the victim repeatedly about the head and face with the defendant's hands; thus, it was unnecessary for the indictment to allege that the defendant used hands as a deadly weapon. *Walker v. State*, 298 Ga. App. 265, 679 S.E.2d 814 (2009).

Trial court did not err in denying a defendant's motion for an out-of-time appeal on the grounds that a count in the indictment alleging aggravated assault was void because the indictment set forth all of the necessary elements of aggravated assault, specifically citing the aggravated assault statute, and informing the defendant that the defendant was accused of unlawfully assaulting the person of defendant's daughter, with objects, to wit: hands and an object, the description of which being unknown, which when used offensively against a person was likely to and did result in serious bodily injury. *Johnson v. State*, 286 Ga. 432, 687 S.E.2d 833 (2010).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal on the ground that there was insufficient evidence that the crimes for which the defendant was charged, aggravated assault, making terroristic threats, and cruelty to children in the third degree, were committed on the date alleged in the indictment because there was sufficient evidence to support the allegations of the indictment; the exact date of the crimes was not a material allegation of the indictment because the exact date was not an essential element with respect to any of the charged offenses, and the date of the crimes proved at trial was prior to the

return of the indictment and within the limitation periods for the crimes. *Coats v. State*, 303 Ga. App. 818, 695 S.E.2d 285 (2010).

There was no defect in the aggravated assault counts of an indictment a grand jury returned against the defendant because those counts alleged that the defendant did make an assault upon the person of a five-year-old boy and his mother with a knife, a deadly weapon; the language of the indictment tracked that of O.C.G.A. § 16-5-21(a)(2) and was not too vague to inform the defendant of the charges against the defendant. *Belcher v. State*, 304 Ga. App. 645, 697 S.E.2d 300 (2010).

**Indictment insufficient to charge aggravated assault.** — An indictment did not set forth the elements of this crime where it failed to state that defendant placed defendant's own hands around the victim's neck in an attempt to use them as deadly weapons, or in an attempt to rape, rob, or murder the victim, and failed to state that, in placing defendant's hands around the victim's neck, defendant intended to inflict a violent injury or place the victim in reasonable apprehension of being injured violently. *Smith v. Hardrick*, 266 Ga. 54, 464 S.E.2d 198 (1995).

Because an indictment did not charge the defendant with all the elements of aggravated assault, it could not support a conviction under O.C.G.A. § 16-5-21(a)(2); therefore, the trial court erred in denying the defendant's motion for an out-of-time appeal. *Fleming v. State*, 276 Ga. App. 491, 623 S.E.2d 696 (2005).

**Admissions in indictment.** — Because the defendant could not admit the charges of aggravated assault and terroristic threats in the indictment and still be innocent, the indictment returned was not defective. *Dudley v. State*, 283 Ga. App. 86, 640 S.E.2d 677 (2006).

**One count indictment was sufficient.** — One-count indictment against the defendant was held sufficient and did not violate the defendant's due process rights, because the indictment charged the defendant with felony murder by causing the death of the victim while committing the felony of aggravated assault and was sufficient to have withstood a general

**Indictment (Cont'd)**

demurrer; the fact that the defendant failed to raise a special demurrer to the indictment prior to pleading to the merits of the indictment was a waiver of that argument. *Stinson v. State*, 279 Ga. 177, 611 S.E.2d 52 (2005).

**Indictment not required to allege party status.** — Indictment's failure to allege that a defendant was a party to aggravated assault, aggravated battery, and first-degree child cruelty under O.C.G.A. §§ 16-5-21(a), 16-5-24(a), and 16-5-70(b) did not require a showing that the defendant was the principal perpetrator under O.C.G.A. § 16-2-21; the defendant's status as a party to the crimes was not an essential element used to increase the sentences for the crimes, and the trial court did not err in instructing the jury that the defendant could be convicted either as the principal perpetrator of the crimes or as a party thereto. *Hill v. State*, 282 Ga. App. 743, 639 S.E.2d 637 (2006).

**Indictment sufficient for assault by dentist against patient.** — Count nine in an indictment charging a defendant, allegedly an oral surgeon, with aggravated assault under O.C.G.A. § 16-5-21(a)(2) was sufficient under O.C.G.A. § 17-7-54(a) because the general intent required under § 16-5-21(a)(2) did not need to be expressly alleged and the use of the phrase "serious bodily harm" was substantially the same as the statutory language; additional pleading was not required simply because the case involved a doctor and a patient. *State v. Austin*, 297 Ga. App. 478, 677 S.E.2d 706 (2009).

**Indictment alleging offensive use of fists also sufficient allegation of simple battery.** — After the defendant was indicted for aggravated assault and convicted of simple battery, language of the indictment tracking the aggravated assault statute by alleging that the offensive use of fists and feet resulted in bodily injury was also a sufficient allegation of simple battery. *Buchanan v. State*, 173 Ga. App. 554, 327 S.E.2d 535 (1985).

**No fatal variance.** — Fact that an indictment charged the defendant with aggravated assault and battery by slicing

the victim's neck with a knife, but the evidence showed the defendant used a box cutter, did not constitute a fatal variance between the indictment and the proof, because the defendant was sufficiently informed of the charges and faced no danger of further prosecution arising out of the incident. *Lawson v. State*, 278 Ga. App. 852, 630 S.E.2d 131 (2006).

In a case when the defendant, a juvenile, was adjudicated delinquent based on aggravated assault, there was not a fatal variance between the allegations and the proof. The petition alleged that the defendant's use of a baton against a deputy amounted to an assault with an object likely to cause serious bodily injury when used offensively, and the proof supported this conclusion; any variance between the allegation that the defendant actually hit the deputy and proof that the defendant merely advanced on the deputy was thus immaterial. *In the Interest of J.A.C.*, 291 Ga. App. 728, 662 S.E.2d 811 (2008).

**Charge of entire aggravated assault statute not required.** — Trial court did not charge the entire aggravated assault statute, but defined aggravated assault as an "assault done in an aggravated manner," committed when a person assaulted another with a deadly weapon as alleged in the indictment; thus, there was no reasonable probability that the defendant was convicted of aggravated assault in a manner not charged in the indictment. *Garza v. State*, 285 Ga. App. 902, 648 S.E.2d 84 (2007), vacated, in part, 300 Ga. App. 352, 685 S.E.2d 366 (2009).

**Indictment alleging rape and aggravated assault.** — Evidence showed that the kidnapping conviction, O.C.G.A. § 16-5-40(a), was based on evidence showing that when the victim attempted to escape the initial attack, defendant grabbed the victim and dragged the victim to a more secluded area of the trailer park and the aggravated assault with intent to rape conviction, O.C.G.A. § 16-5-21, was based on evidence that defendant beat the victim with the defendant's hands and fists with the intention of raping the victim; thus, the two crimes were separate offenses supported by different facts that did not merge as a matter of law. McGuire

v. State, 266 Ga. App. 673, 598 S.E.2d 55 (2004).

**Indictment alleging aggravated assault and aggravated battery.** — Because a conviction on a charge of aggravated assault could be based on the defendant's act of cutting of the victim's throat, while a conviction on a charge of aggravated battery could be based on the serious disfigurement of the victim's arms, a conviction could be entered on each count; hence, merger did not apply. *Goss v. State*, 289 Ga. App. 734, 658 S.E.2d 168 (2008).

**Failure to file demurrer to indictment charging aggravated assault provided no basis for ineffective assistance of counsel.** — Trial court did not err in denying a defendant's motion for new trial based on the defendant's claim that the defendant was rendered ineffective assistance of counsel as a result of defense counsel failing to file a demurrer to an aggravated assault count on the premise that the allegations in the indictment did not adequately track the language of O.C.G.A. § 16-5-21 as, although the indictment did not state that the defendant used the defendant's hands as deadly weapons, that omission did not render the charge flawed since specific reference to a deadly weapon in an indictment must be seen as a general reference to the aggravating circumstance in § 16-5-21. As a result, any objection or demurrer would have been futile and, as such, the defendant's contention provided no basis for an ineffective assistance of counsel claim. *Hall v. State*, 292 Ga. App. 544, 664 S.E.2d 882 (2008), cert. denied, No. S08C1841, 2008 Ga. LEXIS 926 (Ga. 2008).

**Failure to file demurrer to indictment.** — Defendant's motions for a new trial and in arrest of judgment challenging the wording of the indictment charging the defendant with aggravated assault, O.C.G.A. § 16-5-21(a)(2), (3), were properly denied because the defendant could not have admitted the allegations of the indictment without admitting that the defendant was guilty of a crime, and, under O.C.G.A. § 17-7-110, having failed to file a timely special demurrer, the defendant waived the right to a perfect in-

dictment. *McDaniel v. State*, 298 Ga. App. 558, 680 S.E.2d 593 (2009).

Trial counsel was not ineffective in failing to challenge the felony murder count of an indictment because the indictment contained sufficient facts to put the defendant on notice that the defendant was accused of the death of the victim as a result of an aggravated assault when the indictment alleged a specific, offensive use of the defendant's hands and feet and that when the defendant's hands and feet were used in a particular way they were objects which were likely to and actually did result in serious bodily injury; the absence of self-defense, like general intent, did not have to be expressly alleged in an indictment, and even if some such allegation were necessary, language in the indictment asserting that defendant acted unlawfully and contrary to the laws of the state, the good order, peace, and dignity thereof was sufficient. *Lizana v. State*, 287 Ga. 184, 695 S.E.2d 208 (2010).

### Included Crimes

**Which offense to sentence on.** — When the same facts were used to support aggravated assault and aggravated battery charges, the trial court erred in sentencing defendant on the aggravated assault count, the lesser included offense. *Riden v. State*, 226 Ga. App. 245, 486 S.E.2d 198 (1997).

**Legislative intent as to aggravated assault upon police officer.** — Aggravated assault and aggravated assault upon police officer are separate and distinct crimes. Language in the caption to the bill which stated that the purpose of the statute was to define "the crime of aggravated assault upon a police officer" clearly indicated the intent of the General Assembly. *Bundren v. State*, 247 Ga. 180, 274 S.E.2d 455 (1981); but see *Lambert v. State*, 157 Ga. App. 275, 277 S.E.2d 66 (1981).

**Simple assault is lesser included offense of aggravated assault.** — Simple assault or assault (synonymous terms) is necessarily a lesser included offense of the greater crime of aggravated assault and is an essential part thereof. *Smith v. State*, 140 Ga. App. 395, 231 S.E.2d 143 (1976).

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**Reckless conduct is a lesser included offense of aggravated assault.** Bowers v. State, 177 Ga. App. 36, 338 S.E.2d 457 (1985).

In the defendant's trial on a charge of aggravated assault under O.C.G.A. § 16-5-21(a), the trial court did not err in failing to instruct the jury on reckless conduct under O.C.G.A. § 16-5-60(b) because the latter was not a lesser-included offense of the former; while both offenses proscribed the same general conduct, i.e., subjecting another to actual injury or the possibility of injury, aggravated assault required proof that the forbidden act was intentional, while in the case of reckless conduct, the forbidden act is the product of criminal negligence. Chambers v. State, No. A11A0034, 2011 Ga. App. LEXIS 272 (Mar. 24, 2011).

**Crimes included in aggravated assault with deadly weapon.** — Simple assault under former Code 1933, § 26-1301 (see O.C.G.A. § 16-5-20) and pointing a gun or pistol at another under former Code 1933, § 26-2908 (see O.C.G.A. § 16-11-102) are both misdemeanors and included in the greater crime of aggravated assault with a deadly weapon. Morrison v. State, 147 Ga. App. 410, 249 S.E.2d 131 (1978).

**Possession of firearm.** — Trial court properly refused to merge convictions for possession of a firearm during the commission of a crime and aggravated assault. Pace v. State, 239 Ga. App. 506, 521 S.E.2d 444 (1999).

**Cruelty to children can be lesser included crime** under indictment for aggravated assault with deadly weapon. Williams v. State, 144 Ga. App. 130, 240 S.E.2d 890 (1977).

Cruelty to children count merged into count alleging aggravated assault, where both counts alleged the same facts, i.e., that defendant shot daughter. Cranford v. State, 186 Ga. App. 862, 369 S.E.2d 50 (1988).

**Unauthorized possession of weapon by inmate** is not a lesser included offense of aggravated assault. Weaver v. State, 176 Ga. App. 639, 337 S.E.2d 420 (1985).

**Pointing weapon at another.** — In a homicide trial, defendant's act was clearly the felony of aggravated assault, not the misdemeanor of pointing a weapon at another, where the testimony showed that victim, as well as the three passengers in the victim's car, were aware of and understandably apprehensive of immediate violent injury, and defendant's own testimony revealed that defendant's purpose in pointing the weapon was to place victim in apprehension of immediate violent injury. Thus, the request for a charge on misdemeanor manslaughter was properly denied. Rhodes v. State, 257 Ga. 368, 359 S.E.2d 670 (1987); Rameau v. State, 267 Ga. 261, 477 S.E.2d 118 (1996).

Although pointing a firearm at another is an offense included in aggravated assault, it is not error to refuse a charge on it when the evidence does not reasonably raise the issue that defendant may be guilty of only the lesser crime. Head v. State, 233 Ga. App. 655, 504 S.E.2d 499 (1998); Stobbart v. State, 272 Ga. 608, 533 S.E.2d 379 (2000).

**Offense merged with attempted armed robbery.** — Since the defendant was indicted for aggravated assault for pointing a handgun at a victim, which was also a substantial step toward commission of the armed robbery, the trial court properly merged the defendant's aggravated assault conviction with the attempted armed robbery conviction. McKinney v. State, 274 Ga. App. 32, 619 S.E.2d 299 (2005).

**Merger with armed robbery.** — Evidence identifying the defendant as the perpetrator who stole a victim's car and purse at gunpoint, coupled with evidence of the defendant's flight from police, possession of the stolen car, and possession of the revolver used in the crimes, was sufficient to support convictions for hijacking a motor vehicle, possession of a firearm during the commission of a felony, armed robbery, and aggravated assault with a deadly weapon; however, the conviction and sentence for aggravated assault merged as a matter of fact into the armed robbery conviction and sentence. Doublette v. State, 278 Ga. App. 746, 629 S.E.2d 602 (2006).

Merger of an aggravated assault count

into an armed robbery count was required when the only evidence was that the defendant used a gun to rob the victim. There was not a separate aggravated assault before the robbery began; thus, there having been no additional violence used against the victim, it followed that the evidentiary basis for the aggravated assault conviction was "used up" in proving the armed robbery. *Howard v. State*, 298 Ga. App. 98, 679 S.E.2d 104 (2009).

Trial court did not err in failing to merge counts of armed robbery, O.C.G.A. § 16-8-41(a), and aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), because the assault was completed before the armed robbery; the evidence showed that the defendant confronted the victim by entering the room with a pistol and threatening the victim, at which point, the crime of aggravated assault with a deadly weapon was completed. The evidence further showed that after threatening the victim, presumably to prevent the victim from retaliating against the defendant for a prior altercation, the defendant ordered the victim to empty the victim's pockets at gunpoint and took \$200 from the victim, which comprised the armed robbery. *Ransom v. State*, 298 Ga. App. 360, 680 S.E.2d 200 (2009).

Defendant's sentence for armed robbery, O.C.G.A. § 16-8-41(a), and aggravated assault, O.C.G.A. § 16-5-21(a)(2), was not void as a result of the trial court's failure to merge the convictions because the convictions did not merge for sentencing purposes since they did not involve the same conduct; the crime of armed robbery was complete when the defendant entered a restaurant and, with the use of a handgun, demanded and took money from a waitress, and, after completion of the armed robbery, the defendant pushed the gun against the waitress's neck and asked whether the waitress wanted to die, which formed the basis of the aggravated assault conviction. *McKenzie v. State*, 302 Ga. App. 538, 691 S.E.2d 352 (2010).

Defendant's aggravated assault convictions merged into the defendant's armed robbery convictions because there was no element of aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2),

that was not contained in armed robbery, O.C.G.A. § 16-8-41; aggravated assault with a deadly weapon does not require proof of a fact that armed robbery does not, and because the assault requirement of aggravated assault is the equivalent of the "use of an offensive weapon" requirement of armed robbery, the "deadly weapon" requirement of this form of aggravated assault is the equivalent of the "offensive weapon" requirement of armed robbery. *Long v. State*, 287 Ga. 886, 700 S.E.2d 399 (2010).

Because the defendant's conviction under O.C.G.A. § 16-8-41(a) for armed robbery could be sustained based upon the defendant's conduct with a shotgun, and because the defendant's conviction under O.C.G.A. § 16-5-21(a)(2) for aggravated assault could be sustained based upon the defendant's conduct with a knife, pursuant to O.C.G.A. § 16-1-7(a), the two convictions did not merge. *Johnson v. State*, 305 Ga. App. 838, 700 S.E.2d 726 (2010).

Plea counsel performed deficiently in failing to argue for the merger of the defendant's convictions and sentences for armed robbery, O.C.G.A. § 16-8-41(a), and aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), because the aggravated assault with a deadly weapon charges did not require proof of a fact that the armed robbery charges did not likewise require, and the defendant's aggravated assault convictions unquestionably merged into the defendant's armed-robbery convictions; the armed robbery counts in the indictment provided that the defendant unlawfully, with intent to commit theft, did take property from the person of the victim, by use of an offensive weapon, and the aggravated assault counts provided that the defendant did unlawfully make an assault upon the person of the victim with a steel rod, a deadly weapon, an object, which, when used offensively against a person, was likely to or actually did result in serious bodily injury, by beating the victim about the head and face with the steel rod. *Murray v. State*, 307 Ga. App. 621, 705 S.E.2d 726 (2011).

**Reckless conduct as lesser included offense of aggravated assault with a deadly weapon.** — Where evidence indi-

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cated that defendant might have merely fired a gun up into the air while the police were chasing the car in which defendant was riding, the trial court erred in refusing to charge the jury on the offense of reckless conduct as a lesser included offense of an aggravated assault by attempting to injure. *Shaw v. State*, 238 Ga. App. 757, 519 S.E.2d 486 (1999).

**Charge on reckless conduct not warranted.** — When the evidence, including defendant's own admissions, clearly established that the defendant repeatedly fired the weapon with the intention of scaring the victims, even if the defendant did not intend to hit them, the evidence established aggravated assault and there was no error in the failure to give an instruction on reckless conduct. *Huguley v. State*, 242 Ga. App. 645, 529 S.E.2d 915 (2000).

**Rape includes lesser offense of assault with intent to rape or aggravated assault.** *Wingfield v. State*, 231 Ga. 92, 200 S.E.2d 708 (1973), cert. denied, 416 U.S. 942, 94 S. Ct. 1949, 40 L. Ed. 2d 294 (1974).

**Aggravated assault and kidnapping.** — Aggravated assault, with intent to rob as the factor in aggravation, is not a lesser included offense of kidnapping with bodily injury. *Brown v. State*, 232 Ga. App. 787, 504 S.E.2d 452 (1998).

Evidence that was required to convict defendant of three counts of aggravated assault differed from that which was required to prove the three kidnapping charges against defendant, as the aggravated assaults occurred when deadly weapons were pointed at the victims shortly after defendant and another assailant entered a certain store, whereas the kidnappings were complete when the three victims were later dragged from one room to another; thus, the aggravated assault convictions did not merge into the kidnapping convictions for sentencing purposes. *Phanamixay v. State*, 260 Ga. App. 177, 581 S.E.2d 286 (2003).

Trial court's decision not to merge the conviction of kidnapping, in violation of O.C.G.A. § 16-5-40, with the defendant's convictions for aggravated assault and

armed robbery, in violation of O.C.G.A. §§ 16-5-21 and 16-8-41, was proper under O.C.G.A. § 16-1-7(a), as the facts that supported the kidnapping were not the same as those that supported the convictions for the other offenses; the kidnapping occurred when the defendant forced three store employees into an office, the aggravated assaults occurred when the defendant pointed a gun at one employee's head and hit another employee with it, and the armed robbery occurred when the defendant took money from the store safe. *Hill v. State*, 279 Ga. App. 666, 632 S.E.2d 443 (2006).

Kidnapping, aggravated assault, and rape were separate offenses, completed individually, and did not merge as a matter of fact; thus, the trial court did not err in refusing to merge the kidnapping counts into the aggravated assault and rape counts for purposes of sentencing. *Dasher v. State*, 281 Ga. App. 326, 636 S.E.2d 83 (2006).

Because there was independent evidence to support each of the offenses as indicted, a defendant's aggravated assault conviction did not merge as a matter of fact with either the aggravated battery or kidnapping with bodily injury convictions. *Pitts v. State*, 287 Ga. App. 540, 652 S.E.2d 181 (2007).

It was error for the trial court to impose separate sentences for the defendant's aggravated assault convictions because the defendant's convictions for aggravated assault merged as a matter of fact with the defendant's conviction for kidnapping with bodily injury. *Delgiudice v. State*, 308 Ga. App. 397, 707 S.E.2d 603 (2011).

**Aggravated assault is included offense of kidnapping with bodily injury.** — Because the elements of the crime of aggravated assault must have been proved in order to sustain a conviction for the crime of kidnapping with bodily injury, the aggravated assault is an included offense of the crime of kidnapping with bodily injury. *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, cert. denied, 454 U.S. 882, 102 S. Ct. 366, 70 L. Ed. 2d 192 (1981), overruled on other grounds, *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442 (1982), but see, *Morgan v. State*, 267 Ga. 203, 476 S.E.2d 747 (1996); *Herring v. State*, 224

Ga. App. 809, 481 S.E.2d 842 (1997).

**When assault is committed with deadly weapon, simple assault is not lesser included offense.** Hightower v. State, 137 Ga. App. 790, 224 S.E.2d 842 (1976).

When assault is committed with gun, simple assault is not a lesser included offense. Zachery v. State, 158 Ga. App. 448, 280 S.E.2d 860 (1981).

Simple assault is not a lesser included offense of an aggravated assault in which a gun or a knife is alleged to have been used as a deadly weapon. Weaver v. State, 182 Ga. App. 806, 357 S.E.2d 153 (1987).

**Aggravated assault not lesser included offense.** — When the evidence used to prove the commission of an aggravated assault was not used at all in proving the commission of an aggravated battery, defendant's argument that the aggravated assault was a lesser included offense of the aggravated battery was without merit. Grace v. State, 262 Ga. 746, 425 S.E.2d 865 (1993).

When an indictment alleged that an aggravated assault was committed with a firearm by shooting the victims, and an armed robbery alleged the use of an offensive weapon, the aggravated assault charge was not a lesser included offense of armed robbery as a matter of law, and the two offenses rarely merged as a matter of fact. Silvers v. State, 278 Ga. 45, 597 S.E.2d 373 (2004).

**Mutiny in a penal institution and aggravated assault** require proof of different elements and, therefore, the former offense cannot be a lesser included offense of the latter. Bierria v. State, 232 Ga. App. 622, 502 S.E.2d 542 (1998).

**Simple battery.** — When an assault is committed with a deadly weapon, the simple battery is not a lesser included offense under aggravated assault. Powell v. State, 140 Ga. App. 36, 230 S.E.2d 90 (1976).

When the defendant was indicted for aggravated assault upon the person of another "with a bottle, an object which when used offensively against a person is likely to or actually does result in serious bodily injury," simple battery was a lesser included offense of aggravated assault, and the jury was properly instructed as to the lesser included offense. Haun v. State,

189 Ga. App. 884, 377 S.E.2d 878, cert. denied, 189 Ga. App. 912, 377 S.E.2d 878 (1989).

Offense of battery is not necessarily a lesser included offense of aggravated assault. Although the element of physical or bodily harm is a requisite for battery, since the physical or bodily harm is committed with a deadly weapon, simple battery is not a lesser included offense. Givens v. State, 199 Ga. App. 845, 406 S.E.2d 272 (1991); Van Doran v. State, 244 Ga. App. 496, 53 S.E.2d 163 (2000).

**"Affray"** is not a lesser-included offense of aggravated assault. Rowland v. State, 228 Ga. App. 66, 491 S.E.2d 119 (1997).

**When assault occurred after aggravated battery,** and the evidence indicated that any intent defendant may have had to kill her husband before he was shot was abandoned immediately thereafter, when she prevented her son from shooting her husband a second time, it was error to deny her motion for a directed verdict of acquittal as to the offense of aggravated assault with intent to murder. Overstreet v. State, 182 Ga. App. 809, 357 S.E.2d 103 (1987).

**Aggravated assault merged into aggravated battery.** — Because the indictment alleged only one act, the shooting of the victim, and because the evidence showed only that defendant's actions were the result of a single act of firing a series of shots in quick succession at the victim, the convictions for aggravated assault merged into the aggravated battery. Brown v. State, 246 Ga. App. 60, 539 S.E.2d 545 (2000).

**Aggravated assault did not merge with aggravated battery.** — Defendant's convictions of aggravated assault and aggravated battery against the same victim did not merge for sentencing purposes, as the two offenses were proven with different facts: the assault occurred when defendant threatened the victim with a gun, and the battery occurred when defendant later shot the victim in the arm. Pennymon v. State, 261 Ga. App. 450, 582 S.E.2d 582 (2003).

Trial court did not err in refusing to merge the defendant's convictions for aggravated assault and aggravated battery, O.C.G.A. §§ 16-5-21 and 16-5-24, because

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the offenses were established by proving different facts; the defendant was found guilty of aggravated assault because there was evidence that the defendant assaulted the victim with a screwdriver, and the defendant was found guilty of aggravated battery because the victim's left lung was nonfunctional for a period of time due to the stab wound. *Works v. State*, 301 Ga. App. 108, 686 S.E.2d 863 (2009), cert. denied, No. S10C0458, 2010 Ga. LEXIS 251 (Ga. 2010).

**Carrying weapon without license** is not included within aggravated assault with deadly weapon. *Thomas v. State*, 128 Ga. App. 538, 197 S.E.2d 452 (1973).

**Elements of interference with government property** are not included in the elements required for aggravated assault. *Hyman v. State*, 222 Ga. App. 419, 474 S.E.2d 243 (1996).

**Aggravated assault not lesser included offense of burglary.** — Neither burglary nor aggravated assault was established by proof of the same or less than all the facts required to prove the other so the argument that an aggravated assault conviction must merge with a burglary conviction is without merit. *Taylor v. State*, 157 Ga. App. 212, 276 S.E.2d 691 (1981).

**Attempted armed robbery and aggravated assault** are separate and distinct crimes, and separate sentences were properly imposed. *Lambert v. State*, 157 Ga. App. 275, 277 S.E.2d 66 (1981).

Aggravated assault is not included in attempted armed robbery as a matter of law, although these two offenses may as a matter of fact merge if the same facts are used to prove both offenses. However, where the underlying facts show that one crime was completed prior to the second crime, so that the crimes are separate as a matter of law, there is no merger. *Gaither v. Cannida*, 258 Ga. 557, 372 S.E.2d 429 (1988).

Convictions and sentences for both armed robbery and aggravated assault were proper, where each offense charged was clearly supported by its own set of facts. *Millines v. State*, 188 Ga. App. 655, 373 S.E.2d 838 (1988).

**Attempted armed robbery as included offense of aggravated assault.**

— Trial court did not err by refusing to charge the jury that the jury could find the defendant guilty of attempted armed robbery as an included offense of aggravated assault with intent to rob since the defendant was not entitled to a charge or verdict of attempted armed robbery when that offense could only be proved by showing that the defendant brandished a weapon in the faces of the victims with the intent to rob the victims, that is, that the defendant actually committed the greater offense, a completed aggravated assault with the intent to rob. Since the evidence that proved that the defendant committed an attempted armed robbery necessarily proved that the defendant committed the greater, completed crime of aggravated assault with intent to rob, there was no evidence that the defendant committed only the offense of attempted armed robbery and, therefore, the defendant was not entitled to a charge on that lesser included offense. *Pilkington v. State*, 298 Ga. App. 317, 680 S.E.2d 164 (2009), cert. denied, No. S09C1717, 2010 Ga. LEXIS 54 (Ga. 2010).

**Conviction for aggravated assault did not merge with conviction for armed robbery** where the evidence showed that the defendant had completed the armed robbery at the time defendant assaulted the security guard. *Loumakis v. State*, 179 Ga. App. 294, 346 S.E.2d 373 (1986).

Offenses of aggravated assault and robbery did not merge as a matter of law, where although the occurrences happened within a short span of time, the robbery had been completed at the time defendant fired the gun and involved different actions and intents. *Phelps v. State*, 194 Ga. App. 493, 390 S.E.2d 899 (1990).

Aggravated assault conviction did not merge with armed robbery offenses for sentencing purposes because each crime required proof of an additional fact as the robbery required proof that defendant took the property of another, which was not required to prove aggravated assault, and assault required proof that the victim was placed in reasonable fear of immediately receiving a violent injury, which

armed robbery did not require. *Nava v. State*, 301 Ga. App. 497, 687 S.E.2d 901 (2009).

**Aggravated assault did not merge with kidnapping and armed robbery charges because each count relied on separate facts.** *Howard v. State*, 230 Ga. App. 437, 496 S.E.2d 532 (1998).

**Aggravated assault with intent to rob did not merge with kidnapping offense.** — Defendant completed the act of aggravated assault with intent to rob when defendant initially approached the victim and told the victim that defendant intended to steal the car; this crime did not merge into the conviction for kidnapping, which was completed later. *Robinson v. State*, 271 Ga. App. 768, 610 S.E.2d 706 (2005).

**Aggravated assault merged with kidnapping with bodily injury.** — An aggravated assault based on defendant's choking of the victim with an electrical cord merged into the kidnapping with bodily injury, and the sentence imposed for a count of aggravated assault was vacated. *Nelson v. State*, 278 Ga. App. 548, 629 S.E.2d 410 (2006).

**Aggravated assault was included in armed robbery as matter of fact**, when it was not the initial pointing of a pistol at the victim which prompted the victim to open a cash drawer but the subsequent cocking of the weapon by the assailant after the victim had told the assailant that the victim had no money and the actual firing of the weapon occurred virtually at the same moment as the victim was hitting the button to open the drawer. *Moreland v. State*, 183 Ga. App. 113, 358 S.E.2d 276 (1987).

Defendant's aggravated assault conviction should have merged with the defendant's armed robbery conviction as the two convictions were based on the same conduct in sticking a gun to a victim's head with the intent to rob the victim. *Kirk v. State*, 271 Ga. App. 640, 610 S.E.2d 604 (2005).

Defendants' aggravated assault convictions merged into their armed robbery convictions as simultaneous with showing the gun, defendants made clear that they intended to rob the victims, which they proceeded to do; there was not a separate

aggravated assault before the robbery began. *Young v. State*, 272 Ga. App. 304, 612 S.E.2d 118 (2005).

Defendants' aggravated assault by striking a victim with a gun convictions merged into their armed robbery convictions as the robbery was not complete until the gunman struck the victim with the gun, thereby allowing defendant to take the victim's money. *Young v. State*, 272 Ga. App. 304, 612 S.E.2d 118 (2005).

**Aggravated assault conviction merged with robbery conviction** where victim was placed in fear of receiving bodily injury before the victim's money was taken. *Luke v. State*, 171 Ga. App. 201, 318 S.E.2d 833 (1984).

Defendant's five convictions of aggravated assault merged with defendant's conviction on five counts of attempted armed robbery where defendant's act of pointing a pistol at bank employees when defendant announced an intent to rob the bank was the act underlying both the convictions for attempted armed robbery and for aggravated assault. *Hambrick v. State*, 256 Ga. 148, 344 S.E.2d 639 (1986).

Since the evidence adduced to convict defendant of aggravated assault with intent to rob — that defendant threw the victim on the floor, hit the victim, and strangled the victim with a bed sheet — was part and parcel of the evidence underlying defendant's robbery conviction, the offenses merged as a matter of fact. *Johnson v. State*, 247 Ga. App. 157, 543 S.E.2d 439 (2000).

**Aggravated assault merged with armed robbery**, where the aggravated assault alleged separately in the indictment was the same assault alleged to have been committed in the course of the armed robbery. *Cherry v. State*, 178 Ga. App. 483, 343 S.E.2d 510 (1986).

When the defendant's offense of attempted armed robbery was included in the defendant's offense of aggravated assault with intent to rob a restaurant manager, only one sentence should have been imposed in connection with the two charges. *Redding v. State*, 193 Ga. App. 50, 386 S.E.2d 907 (1989).

Aggravated assaults did not merge with the robbery of two victims, where the robberies were completed, both victims

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having been deprived of their property, when they were marched off for another criminal purpose and the aggravated assaults on each victim occurred. *Glass v. State*, 199 Ga. App. 530, 405 S.E.2d 522 (1991).

Aggravated assault count merged into robbery count, where the only aggravated assault (committed by defendant) shown by the evidence was that by which the commission of the robbery was effectuated. Since there was no additional, gratuitous violence employed against the victim, the evidentiary basis for the aggravated assault conviction was "used up" in proving the robbery. *Head v. State*, 202 Ga. App. 209, 413 S.E.2d 533 (1991).

Defendant's ineffective assistance of counsel claim based on counsel's failure to ask at sentencing that defendant's convictions for aggravated assault be merged into the armed robbery convictions was rejected as the convictions were merged at the motion for a new trial hearing. *Buchanan v. State*, 273 Ga. App. 174, 614 S.E.2d 786 (2005).

**Separate sentences for aggravated assault and assault with the intent to rape.** — When there was evidence of assaults as the defendant wielded the knife that were gratuitous and unconnected with the assault with the intent to rape the victim, it was not error to sentence the defendant separately on the jury's findings of guilt for the aggravated assaults. *Woodson v. State*, 242 Ga. App. 67, 530 S.E.2d 2 (2000), aff'd, 273 Ga. 557, 544 S.E.2d 431 (2001).

**Aggravated assault merged with criminal attempt to commit murder.** — Aggravated assault conviction merged into a criminal attempt to commit murder conviction, where both counts were based on allegations that defendant had stabbed the victim with a knife. *Kelley v. State*, 201 Ga. App. 343, 411 S.E.2d 276 (1991).

**Merger of aggravated assault with malice murder.** — Convictions and sentences for aggravated assault with intent to murder and aggravated assault with a deadly weapon were vacated where the evidence showed that they both merged as a matter of fact with the malice murder

conviction. *Williams v. State*, 277 Ga. 368, 589 S.E.2d 563 (2003).

Because the evidence the state used to prove that the defendant committed aggravated assault was the same that it used to prove that defendant committed malice murder, the aggravated assault offense merged into the malice murder as a matter of fact. Thus, the separate judgment of conviction and sentence for aggravated assault had to be vacated. *Ludy v. State*, 283 Ga. 322, 658 S.E.2d 745 (2008).

Convictions against the defendant for both malice murder and aggravated assault were error under O.C.G.A. § 16-1-7(a)(1) as the aggravated assault was included within the malice murder conviction under O.C.G.A. § 16-1-6(1) because the same conduct established the commission of both offenses. *Bell v. State*, 284 Ga. 790, 671 S.E.2d 815 (2009).

With regard to a defendant's malice murder conviction arising from the suffocation death of the defendant's newborn daughter, the defendant's conviction and sentence for aggravated assault was vacated inasmuch as the evidence showed that the aggravated assault merged as a matter of fact with the malice murder conviction. *Wright v. State*, 285 Ga. 428, 677 S.E.2d 82 (2009), cert. denied, U.S. , 130 S. Ct. 1076, 175 L. Ed. 2d 903 (2010).

**Aggravated assault did not merge with malice murder.** — When the defendant fired a gun at someone and the bullet grazed the person, went through a wall, and killed another person, the aggravated assault and malice murder convictions did not merge for sentencing purposes. *George v. State*, 276 Ga. 564, 580 S.E.2d 238 (2003).

**Aggravated assault not lesser included offense.** — Where an indictment alleged that an aggravated assault was committed with a firearm by shooting the victims, and an armed robbery alleged the use of an offensive weapon, the aggravated assault charge was not a lesser included offense of armed robbery as a matter of law, and the two offenses rarely merged as a matter of fact. *Silvers v. State*, 278 Ga. 45, 597 S.E.2d 373 (2004).

Trial court erred in sentencing defendant for malice murder and aggravated

assault as the victim's death was caused by a combination of blunt force trauma and strangulation and the aggravated assault merged into the malice murder as a matter of fact. *Young v. State*, 280 Ga. 65, 623 S.E.2d 491 (2005).

Defendant's conviction and sentence for aggravated assault was vacated as the malice murder and the aggravated assault charges merged as a matter of fact because the same evidence to prove aggravated assault as indicted, stabbing the victim with a knife, was used to prove malice murder. *Williams v. State*, 279 Ga. 154, 611 S.E.2d 19 (2005).

Because the evidence that defendant assaulted the victim with a shotgun was used to prove both an aggravated assault and malice murder, the aggravated assault conviction merged by fact into the malice murder conviction. *Nix v. State*, 280 Ga. 141, 625 S.E.2d 746 (2006).

When a prisoner was convicted of malice murder under O.C.G.A. § 16-5-1(a), a jury did not return a verdict on felony murder counts because O.C.G.A. § 16-1-7 prohibited a conviction for both offenses for the death of a single victim. Further, the prisoner's crime of aggravated assault under O.C.G.A. § 16-5-21(a) also merged with the malice murder offense as it was a crime included within the greater offense. *Newland v. Hall*, 527 F.3d 1162 (11th Cir. 2008), cert. denied, U.S. , 129 S. Ct. 1336, 173 L. Ed. 2d 607 (2009).

**Aggravated assault with intent to rob and aggravated assault with deadly weapon merged.** — Convictions for aggravated assault of a male victim with the intent to rob and aggravated assault of the male victim with a deadly weapon did not rely on distinct criminal acts, as the weapons used in the assault were also implements of the robbery and used with the same purpose and intent; since the same facts were used to prove both crimes, the different crimes merged as a matter of fact for sentencing purposes. *Maddox v. State*, 277 Ga. App. 580, 627 S.E.2d 166 (2006).

**Armed robbery and aggravated assault with deadly weapon are separate crimes**, and one is not included in the other. Neither prohibits a designated kind of conduct generally while the other pro-

hibits a specific instance of such conduct. *Roberts v. State*, 228 Ga. 298, 185 S.E.2d 385 (1971).

**Aggravated assault and armed robbery not always different crimes.** — While aggravated assault and armed robbery are different crimes as a matter of law, they are not always so as a matter of fact. *Lambert v. State*, 157 Ga. App. 275, 277 S.E.2d 66 (1981).

**Conviction of aggravated assault and armed robbery constitutional.** — There was no violation of defendant's protection from double jeopardy in defendant's having been convicted of and punished for both the aggravated assault and armed robbery of defendant's victim, where the indictment charged armed robbery with the specific intent to commit a theft and the two acts were in fact separate though in close succession. *Taylor v. State*, 177 Ga. App. 624, 340 S.E.2d 263 (1986).

**Charge of aggravated assault on a peace officer merges into a mutiny conviction** because the aggravated assault charge is established by proof of less than all the facts required to establish the commission of mutiny. *Lummen v. State*, 180 Ga. App. 204, 348 S.E.2d 584 (1986).

**Aggravated assault on a police officer merged with obstruction of a police officer.** — Trial court erred in failing to merge the defendant's convictions for four counts of obstruction of a police officer into the convictions for four counts of aggravated assault on a police officer because each count of the crime of obstruction was established by proof of the same or less than all the facts required to establish each count of the crime of aggravated assault; the state conceded that the trial court erred in failing to merge the convictions for obstruction into the convictions for aggravated assault on a police officer. *Dobbs v. State*, 302 Ga. App. 628, 691 S.E.2d 387 (2010).

#### Assault with Deadly Weapon

**"Assault with deadly weapon" and "assault with intent to murder" compared.** — While an assault with intent to commit murder is usually manifested by the use of some deadly weapon, yet the offense of an assault with intent to commit

**Assault with Deadly Weapon (Cont'd)**

murder may be committed without a weapon likely to produce death. Wright v. State, 40 Ga. App. 118, 149 S.E. 153 (1929).

**"Assault with deadly weapon" and "assault with an object used offensively" compared.** — Despite the defendant's claim that insufficient evidence was presented that the gun used in the commission of the charged crime was used as a deadly weapon, because the defendant was indicted for committing an assault by striking the victim on the side of the victim's head with the gun, an object when used offensively was likely to result in serious injury, no evidence of a deadly weapon was required at trial. Vonhagel v. State, 287 Ga. App. 507, 651 S.E.2d 793 (2007).

**Assault with deadly weapon is essential element of offense of aggravated assault.** Haygood v. State, 142 Ga. App. 627, 236 S.E.2d 696 (1977).

**Assault with deadly weapon constitutes aggravated assault, felony.** Ruff v. State, 150 Ga. App. 238, 257 S.E.2d 203 (1979).

**Assault is aggravated when made with deadly weapon, regardless of intent.** Ross v. State, 131 Ga. App. 587, 206 S.E.2d 554 (1974).

**When jury can be given discretion to convict of lesser included offense.**

— Under the proof in a case, the jury can be given the discretion to convict of a lower offense included in a higher felony charged, if they believe the evidence does not show a specific intent to kill. Jackson v. State, 99 Ga. App. 740, 109 S.E.2d 886 (1959).

**Instruction on lesser offense and authorization to so convict.** — Under an indictment for murder the accused may be convicted of a lower grade of felony, or of a misdemeanor, if the lesser offense is one involved in the homicide and is sufficiently charged in the indictment; but whether the jury should be instructed on the law of a lesser offense, or they would be authorized to convict of a lesser offense, depends on the evidence. Moore v. State, 55 Ga. App. 213, 189 S.E. 731 (1937).

When one is charged with murder by

shooting and the evidence does not demand a finding that the victim died from such gunshot wounds and the defendant admits the shooting, a verdict of guilty of assault with intent to murder may be authorized and it is not error to charge the jury on such lesser crime. Kimbro v. State, 113 Ga. App. 314, 147 S.E.2d 876 (1966).

Because the evidence showed that defendant committed an assault with intent and a deadly weapon, the crime constituted an aggravated assault under O.C.G.A. § 16-5-21(a)(2); therefore, a charge on the lesser-included offenses of simple assault or reckless conduct under O.C.G.A. §§ 16-5-20(a)(2) and 16-5-60(b) was not warranted. Paul v. State, 296 Ga. App. 6, 673 S.E.2d 551 (2009).

**Intent is a question for the jury.** — When defendant contended the evidence was not sufficient to support the verdict because defendant did not intend to shoot anyone, but only intended to scare off people who were attacking defendant's home and defendant's automobile, it was held that intent is a question for the jury, and the evidence was sufficient. Cade v. State, 180 Ga. App. 314, 348 S.E.2d 769 (1986).

**State of mind** of either a perpetrator or a victim, including whether a victim has been placed under reasonable apprehension of injury or fear from an event, when in issue, may be proved by indirect or circumstantial evidence. Williams v. State, 208 Ga. App. 12, 430 S.E.2d 157 (1993).

**Intent to kill is not element of aggravated assault with deadly weapon.** Emmons v. State, 142 Ga. App. 553, 236 S.E.2d 536 (1977); Riddle v. State, 145 Ga. App. 328, 243 S.E.2d 607 (1978), overruled on other grounds, Adsitt v. State, 248 Ga. 237, 282 S.E.2d 305 (1981).

**Intent to injure is not an element** of aggravated assault with a deadly weapon. Collins v. State, 199 Ga. App. 676, 405 S.E.2d 892 (1991); Turner v. State, 205 Ga. App. 745, 423 S.E.2d 439 (1992); Jay v. State, 232 Ga. App. 661, 503 S.E.2d 563 (1998).

It is the reasonable apprehension of harm by the victim of an assault by a firearm that establishes the crime of ag-

gravated assault, not the assailant's intent to injure. *Collins v. State*, 199 Ga. App. 676, 405 S.E.2d 892 (1991); *Turner v. State*, 205 Ga. App. 745, 423 S.E.2d 439 (1992).

Intent to harm the victim is not an element of aggravated assault, and the state needs only to prove that defendant committed an assault and that defendant used a deadly weapon in doing so; a jury's finding that defendant was guilty of aggravated assault was supported by evidence that defendant, armed with a knife, grabbed the victim as the victim was running; defendant and the victim struggled; the victim fell to the ground; defendant held a knife to the victim's neck, forced the victim into a near-by pick-up truck, and drove away; and while in the truck, the defendant punched the victim in the face and threatened to kill the victim. *Bailey v. State*, 269 Ga. App. 262, 603 S.E.2d 786 (2004).

**Intent to scare victim not a defense.** — When the defendant discharged a firearm in the direction of the victim, the defendant committed aggravated assault, and defendant's claim that the defendant was just trying to scare the victim was no defense. *Jordan v. State*, 214 Ga. App. 598, 448 S.E.2d 917 (1994).

**Actual injury not required.** — There is no requirement that a victim actually be injured by the deadly weapon before a conviction for aggravated assault is authorized, since it is the reasonable apprehension of harm by the victim from exposure to the deadly weapon that establishes the crime of aggravated assault. *Gilbert v. State*, 209 Ga. App. 483, 433 S.E.2d 664 (1993).

When the defendant fired shots into the cab of a single cab pickup truck containing three people, the evidence was sufficient for a conviction of aggravated assault against the two victims who were not struck by a bullet, because one of those victims testified that the defendant shot at the victim and the jury could surmise that the victims not struck suffered apprehension of being shot. *Cornelius v. State*, 273 Ga. App. 806, 616 S.E.2d 148 (2005), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

**Criminal negligence cannot substitute for criminal intent** in cases of

aggravated assault with a deadly weapon based on either an attempt to commit violent injury to the person of another (O.C.G.A. § 16-5-20(a)(1)), or the commission of an act placing another in apprehension of receiving an injury (O.C.G.A. § 16-5-20(a)(2)). *Dunagan v. State*, 269 Ga. 590, 502 S.E.2d 726 (1998), overruling *Osborne v. State*, 228 Ga. App. 758, 492 S.E.2d 732 (2007) and *Jordan v. State*, 214 Ga. App. 598, 448 S.E.2d 917 (1994).

**Aggravated assault with deadly weapon is completed** when simple assault committed by means of deadly weapon. *Scott v. State*, 141 Ga. App. 848, 234 S.E.2d 685 (1977); *Tuggle v. State*, 145 Ga. App. 603, 244 S.E.2d 131 (1978); *Hurst v. State*, 158 Ga. App. 722, 282 S.E.2d 192 (1981); *Doss v. State*, 166 Ga. App. 361, 304 S.E.2d 484 (1983); *Rust v. State*, 264 Ga. App. 893, 592 S.E.2d 525 (2003).

**Recanting of assault by victim.** — Investigative statements given by a passenger at the scene of a car accident and subsequent statement that defendant swung and hit the passenger with a gun constituted substantive evidence of defendant's guilt despite the passenger's subsequent recantation or equivocation. *Hurst v. State*, 258 Ga. App. 664, 574 S.E.2d 876 (2002).

Trial court did not err in denying defendant's motion for a directed verdict regarding an aggravated assault count involving defendant's spouse, even though the spouse testified that the spouse did not believe defendant would harm the spouse despite the fact that defendant had been carrying a gun, as the police testimony that the spouse was in a very fearful state when police found the spouse sufficiently showed that the spouse had a reasonable apprehension of immediately receiving a violent injury. *Gordian v. State*, 261 Ga. App. 75, 581 S.E.2d 616 (2003).

Despite the recantation by a juvenile's parent at trial, because sufficient evidence that the juvenile placed the parent in reasonable apprehension of being struck with a hammer, which was in line with the allegations in the parent's complaint filed immediately following the incident, the juvenile court's adjudication against the juvenile for aggravated assault was up-

**Assault with Deadly Weapon (Cont'd)**

held on appeal. *In the Interest of C.B.*, 288 Ga. App. 752, 655 S.E.2d 342 (2007).

**Assault on victim holding child.** — When the defendant discharged a firearm in the direction of a victim who was holding a two-year-old child in the victim's arms, the defendant's deliberate act could be found to have included an attempt to injure those at whom defendant aimed, and the evidence was sufficient to support a conviction of aggravated assault upon the child. *Jordan v. State*, 214 Ga. App. 598, 448 S.E.2d 917 (1994).

**Assault against several people.** — Evidence was sufficient to convict the defendant of three counts of aggravated assault after one victim testified about being fearful and that the defendant pointed a gun at all three victims. *Jackson v. State*, 251 Ga. App. 578, 554 S.E.2d 768 (2001).

**Attempting injury with deadly weapon.** — Person commits aggravated assault when a person attempts to commit violent injury upon another person with a deadly weapon. *Riddle v. State*, 145 Ga. App. 328, 243 S.E.2d 607 (1978), overruled on other grounds, *Adsitt v. State*, 248 Ga. 237, 282 S.E.2d 305 (1981).

**Reasonable apprehension of violent injury on part of victim must be shown.** — When the facts establish clearly that defendant committed an act with a deadly weapon which placed the victim in reasonable apprehension of immediately receiving a violent injury, this is sufficient to support the charge of aggravated assault; there is no requirement that a victim be actually injured, and the crime is complete without proof of injury. *Daughtry v. State*, 180 Ga. App. 711, 350 S.E.2d 53 (1986).

**Unreasonable apprehension or suspicion of harm.** — Juvenile defendant was not authorized to stab the victim under O.C.G.A. § 16-3-21(a), where defendant was attacked by the victim from behind with the victim's fists, and could see that the victim did not have a weapon; defendant's belief that defendant's own life was in danger was a mere unreasonable apprehension or suspicion of harm, which was insufficient to justify the use of deadly force, and defendant was properly

adjudicated a delinquent for aggravated assault under O.C.G.A. § 16-5-21(a)(2) and for carrying a weapon onto a school bus under O.C.G.A. § 16-11-127.1(b). *In re Q.M.L.*, 257 Ga. App. 22, 570 S.E.2d 92 (2002).

**Fear is not the same as reasonable apprehension.** — Simple assault is defined as an act which places another in reasonable apprehension of immediately receiving a violent injury pursuant to O.C.G.A. § 16-5-20(a)(2), an assault becomes aggravated when it is committed with a deadly weapon, O.C.G.A. § 16-5-21(a)(2); thus, if the victim is in reasonable apprehension of an immediate violent injury from a weapon, an aggravated assault has occurred. Because reasonable apprehension of injury is not the same as simple fear, the testimony that the victim was not afraid of the defendant does not preclude conviction. *Lunsford v. State*, 260 Ga. App. 818, 581 S.E.2d 638 (2003).

**Conviction upheld despite accident defense.** — Court would reject the contention that injuries to one victim were caused accidentally during the assault of the other victim since the defendant explicitly threatened the first victim's life and since the defendant's conviction could otherwise be supported by the doctrine of transferred intent. *Harris v. State*, 233 Ga. App. 696, 505 S.E.2d 239 (1998).

**Conviction upheld despite coercion defense.** — When the defendant, on appeal, conceded to being present and participating in an armed robbery and the assault that occurred along with the robbery, but contended (as defendant did at trial) that the defendant was not a voluntary participant in the crimes but acted only out of fear for the defendant's own life through the coercion of other participants in the crimes, it was held that the jury was presented with sufficient admissible evidence to establish to the satisfaction of a rational trier of fact that guilt was proven beyond a reasonable doubt. *August v. State*, 180 Ga. App. 510, 349 S.E.2d 532 (1986).

**Conviction upheld despite self-defense argument.** — When the victim threw the hot contents of a frying pan at the defendant and the defendant

then drew a knife from her blouse and stabbed the victim numerous times, but there were no eyewitnesses to the stabbing other than the victim and the defendant, and the defendant testified she stabbed the victim in self-defense in the belief that he was reaching into his pocket for a weapon and that, while she had meant to "hurt" the victim, she had not intended to kill him, a rational trier of fact could have found the defendant guilty of the crime of felony murder beyond a reasonable doubt by causing the victim's death while committing the felony of aggravated assault. *Henderson v. State*, 256 Ga. 486, 350 S.E.2d 236 (1986).

Defendant was properly convicted of aggravated assault after the defendant pulled a gun on security personnel at a tavern after they took defendant's keys because of the defendant's intoxicated condition, notwithstanding the defendant's contention that the actions were in self-defense. *Richardson v. State*, 233 Ga. App. 890, 505 S.E.2d 57 (1998).

Testimony of a parent and two children that a defendant allegedly pointed a gun at their vehicle and that, as a result, they were in fear of being shot was sufficient to support the defendant's conviction on three counts of aggravated assault under O.C.G.A. § 16-5-21(a)(2); given the evidence, a rational trier of fact could have found the essential elements of aggravated assault beyond a reasonable doubt, and the jury obviously resolved the defendant's self-defense claim against the defendant. *Adams v. State*, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

Evidence plainly was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of aggravated assault with a deadly weapon in violation of O.C.G.A. § 16-5-21(a)(2) and battery in violation of O.C.G.A. § 16-5-23.1(a) because the state presented more than ample evidence that the defendant's use of force was not justified under O.C.G.A. § 16-3-21(a); based upon the victim's testimony and the victim's prior statement to the responding officer, the jury clearly was authorized to find that the defendant's acts of grabbing the victim by the hair, throwing the victim to the ground, and choking the victim to

the point of unconsciousness constituted excessive force, and the prior and subsequent difficulties evidence and the similar transaction evidence the state presented supported the jury's decision to give little credence to the defendant's self-defense claim. *Whitley v. State*, 307 Ga. App. 553, 707 S.E.2d 375 (2011).

**Words "deadly weapon," include all means or instrumentalities by which assaults with intent to commit murder may be made.** *Wright v. State*, 40 Ga. App. 118, 149 S.E. 153 (1929).

Although hands are not per se "deadly weapons," where the defendant's hands were restrained by handcuffs, and a doctor testified that the victim's severe injuries were consistent with being struck by hands, fists, and handcuffs, there was sufficient evidence to sustain a conviction for aggravated assault. *Gamble v. State*, 235 Ga. App. 777, 510 S.E.2d 69 (1998).

**Proving that weapon is one likely to produce death.** — When an indictment charges the commission of the offense of assault with intent to murder by using a knife such as was "likely to produce death," the proof must show that it was a weapon of this character, but this may be done by evidence as to the nature of the wound, as well as direct proof of the character of the weapon. *Jackson v. State*, 56 Ga. App. 374, 192 S.E. 633 (1937).

**Assault with deadly weapon while resisting arrest** constitutes prima facie case of assault with intent to kill. *Garrett v. State*, 89 Ga. 446, 15 S.E. 533 (1892).

**Unprovoked assault by police officer with deadly weapon justifying offender's killing policeman.** — If an officer who makes a lawful arrest for a misdemeanor committed in the officer's presence does so in an unlawful manner by making an unprovoked assault with a weapon likely to produce death, and with intent to kill the offender, if the circumstances are sufficient to excite the fears of a reasonable man that a felony is intended, and the offender slays the officer, not in a spirit of revenge or for the purpose of preventing the lawful arrest, but to protect self from what is or what reasonably appears to be such a felonious assault, then, in either of such events, the killing would be justifiable. *Mullis v. State*, 196 Ga. 569, 27 S.E.2d 91 (1943).

**Assault with Deadly Weapon (Cont'd)**

Since an assault and battery is a misdemeanor and not a felony, the mere unlawful striking of an offender by an officer lawfully arresting the offender for a misdemeanor would not be sufficient to justify the offender in killing the officer, unless the conduct of the officer was such as to excite the fears of a reasonable man that a felony was in fact about to be committed, and the offender really acted on such fears. *Mullis v. State*, 196 Ga. 569, 27 S.E.2d 91 (1943).

**Whether instrument used constitutes deadly weapon is properly for jury's determination.** *Quarles v. State*, 130 Ga. App. 756, 204 S.E.2d 467 (1974); *Ellis v. State*, 137 Ga. App. 834, 224 S.E.2d 799 (1976); *Harper v. State*, 157 Ga. App. 480, 278 S.E.2d 28 (1981).

Because the jury viewed the weapon used in an attack subject to the underlying aggravated assault charge against the defendant, and received testimony and photographic evidence about the nature and extent of the victim's actual injuries and the manner in which the defendant used the shank to stab the victim in the area of several vital organs, the jury was authorized to infer from the evidence that the instrument was a deadly weapon. *Ellison v. State*, 288 Ga. App. 404, 654 S.E.2d 223 (2007).

**Manner of weapon's use determinative of nature.** — Manner in which a weapon is used may determine whether that weapon is an offensive or deadly weapon for the purpose of O.C.G.A. § 16-5-21. *Banks v. State*, 169 Ga. App. 571, 314 S.E.2d 235 (1984).

**Deadly weapon depends on object's use, wounds inflicted and the like.** — An object may be found to be a deadly weapon by the jury depending on the manner and means of its use, the wound inflicted, etc. *Ellis v. State*, 137 Ga. App. 834, 224 S.E.2d 799 (1976).

**Assault with knife.** — There was sufficient evidence to support conviction for aggravated assault, in violation of O.C.G.A. § 16-5-21, against a waitress after defendant jumped over the restaurant counter, held a knife to the waitress' neck, and indicated that defendant would

use the knife if another employee came closer; the conviction under O.C.G.A. § 16-5-21 for aggravated assault of the other employee was also supported by sufficient evidence as the employee was cut by defendant's knife, which constituted suffering of a violent injury, and although the employee testified that the employee did not perceive a threat from the knife, there was sufficient circumstantial evidence to support such a finding. *Lemming v. State*, 272 Ga. App. 122, 612 S.E.2d 495 (2005), overruled on other grounds, *Miller v. State*, 285 Ga. 285, 676 S.E.2d 173 (2009).

Sufficient evidence supported an aggravated assault conviction where the victim testified that, during a dispute, the defendant stabbed the victim several times with a knife, where defendant's sibling testified to a similar incident 11 days earlier, in which defendant assaulted the sibling during a dispute, where a witness testified that the defendant admitted to stabbing the victim because of the way the victim had treated the witness's friend, and where defendant admitted stabbing the victim, but claimed it was in self-defense. *Cochran v. State*, 277 Ga. App. 251, 626 S.E.2d 217 (2006).

Aggravated assault conviction was supported by sufficient evidence that, after the victim confronted the defendant about a comment made to the victim's spouse, the defendant stabbed the victim to death; witnesses saw the defendant fighting with the victim, saw the defendant fold up a knife after the victim fell, and the defendant admitted to stabbing the victim. *Williams v. State*, 280 Ga. 297, 627 S.E.2d 32 (2006).

Evidence was sufficient to support convictions for aggravated assault on a peace officer and making a terroristic threat or act, in violation of O.C.G.A. §§ 16-5-21(a)(2) and 16-11-37(a), respectively, where the defendant was agitated when officers came to the residence to investigate complaints of a terroristic threat, the defendant brandished two knives at the officers which caused them to retreat outside of the residence, defendant refused to put the knives down despite being instructed to do so at gunpoint by the officers, and when the defendant

threatened to stab an officer and raised the knife up, the defendant was shot in the hand. *Williams v. State*, 277 Ga. App. 884, 627 S.E.2d 897 (2006).

Sufficient evidence supported the defendant's convictions of aggravated assault in violation of O.C.G.A. § 16-5-21 and aggravated sodomy in violation of O.C.G.A. § 16-6-2(a) although the defendant pointed to the defendant's previous sexual relationship with the victim and to alleged inconsistencies in the testimony of the victim and the victim's friend; the appellate court refused to weigh the evidence or determine witness credibility, and it found that the evidence, which included testimony that the defendant forcibly placed the victim in the defendant's truck, drove the victim across the state line to an apartment, forced the victim to have sex with the defendant, and cut the victim with a knife, was sufficient to convict. *Martin v. State*, 281 Ga. App. 64, 635 S.E.2d 358 (2006).

Testimony from an eyewitness that the defendant and the victim scuffled and fell to the ground, and that the defendant knelt over the victim, stabbing the victim repeatedly with a knife, was sufficient to support the defendant's convictions of felony murder and aggravated assault with a deadly weapon. *Lamplley v. State*, 284 Ga. 37, 663 S.E.2d 184 (2008).

In a trial for aggravated assault, the evidence was sufficient to establish that the defendant was armed with a knife when an apparently bloodstained knife was found on the defendant's person when the defendant was arrested, the defendant admitted both to possessing and brandishing the knife at the victim, and the victim testified that the victim was stabbed. Furthermore, the state was not required to prove the cause of the victim's injuries with medical evidence. *Brown v. State*, 293 Ga. App. 224, 666 S.E.2d 600 (2008).

Evidence supported the convictions of felony murder, aggravated assault, and possession of a knife during the commission of a felony. The victim's grandchild saw the defendant stab the victim after an argument, then went to a relative for help; the defendant then attacked the relative and fled, throwing the knife the defendant used to stab the victim in the bushes;

when the defendant was found by police shortly thereafter, the defendant admitted to stabbing the victim; and a medical examiner testified that the bulk of the victim's stabs came from behind and that the cut on the defendant's hand was an offensive wound likely sustained as the defendant was stabbing the victim with enough force to break one of the victim's ribs. *Butler v. State*, 285 Ga. 518, 678 S.E.2d 92 (2009).

Evidence was sufficient to convict the defendant of aggravated assault because a rational trier of fact could have inferred that the defendant's girlfriend apprehended a knife attack; jury could reasonably conclude that when the defendant threatened the girlfriend's life while holding a knife, and the girlfriend reached up with her hand, she was in reasonable apprehension of immediately receiving a violent injury. *Wilson v. State*, 304 Ga. App. 743, 698 S.E.2d 6 (2010).

**Nature and location of wounds showing character of weapon.** — Even in absence of production or verbal description of weapon used, evidence as to nature, kind, and location of wounds inflicted by assailant is sufficient to allow jury to infer character of weapon. *Wade v. State*, 157 Ga. App. 296, 277 S.E.2d 292 (1981); *Wright v. State*, 211 Ga. App. 431, 440 S.E.2d 27 (1994).

**State must show how object not per se deadly weapon is such in circumstances.** — When an object is not per se a deadly weapon within the meaning of Ga. L. 1968, pp. 1249, 1280 (see O.C.G.A. § 16-5-21), it is incumbent upon the state to show the circumstances of the object's use which made the object a deadly weapon. *Talley v. State*, 137 Ga. App. 548, 224 S.E.2d 455 (1976).

**Evidence sufficient to allow jury to infer character of weapon.** — Lethal character of the weapon used in making an assault may be inferred from the effect and nature of the wound inflicted. *Wells v. State*, 125 Ga. App. 579, 188 S.E.2d 407 (1972).

Even if the actual weapon alleged to be a deadly one in an indictment is not produced or described, evidence as to the nature, kind and location of the wounds inflicted by the assailant is sufficient to

**Assault with Deadly Weapon (Cont'd)**

allow the jury to infer the character of the weapon. *Zachery v. State*, 153 Ga. App. 531, 265 S.E.2d 860 (1980).

Description of the injuries sustained by the victim is admissible to prove that the pistol used by the defendant was a deadly weapon. *Howard v. State*, 165 Ga. App. 555, 301 S.E.2d 910 (1983).

**No evidence showed that aggravated assault could have occurred other than through use of deadly weapon.** — Although the indictment only referred to the commission of the crimes through the use of a deadly weapon, defendants did not point to evidence showing that an aggravated assault could have occurred other than through the use of a deadly weapon; moreover, because the trial court instructed the jury that the state was required to prove beyond a reasonable doubt every material allegation of the indictment, even if the aggravated assault charge was erroneous, such error was rendered harmless in light of the additional instruction. *Dunbar v. State*, 273 Ga. App. 29, 614 S.E.2d 472 (2005).

**Deadly weapon need not be introduced.** — It is not necessary for the state to admit into evidence the deadly weapon used by the defendant in order for the defendant to be found guilty of aggravated assault. *Lattimer v. State*, 231 Ga. App. 594, 499 S.E.2d 671 (1998).

With regard to the sufficiency of the evidence to uphold a defendant's conviction for aggravated assault with a deadly weapon, because two police officers testified that the defendant fired a gun, the testimony was sufficient to infer the presence of a weapon even though no weapon was introduced into evidence. *Johnson v. State*, 287 Ga. App. 352, 651 S.E.2d 450 (2007).

**It is not essential for state to locate bullets, bullet holes, or expended shells to establish the crime of aggravated assault.** *Radford v. State*, 251 Ga. 50, 302 S.E.2d 555 (1983).

**Admissible evidence of res gestae.** — Evidence was sufficient to find the defendant guilty of assault with a deadly weapon, possession of a firearm during the commission of a crime, and kidnap-

ping; the victim's statement that the victim's sister was afraid of the defendant because the defendant had done the same thing to the sister was clearly admissible as part of the res gestae even if it incidentally placed the defendant's character in evidence. *McLendon v. State*, 258 Ga. App. 133, 572 S.E.2d 763 (2002).

**Evidence sufficient for conviction.**

— When the state's evidence shows that the victim was standing outside the victim's apartment when the defendant approached, the defendant accused the victim of stealing the defendant's television and attacked the victim, stabbing the victim with a knife, and after stabbing the victim, the defendant left the scene, considering the evidence in the light most favorable to the verdict, a rational trier of fact reasonably could find the defendant guilty beyond a reasonable doubt of the offense charged. *Jackson v. State*, 180 Ga. App. 363, 349 S.E.2d 252 (1986).

Although expressing concern for personal safety, the defendant admitted seeing nothing but the victim's closed fist and that the defendant stabbed the victim with an eight-inch long butcher knife, the wound to the victim was in the victim's back, between the victim's shoulder blades and puncturing the victim's lung, although the defendant said the defendant stabbed the victim in the shoulder, and the sole defense was self-defense, viewing the evidence in the light most favorable to the state, there was sufficient evidence to authorize the trial judge, as trier of fact, to find appellant guilty of aggravated assault beyond a reasonable doubt. *Roberts v. State*, 180 Ga. App. 646, 350 S.E.2d 39 (1986).

See *Johnson v. State*, 185 Ga. App. 167, 363 S.E.2d 773 (1987); *Nash v. State*, 222 Ga. App. 766, 476 S.E.2d 69 (1996); *Littleton v. State*, 225 Ga. App. 900, 485 S.E.2d 230 (1997); *Harris v. State*, 233 Ga. App. 696, 505 S.E.2d 239 (1998); *Jones v. State*, 233 Ga. App. 291, 503 S.E.2d 902 (1998); *Head v. State*, 233 Ga. App. 655, 504 S.E.2d 499 (1998); *Tolliver v. State*, 243 Ga. App. 180, 531 S.E.2d 383 (2000); *Bartlett v. State*, 244 Ga. App. 49, 537 S.E.2d 362 (2000).

When the record showed that defendant pointed a gun at the defendant's father

and brothers-in-law during the kidnapping of his wife, the evidence was sufficient to render a conviction. *Williams v. State*, 207 Ga. App. 371, 427 S.E.2d 846 (1993).

Intentionally firing a gun at another, absent justification, is sufficient in and of itself to support a conviction of aggravated assault. *Quinn v. State*, 209 Ga. App. 480, 433 S.E.2d 592 (1993).

Testimony by the victim, in which the victim positively identified defendant as the person who entered the victim's home, and committed the crimes of robbery by intimidation, kidnapping, aggravated assault, aggravated assault with a knife, aggravated battery and possession of a knife during the commission of a crime, charged in the indictment and eyewitness testimony that defendant entered the victim's premises minutes before the attack of the victim was sufficient to authorize the jury's finding that defendant was guilty, beyond a reasonable doubt, of committing the crimes charged in the indictment. *Mobley v. State*, 211 Ga. App. 709, 441 S.E.2d 73 (1994).

Evidence was sufficient to enable a rational trier of fact to find appellant guilty of murder, aggravated assault with a deadly weapon, and possession of a firearm by a convicted felon beyond a reasonable doubt. *Hall v. State*, 264 Ga. 85, 441 S.E.2d 245 (1994).

Evidence was sufficient to sustain the defendant's conviction of aggravated assault, when the victim was attacked and beaten with fists and a round "fence pipe," the victim identified the defendant at trial as the victim's principal assailant, a witness testified to seeing the defendant pick up an object like a pole or stick and repeatedly strike the victim, and a wooden fence post with blood on the post was located a short distance from where the police found the victim. *Peek v. State*, 234 Ga. App. 731, 507 S.E.2d 553 (1998).

Victim's in-court identification of defendant as the assailant was sufficient to authorize the jury's verdict that defendant committed aggravated assault with a handgun, a deadly weapon, as alleged in the indictment. *Graham v. State*, 236 Ga. App. 673, 512 S.E.2d 921 (1999).

Evidence was sufficient to sustain a

conviction for a violation of O.C.G.A. § 16-5-21(a)(2) where: (1) an officer observed a broken truck window and saw the defendant disappearing into the woods behind grandmother's home; (2) one of the defendant's friends warned the officer that the defendant would probably shoot at the officer; (3) that friend testified that the friend had seen the defendant break the glass and take the gun from the truck; (4) the officers testified that they were able to identify the general type of weapon and the direction of travel of the first bullet; (5) the area was desolate and remote; and (6) no evidence showed the presence of any other person in the area at that time of night which was approaching midnight. *Yawn v. State*, 237 Ga. App. 206, 515 S.E.2d 182 (1999).

Evidence was sufficient to support a conviction since the victim testified that the defendant stabbed the victim in the arm and that the knife the victim observed in the defendant's possession was "maybe six or eight inches long with a handle on it," and two witnesses testified that they saw the defendant stab the victim with a large knife. *Silas v. State*, 247 Ga. App. 792, 545 S.E.2d 358 (2001).

Evidence was sufficient to support a conviction for aggravated assault since: (1) the defendant snatched a woman's purse in the parking lot of a restaurant as she and her husband walked to the restaurant; (2) the husband pursued the defendant and managed to attach himself to the driver's side of the pick-up in which defendant sped away; and (3) the defendant nonetheless drove off, dragging the husband with him, managing to shake him from the vehicle, and leaving him injured on the ground. *Bogan v. State*, 249 Ga. App. 242, 547 S.E.2d 326 (2001).

Evidence that defendant threatened a daycare owner and two daycare workers with a handgun when they tried to stop defendant from taking defendant's daughter supported defendant's convictions of two aggravated assaults in violation of O.C.G.A. § 16-5-21(a)(2) and possessing a firearm during the commission of a felony in violation of O.C.G.A. § 16-11-106(b)(1). *Diaz v. State*, 255 Ga. App. 288, 564 S.E.2d 872 (2002).

Evidence was sufficient to establish ag-

**Assault with Deadly Weapon (Cont'd)**

gravated assault under O.C.G.A. § 16-5-21(a), because defendant placed his wife in reasonable apprehension of immediately receiving a violent injury, which assault was aggravated by the use of a shotgun in a threatening manner. *Weaver v. State*, 256 Ga. App. 573, 568 S.E.2d 836 (2002).

Evidence that defendant intentionally stabbed a man in the side with a knife after a confrontation was sufficient to support defendant's conviction of aggravated assault under O.C.G.A. § 16-5-21(a)(2). *Townsend v. State*, 256 Ga. App. 837, 570 S.E.2d 47 (2002).

Evidence that defendant knew people lived inside a home and that there was a truck parked next to the home when defendant fired four or five shots from a .30 caliber rifle into the home at 10:30 a.m. was sufficient to sustain defendant's convictions for aggravated assault and using a firearm in the commission of a felony. *Maynor v. State*, 257 Ga. App. 151, 570 S.E.2d 428 (2002).

Although the victim's statement to the police was sufficient to prove that defendant threatened to kill the victim as alleged in the indictment, proof that defendant threatened to kill the victim was not a necessary element of the charge of aggravated assault with a deadly weapon in violation of O.C.G.A. § 16-5-21(a)(2); evidence that defendant caused the victim to be very much afraid by pointing a pistol at the victim was sufficient to prove the offense. *Thomas v. State*, 257 Ga. App. 350, 571 S.E.2d 178 (2002).

Evidence that defendant pulled a knife out, struck it against the neck of a woman defendant was dating, and told the woman that defendant should have killed the woman was sufficient to support defendant's conviction for aggravated assault as it showed defendant assaulted the woman with a deadly weapon. *Alvarado v. State*, 257 Ga. App. 746, 572 S.E.2d 18 (2002).

Eyewitnesses saw defendant standing by the door of the barber shop shooting repeatedly at the murder victim, who died from those wounds, and the police recovered the pistol from defendant that shot

the victim; thus, the evidence was sufficient to enable a rational trier of fact to find defendant guilty beyond a reasonable doubt of malice murder, felony murder, and aggravated assault with a deadly weapon under O.C.G.A. §§ 16-5-1 and 16-5-21. *Roberts v. State*, 276 Ga. 258, 577 S.E.2d 580 (2003).

Evidence was sufficient to support the defendant's conviction for aggravated assault where the record revealed that the defendant admitted to being in the apartment of the victim, who was the defendant's former love interest, the defendant admitted to having the gun, and the defendant's only defense was that the gun went off accidentally, which was contradicted by the evidence of the defendant's intentional punching and shooting of the victim. *Milton v. State*, 259 Ga. App. 660, 577 S.E.2d 862 (2003).

Defendant's conviction for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) was supported by sufficient evidence after the victim testified as to the attack, there were photographs which showed the victim's cuts, and the jury's decision was based in part on its weighing of the credibility of the witnesses; it was also determined that the sentence imposed was within the statutory guidelines of O.C.G.A. § 16-5-21(g) and was not more severe merely because defendant had requested a jury trial. *Benham v. State*, 260 Ga. App. 243, 581 S.E.2d 586 (2003).

Evidence was sufficient to support the defendant's convictions of two counts of armed robbery, two counts of theft by taking, three counts of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2), three counts of simple battery, three counts of kidnapping, and two counts of possessing a firearm during the commission of a crime since: (1) there was evidence that the defendant entered a store, placed a knife to the neck of one of the three victims, forced that victim to the back of the store, aided another assailant who was armed with a gun to bind the victims and drag them to the back of the store, and stole money and other items from two of the victims; (2) the defendant confessed to the crimes during interviews with law enforcement officials; and (3) the

defendant's confessions were corroborated by the testimony of one of the victims who, despite earlier being unable to identify the robbers, ultimately identified the defendant as one of the robbers. The corroborating victim's initial inability to identify the defendant posed an issue of credibility for the jury's resolution and did not require reversal. *Phanamixay v. State*, 260 Ga. App. 177, 581 S.E.2d 286 (2003).

When a jury could believe that defendant shot a victim without aggravation rather than defendant's claim that a gun went off by accident during a struggle, ample evidence sustained the conviction for aggravated assault pursuant to O.C.G.A. § 16-5-21(a)(2). *Wilson v. State*, 261 Ga. App. 28, 581 S.E.2d 625 (2003).

Evidence was sufficient to convict the defendant of aggravated assault, a violation of O.C.G.A. § 16-5-21(a)(2), because the State of Georgia presented evidence that the defendant stabbed the defendant's love interest's child several times with a butcher knife. Even though the defendant argued that the defendant was merely defending against the child's attack with a bat, the jury was authorized by O.C.G.A. § 16-3-21(b)(2) to reject the defendant's justification claim; the evidence showed that the love interest's child hit the defendant with a bat to protect the child's parent from the defendant, who forcefully entered their house and then charged the love interest's child, pushed the child down, and stabbed the child. *Williams v. State*, 268 Ga. App. 384, 601 S.E.2d 833 (2004).

Evidence was sufficient to support the defendant's conviction of aggravated assault because: (1) the defendant was in an altercation with the victim at a dance; (2) eyewitnesses saw the defendant make a stabbing motion at the victim; (3) the victim died of a nine stab wounds, including one to the heart; (4) the defendant's burned blue jeans were found in the defendant's love interest's backyard; (5) the defendant provided an investigator with clean clothes the defendant allegedly wore at the dance; and (6) the victim's blood and DNA were found on the defendant's leather jacket and on the shirt the defendant's love interest wore to the dance. *Rakestrau v. State*, 278 Ga. 872, 608 S.E.2d 216 (2005).

Evidence supported defendant's conviction for malice murder and aggravated assault because the victim had defensive wounds on a hand, the victim's blood was found on defendant's shoe, a mixture of the victim's and defendant's blood was found on defendant's shirt, and the victim planned to ask defendant to leave the apartment. *Williams v. State*, 279 Ga. 154, 611 S.E.2d 19 (2005).

There was sufficient evidence to support defendants' convictions for armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), burglary, O.C.G.A. § 16-7-1(a), and possession of a firearm during the commission of certain crimes, O.C.G.A. § 16-11-106(b)(2), because evidence was seen in one of the defendant's vehicles during a traffic stop, defendants were identified from the videotape of the stop, and the shotgun used by the assailant in the home invasion was found in one of the defendant's homes. *Dunbar v. State*, 273 Ga. App. 29, 614 S.E.2d 472 (2005).

Evidence was sufficient to support the convictions of murder, armed robbery, aggravated assault, burglary, and a statutory violation, all in violation of O.C.G.A. §§ 16-5-1, 16-5-21, 16-7-1, 16-8-41, and 16-11-106, respectively, where the defendant and the codefendant went to a club with the intention of robbing someone, met the victim and drove the victim back to the victim's home, beat and fatally stabbed the victim, and upon leaving the victim's apartment, took some of the victim's belongings. *Willoughby v. State*, 280 Ga. 176, 626 S.E.2d 112 (2006).

Victim's testimony that the defendant threatened the victim with a knife and struck the victim with a lamp, and evidence that the victim was found in a bathroom with an electrical cord wrapped tightly around the victim's neck, and that the defendant's finger and palm prints were lifted from blood on the bathroom wall, allowed any rational trier of fact to find defendant guilty of three counts of aggravated assault, under O.C.G.A. § 16-5-21(a)(2). *Nelson v. State*, 278 Ga. App. 548, 629 S.E.2d 410 (2006).

Evidence was sufficient to find the defendant guilty of voluntary manslaughter in violation of O.C.G.A. § 16-5-2, felony

**Assault with Deadly Weapon (Cont'd)**

murder predicated on possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-5-1, two counts of aggravated assault in violation of O.C.G.A. § 16-5-21, possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-11-131, and possession of a firearm during the commission of a felony murder in violation of O.C.G.A. § 16-11-106, as the defendant was angered by the victim's presence in the residence, the defendant assaulted the victim with a baseball bat and threatened to kill the victim if the victim did not leave the residence, and when the victim returned to the residence, the defendant fatally shot the victim in the stomach. *Lawson v. State*, 280 Ga. 881, 635 S.E.2d 134 (2006).

Evidence supported a defendant's convictions for malice murder, felony murder, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony as: (1) the defendant repeatedly followed the victim in and out of a restaurant, and eventually chased the victim from the restaurant, firing at the victim at least nine times; (2) after the shooting, the defendant jumped into a silver truck and sped away; (3) the victim died as a result of the gunshot wounds; and (4) two witnesses identified the defendant from photographic lineups. *Waters v. State*, 281 Ga. 119, 636 S.E.2d 538 (2006).

In spite of the defendant's contrary testimony, a conviction on a charge of aggravated assault with a deadly weapon upon a police officer, in violation of O.C.G.A. § 16-5-21(a)(2) and (c), was supported by sufficient evidence; the trial judge, as the trier of fact, was authorized to credit testimony that the defendant's act of pointing a gun at the victim's midsection caused that person a reasonable apprehension of fear, over testimony presented by the defendant. *Defrancisco v. State*, 289 Ga. App. 115, 656 S.E.2d 238 (2008).

Evidence of the defendant's shooting a victim, striking the victim's companion with a motorcycle helmet, the defendant's sibling's pointing a gun at the companion, and the sibling's pointing a gun at the victim and pulling the trigger, was sufficient to convict the defendant of four

counts of aggravated assault, O.C.G.A. § 16-5-21(a)(2), as the defendant was responsible for the sibling's acts as an aider and abettor under O.C.G.A. § 16-2-20(b)(3). *Serchion v. State*, 293 Ga. App. 629, 667 S.E.2d 624 (2008).

**Conviction of aggravated assault, murder, and possession of a firearm by a convicted felon was justified.** — See *Brooks v. State*, 250 Ga. 739, 300 S.E.2d 810 (1983).

**Instruction on defense of accident or misfortune properly refused.** — Trial court properly refused to give a requested jury instruction on the defense of accident or misfortune, where defendant's own testimony showed that defendant was engaged in an attempt to commit an aggravated assault upon the victim when defendant's pistol discharged and the victim was struck by a bullet. *Grude v. State*, 189 Ga. App. 901, 377 S.E.2d 731 (1989).

**Assault With Gun**

**Stun gun.** — Victim's acts of cooperation when the victim recognized that assailants were armed with a stun gun, the testimony of the victim's intense reaction to being repeatedly assaulted by the gun's electronic discharge, and the legal recognition that the stun gun was an "offensive weapon" constituted sufficient evidence from which the jury could conclude that the victim was assaulted with a weapon likely to result in serious bodily injury. *Harwell v. State*, 270 Ga. 765, 512 S.E.2d 892 (1999).

**An unloaded gun pointed at another in a threatening manner** is a deadly weapon. *Daughtry v. State*, 180 Ga. App. 711, 350 S.E.2d 53 (1986).

When it reasonably appears to an assault victim that the firearm is or might be loaded, then the assailant should be held to consequences of using a deadly weapon whether or not the weapon in fact is loaded. An unloaded shotgun pointed at another in a threatening manner is a "deadly weapon" as a matter of law within the meaning of O.C.G.A. § 16-5-21. *Adsitt v. State*, 248 Ga. 237, 282 S.E.2d 305 (1981).

**Empty pellet gun in the shape of an automatic weapon** was per se a deadly weapon. *Clark v. State*, 191 Ga. App. 386,

381 S.E.2d 763 (1989).

**When a pellet gun that could not be fired** reasonably appeared to the victims to be a deadly weapon, such evidence authorized defendant's conviction of aggravated assault. *Mitchell v. State*, 222 Ga. App. 866, 476 S.E.2d 639 (1996).

**Toy pistol can be offensive or deadly weapon under certain circumstances** but is not necessarily a deadly weapon. *Butts v. State*, 153 Ga. App. 464, 265 S.E.2d 370 (1980).

**Toy gun having appearance of real gun.** — Defendant did not object to the officer's direct testimony that the toy gun the defendant used to assault defendant's former girlfriend looked like a real gun and defendant did not challenge admission of that testimony on appeal; so, the testimony was properly admitted to prove aggravated assault under O.C.G.A. § 16-5-21. Further, defendant had stated to friends who were witnesses that the defendant used the toy gun since the toy looked like a real gun; therefore, the defendant did not show prejudice since the officer's opinion was also cumulative of other evidence. *Jackson v. State*, 270 Ga. App. 166, 605 S.E.2d 876 (2004).

**Reassembled rifle.** — Regardless of whether the reassembled rifle the defendant used in committing an aggravated assault was loaded and capable of firing, the gun reasonably appeared to be a deadly weapon, despite testimony from the defendant's sibling that the sibling later informed the victim that the defendant's rifle was broken. *Stancil v. State*, 278 Ga. App. 843, 630 S.E.2d 130 (2006).

**Armed robbery can be committed either with a real weapon or with a toy or replica weapon having appearance of being real.** *Adsett v. State*, 248 Ga. 237, 282 S.E.2d 305 (1981).

**Pistol as deadly weapon.** — Pistol was a "deadly weapon" within the meaning of O.C.G.A. § 16-5-21(a) as a matter of law even though it was loaded only with blanks. *Veal v. State*, 191 Ga. App. 445, 382 S.E.2d 131, cert. denied, 191 Ga. App. 923, 382 S.E.2d 131 (1989).

**Whether pistol was deadly weapon is jury question.** — If the jury were to find that there was an assault, then whether the pistol used was a weapon

likely to produce death when used in such manner was a jury question. *Kerbo v. State*, 230 Ga. 241, 196 S.E.2d 424 (1973).

**Defendant's use of police officer's pistol involved jury question.** — Whether the defendant's use of a police officer's pistol by placing the defendant's hand on the pistol and trying to pull the pistol from the pistol's holster constituted use of a deadly weapon under the circumstances was properly for the jury's determination. *Hall v. State*, 189 Ga. App. 107, 375 S.E.2d 50 (1988).

Evidence supported the defendant's aggravated assault upon a police officer conviction as whether to credit the defendant's testimony that the defendant acted in self-defense and that the defendant did not have control of or fire the officer's weapon was a matter for the jury. *Mills v. State*, 273 Ga. App. 699, 615 S.E.2d 824 (2005).

**Indictment alleging "shooting" by defendant adequately denotes use of deadly weapon.** — An indictment charging aggravated assault and alleging that the defendant committed an aggravated assault on the victim by commission of an act of "shooting" clearly denotes the use of a deadly weapon and, therefore, is not fatally defective. *Rushin v. State*, 180 Ga. App. 276, 348 S.E.2d 910 (1986).

**Sufficiency of circumstantial evidence.** — Defendant's convictions of aggravated assault, O.C.G.A. § 16-5-21, and burglary, O.C.G.A. § 16-7-1, were affirmed, as there was sufficient circumstantial evidence under O.C.G.A. § 24-4-6 to prove that the defendant was the person who committed the acts in question, based on witness testimony and the discovery of clothes and a gun used in the robbery in the defendant's room. *Moore v. State*, 277 Ga. App. 474, 627 S.E.2d 107 (2006).

**Evidence sufficient for assault with gun.** — Evidence was sufficient to support defendant's conviction given testimony showing that defendant fired defendant's gun inside a game room along with a bullet hole that an officer found behind the counter where a victim was located which allowed a rational trier of fact to conclude that defendant committed the crime of aggravated assault by shooting

**Assault With Gun (Cont'd)**

defendant's gun toward one of the victims. *Dukes v. State*, 264 Ga. App. 820, 592 S.E.2d 473 (2003).

Determination of witness credibility, including the accuracy of eyewitness identification, is within the exclusive province of the jury. Evidence that defendant wielded and attempted to use a gun during the robbery of a pool hall owner was sufficient to convict defendant for aggravated assault where the question of eyewitness identification of defendant was a jury matter. *Bartley v. State*, 267 Ga. App. 367, 599 S.E.2d 318 (2004).

There was sufficient evidence to support defendant's convictions of burglary in violation of O.C.G.A. § 16-7-1(a), aggravated assault in violation of O.C.G.A. § 16-5-21(a)(1), (2), and possession of a firearm during the commission of a crime in violation of O.C.G.A. § 16-11-106(b), where evidence showed that three persons forcibly entered the victims' apartment and demanded money, that all three persons were in the car together on the way to the apartment and on the way to the hospital to drop off a bleeding codefendant, that all three persons carried guns, that one of the victims was shot, and that defendant's statement that defendant only was involved to drop off the bleeding codefendant at the hospital was in contrast to the fact that defendant had blood on defendant's pants, shirt, boxer shorts, and that defendant ejected the bloody codefendant from the car in a hurried manner at the hospital. *Brown v. State*, 267 Ga. App. 642, 600 S.E.2d 731 (2004).

There was sufficient evidence for the jury to find defendant guilty beyond a reasonable doubt of aggravated assault and possession of a firearm during the commission of a crime because the testimony of the victim was sufficient to establish that defendant was the perpetrator. *Davis v. State*, 267 Ga. App. 668, 600 S.E.2d 742 (2004).

Evidence was sufficient to support burglary, aggravated assault, kidnapping, false imprisonment, and armed robbery convictions where one of the victims opened the door to the victim's home when the victim recognized one of defendant's

accomplices, where defendant and another then pushed the door open and rushed inside, and where defendant grabbed the first victim, pointed a gun at the first victim's head, took money from the second victim's wallet, kept the gun pointed at both victims during the entire incident, ripped the telephone cord out of the wall, and instructed the accomplices to bind and blindfold the victims, which they did; the victims both identified defendant as the gunman from a police photo array and made an in-court identification at trial, and any conflict between the victims' testimony that the gunman had a tattoo on the gunman's arm and a trial demonstration revealing no tattoo on defendant's arm was a matter for the jury to resolve and did not affect the sufficiency of the identification. *Kates v. State*, 269 Ga. App. 8, 603 S.E.2d 342 (2004).

Evidence was sufficient to support defendant's conviction of aggravated assault, as: (1) defendant previously threatened to kill the victim; (2) defendant pointed a gun at the victim, warned the victim not to give information to the police about what they did, and said, "We own this area"; (3) the frightened victim told defendant to leave; and (4) defendant left after further words were exchanged. *Husband v. State*, 275 Ga. App. 246, 620 S.E.2d 479 (2005).

Trial court did not err in denying a codefendant's motion for a directed verdict of acquittal on two aggravated assault charges, given that sufficient evidence was presented that: (1) both the defendant and the codefendant, while armed, attempted to rob the victims; (2) off-duty police officers working as security officers identified the defendants; (3) an assault rifle and a sawed-off shotgun were fired by the police as both the defendants were pursued; and (4) the weapons were recovered after both the defendants were apprehended. *Walker v. State*, 281 Ga. App. 163, 635 S.E.2d 422 (2006).

Convictions for felony murder and aggravated assault with a deadly weapon, in violation of O.C.G.A. §§ 16-5-1 and 16-5-21, were supported by sufficient evidence, including that the defendant and the codefendant were acting in concert, and the denial of the defendant's motion

for a judgment of acquittal pursuant to O.C.G.A. § 17-9-1 was proper; the defendant argued with the victim, a prostitute, and refused to pay for the victim's services, prompting the victim to get a gun and fire a shot into the air, whereupon the defendant and a codefendant fired their guns back at the victim in a car leaving the area, and a bullet from the codefendant's gun killed the victim. *Stinchcomb v. State*, 280 Ga. 170, 626 S.E.2d 88 (2006).

Convictions for kidnapping, aggravated assault, and malice murder, in violation of O.C.G.A. §§ 16-5-40, 16-5-21, and 16-5-1, respectively, were supported by sufficient evidence where defendant got into a dispute with the victim over a drug deal, defendant and the codefendants kidnapped the victim, drove the victim to a remote area, and shot the victim several times. *Morris v. State*, 280 Ga. 179, 626 S.E.2d 123 (2006).

Evidence was sufficient to support a conviction for aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), where the defendant fired shots towards the victim, who was "having a good time" with a group of other people in the apartment parking lot; the victim's reasonable apprehension of receiving a violent injury was sufficient to satisfy the intent element under O.C.G.A. § 16-5-20(a)(2). *Thompson v. State*, 277 Ga. App. 323, 626 S.E.2d 825 (2006).

Evidence supported convictions for armed robbery and aggravated assault where using defendant's parent's telephone number, defendant contacted the victim and arranged a meeting to buy shoes, where the victim identified the car defendant was driving, which was registered to defendant's parent, where the victim identified defendant from a pretrial police photo array and at trial, and where, at the meeting arranged by defendant, the victim was shot in the face and defendant then rummaged through the victim's car where the victim kept the shoes. *Waddell v. State*, 277 Ga. App. 772, 627 S.E.2d 840 (2006), cert. denied, 127 S. Ct. 731, 2006 U.S. LEXIS 9304, 166 L.Ed.2d 567 (2006).

Evidence that three unarmed people went to talk to defendant about rumors that the defendant wanted to harm them, and that, when one approached the defen-

dant, the defendant fired five shots in their direction, killing one of them, was sufficient to support convictions for felony murder and aggravated assault. *Traylor v. State*, 280 Ga. 400, 627 S.E.2d 594 (2006).

Sufficient evidence supported convictions of aggravated assault with intent to rob and possession of a firearm during the commission of a crime where the defendant and two other persons tried to rob a market, one of the other persons had a pistol, which was pointed at the market's owners, the armed participant forced one of the owners to try to open the register, and during the course of the robbery, one of the owners grabbed a hidden gun and shot and killed the armed robber, where the defendant and the other participant fled. *Laurel v. State*, 278 Ga. App. 147, 628 S.E.2d 208 (2006).

Sufficient evidence supported defendant's aggravated assault conviction, as the fact that the victim and the defendant offered opposite accounts as to the reason the defendant reached for the gun was of no consequence on appeal, and the appeals court refused to speculate as to which evidence the jury chose to believe. *Moss v. State*, 278 Ga. App. 221, 628 S.E.2d 648 (2006).

Evidence that the defendant and others approached two separate victims while the defendant brandished a shotgun, that defendant threatened the victims with the gun, and that defendant and the compatriots stole both of the victims' cars, sufficed to sustain convictions of two counts of hijacking a motor vehicle, two counts of armed robbery, two counts of aggravated assault with a deadly weapon, and two counts of possession of a firearm during the commission of a felony; the jury was free to disbelieve defendant's testimony that defendant was coerced into threatening the victims at gunpoint and participating in the car thefts. *Martinez v. State*, 278 Ga. App. 500, 629 S.E.2d 485 (2006).

Evidence was sufficient to support a juvenile's delinquency adjudication based on charges of aggravated assault, possession of a firearm by a minor, and discharge of a gun or pistol near a street, in violation of O.C.G.A. §§ 16-5-21(a), 16-11-132(b), and 16-11-103, as the juvenile was at a party and went outside with a crowd of

**Assault With Gun (Cont'd)**

others due to a fight, and the juvenile fired a gun into the air while standing in the midst of a crowd; the juvenile was identified by three eyewitnesses, whose testimony established that they were placed in reasonable apprehension of immediate violent injury due to the juvenile's actions. *In the Interest of C.D.G.*, 279 Ga. App. 718, 632 S.E.2d 450 (2006).

Defendant's conviction as a party for aggravated assault and aggravated battery was affirmed as: (1) the defendant drove a car knowing a gun was inside; (2) the defendant extinguished the headlights and drove slowly past a crowded corner as a passenger opened fire; (3) the defendant stopped the car next to a prone victim while the passenger continued shooting; and (4) the defendant told the police that the defendant did not care who had been shot. *Ford v. State*, 280 Ga. App. 580, 634 S.E.2d 522 (2006).

Defendant's motion for a new trial on the defendant's aggravated assault and possession of a firearm during the aggravated assault charges was properly denied as the defendant's actions before, during, and after a friend's aggravated assault and firearm possession crimes at a home showed not only that the defendant was a party to those crimes, but that the defendant was a fellow conspirator in the assault against the victim as the defendant: (1) forced the victim at gunpoint to drive to the home; (2) stayed in the nearby living room while the friend shot a gun and threatened the victim (and defendant looked into the bedroom after the gun was fired); (3) accompanied the friend and the handcuffed victim in the vehicle following the incident while the friend searched for the victim's love interest's residence; (4) encouraged the friend to kill the victim; and (5) did not protest any of the friend's actions throughout the evening. *Sapp v. State*, 280 Ga. App. 592, 634 S.E.2d 523 (2006).

Defendant's convictions for aggravated assault with a deadly weapon, aggravated battery, and possessing a firearm during the commission of a felony were supported by evidence that: (1) the victim and the defendant had an acrimonious relation-

ship; (2) the defendant threatened to hit the victim with a jug; and (3) the defendant's statement that the victim was not "dead yet" after the victim was shot in the back; the jury could reject the defendant's claim that the defendant fired a warning shot away from the victim and could convict the defendant, even though the victim did not see the defendant point the gun at the victim. *Rowe v. State*, 280 Ga. App. 881, 635 S.E.2d 251 (2006).

Evidence supported a defendant's conviction for malice murder, felony murder while in commission of an aggravated assault, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony as: (1) the defendant came to a tenant's apartment and told the victim that the defendant just shot someone in the backyard; (2) the tenant heard the victim calling the tenant's name; (3) another witness heard a series of gunshots and then someone being beaten, was familiar with the victim and recognized the victim's voice as the victim hollered, "You stomping me. I've been shot. You already done shot me," and saw the defendant emerge from behind the residence with a gun in the defendant's hand; (4) the defendant held the gun to the head of the witness, but then instructed the witness to leave the area; and (5) the victim's death was caused by two fatal gunshot wounds to the neck and chest and there was blunt force trauma to the head. *Compton v. State*, 281 Ga. 45, 635 S.E.2d 766 (2006).

Evidence supported a defendant's conviction of felony murder, aggravated assault, and possession of a firearm during the commission of a felony as: (1) the defendant told the victim that the defendant was going to shoot the victim and then the defendant shot the victim in the stomach, argued with the victim some more, and shot the victim again; (2) the victim never admitted cheating on the defendant; (3) after the second shot, the defendant and a friend took the victim to a hospital in a car; (4) while en route, the defendant persisted in the defendant's efforts to get the victim to admit to cheating on the defendant; and (5) the defendant wiped down the revolver and threw it out of the car. *Durham v. State*, 281 Ga. 208, 636 S.E.2d 513 (2006).

Evidence supported a defendant's conviction for robbery by intimidation, possession of a firearm during the commission of a felony, and aggravated assault with a deadly weapon as: (1) the defendant demanded that the victim give the defendant the victim's purse and then threatened the victim with a gun and told the victim that the defendant would use it; (2) feeling that the victim's life was in danger, the victim ran; (3) the defendant chased the victim and snatched the victim's purse; (4) two witnesses chased the defendant to an abandoned house, where the victim's purse was later found; (5) a witness obtained the tag number of the defendant's vehicle and police traced the vehicle to the defendant's parent; even assuming that the pre-trial identification procedures were unduly suggestive, the in-court identifications by a witness and the victim were admissible as they were based on independent recollections. *Boatwright v. State*, 281 Ga. App. 560, 636 S.E.2d 719 (2006).

Aggravated assault convictions were upheld on appeal based on the defendant's act of deliberately firing a gun in the direction of another; moreover, the fact that one of the defendant's cohorts also fired a weapon in the direction of the shooting victims was sufficient for the defendant to be guilty as a party to those criminal acts. *Thompson v. State*, 281 Ga. App. 627, 636 S.E.2d 779 (2006).

On appeal from the defendant's aggravated assault, possession of a firearm during the commission of a crime, and first-degree criminal damage to property convictions, the court held that the testimony provided by two of the victims identifying the defendant as one of the perpetrators was sufficient to uphold the same, as: (1) the testimony of a single witness was generally sufficient to establish a fact; and (2) under O.C.G.A. § 24-9-80, the credibility of a witness was a matter to be determined by the jury under proper instructions from the court. *Reid v. State*, 281 Ga. App. 640, 637 S.E.2d 62 (2006).

Evidence supported a defendant's conviction for malice murder, aggravated assault, and possession of a firearm in the commission of a felony as: (1) during a van ride, the defendant fought with an assault

victim, striking the assault victim in the head with a gun, and was told to stop hitting the assault victim; (2) a gunshot was heard and the passengers saw a murder victim lying dead and the defendant holding the gun; (3) the gun was inside the murder victim's mouth when it was fired; (4) the assault victim and another passenger fled; and (5) the defendant and an accomplice dumped the body in an industrial area. *Johnson v. State*, 281 Ga. 229, 637 S.E.2d 393 (2006).

Defendant's malice murder and aggravated assault convictions were upheld on appeal, as supported by sufficient evidence, including that: (1) the defendant, along with two codefendants, fired numerous shots into a crowd in an attempt to shoot several men with whom they had been feuding; (2) one of the codefendants later told a friend that the three committed the crimes; (3) one of the defendant's friends saw the defendant with a shotgun shortly after the shooting, the shotgun had red shells, and the defendant told the friend that the gun had been used in the shootings; and (4) forensic evidence later confirmed that red shotgun shells were found at the scene. *Adkins v. State*, 281 Ga. 301, 637 S.E.2d 714 (2006).

Sufficient evidence was presented to convict the defendant of two counts of aggravated assault under O.C.G.A. § 16-5-21 because witness testimony indicated that the first victim and the first victim's young child, the second victim who was also the defendant's child, were scared and crying after a confrontation with the defendant and that gunshots were fired; thus, the evidence established that the victims were in reasonable apprehension of immediately receiving a violent injury as required by § 16-5-21. *Cain v. State*, 288 Ga. App. 535, 654 S.E.2d 456 (2007).

There was sufficient evidence to support a defendant's convictions for aggravated assault and possession-of-a-firearm based on the testimony of three separate witnesses, including the victim, that the defendant threateningly pointed a gun at the victim's head. Further, regarding the need to show the victim's reasonable apprehension of immediately receiving a violent injury, the state presented evidence

**Assault With Gun (Cont'd)**

from the victim's mouth that the victim feared the gun and that the fear resulted in the victim urinating on the victim's person and in the victim lying to an officer at the front door to protect the victim's children. *Hardy v. State*, 293 Ga. App. 265, 666 S.E.2d 730 (2008).

Victim's testimony that the defendant kicked in the door of the victim's residence, entered, pointed a shotgun at the victim, and threatened to shoot the victim if the victim did not give the defendant money was sufficient in itself to support the defendant's conviction for aggravated assault in violation of O.C.G.A. § 16-5-21(a). *Reed v. State*, 293 Ga. App. 479, 668 S.E.2d 1 (2008).

Though the victim was approaching the defendant when the defendant fatally shot the victim at a distance of three feet, the evidence was sufficient to convict the defendant of aggravated assault and felony murder despite the defendant's claim of self-defense as the defendant decided to confront the victim and beat the victim up, retrieved a gun from a car, and lied to police about the victim's pulling a knife before the shooting. *McNeil v. State*, 284 Ga. 586, 669 S.E.2d 111 (2008).

Evidence was sufficient to convict a defendant of aggravated assault in connection with the robbery of a cell phone store at gunpoint as the employees of the store identified the defendant from a non-suggestive photographic array; the getaway car had been rented by the defendant's spouse; and the employee of another cell phone store that had been robbed 20 minutes earlier identified the defendant as the robber. *Fuller v. State*, 295 Ga. App. 439, 672 S.E.2d 438 (2009), cert. denied, No. S09C0749, 2009 Ga. LEXIS 220 (Ga. 2009).

Sufficient evidence was presented to convict a defendant of aggravated assault with a deadly weapon based on evidence that the defendant and a codefendant approached the victims' rental car and brandished guns; while pistol whipping the victims and robbing them of their property, the defendant's gun went off and fatally wounded the first victim; and a gun matching the caliber of bullet recovered

from the first victim during the autopsy was found during the execution of a search warrant at a hotel where the defendant had visited a guest on three occasions. *Watkins v. State*, 285 Ga. 107, 674 S.E.2d 275 (2009).

Because an officer, knowing a bank robbery and carjacking had just occurred, saw defendant with a white bag running away from a car matching the stolen car's description, and the fleeing individual pointed a gun at the officer after being ordered to stop, and a bystander corroborated the officer's testimony about the pointing of the gun, there was probable cause to believe defendant had committed the felonies of aggravated assault and aggravated assault upon a peace officer under O.C.G.A. § 16-5-21, and detaining defendant was a lawful warrantless seizure such that none of the evidence obtained from the seizure was tainted. *United States v. Epps*, 613 F.3d 1093 (11th Cir. 2010), cert. denied, U.S. , 131 S. Ct. 1526, 179 L. Ed. 2d 344 (2011).

Rational trier of fact could have found beyond a reasonable doubt that the defendant committed voluntary manslaughter, O.C.G.A. § 16-5-2, possession of a firearm during the commission of a crime (voluntary manslaughter), O.C.G.A. § 16-11-106, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime (aggravated assault), O.C.G.A. § 16-11-106, because the defendant's explanation of the killing was inconsistent with and not explanatory of the other direct and circumstantial evidence, and, therefore, the jury was permitted to reject such explanation and convict on the remaining evidence; the defendant's son testified on direct that the defendant told the son that the defendant shot the victim once, that the victim ran, that the defendant pursued, and that although the victim begged for the victim's life, the defendant shot the victim again, and there also was forensic evidence indicating that the defendant fired three more rounds into the victim's body. *Cantera v. State*, 304 Ga. App. 289, 696 S.E.2d 354 (2010).

Defendant's claim that the testimony of an armed robbery victim was insufficient to authorize the jury to find that an aggra-

vated assault victim was placed in apprehension of receiving an immediate bodily injury was not supported by the record because the record revealed that the actual victim of the aggravated assault testified that one of the robbers pointed a gun at the victim. *Hester v. State*, 304 Ga. App. 441, 696 S.E.2d 427 (2010).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt as a party to two counts of aggravated assault in violation of O.C.G.A. § 16-5-21 because even though the defendant did not actually use a weapon, there was evidence that an accomplice brandished a handgun and pointed the handgun at both the manager and the clerk of the video store, and the accomplice's use of a weapon could be attributed to the defendant; one who intentionally aids or abets the commission of a crime by another is a party to the crime and equally guilty with the principal, and reasonable apprehension of injury can be proved by circumstantial or indirect evidence as well as by direct or positive evidence since the presence of a gun would normally place a victim in reasonable apprehension of being injured violently. *Rainy v. State*, 307 Ga. App. 467, 705 S.E.2d 246 (2010).

Evidence supported the defendant's convictions for malice murder, felony murder, criminal attempt to commit armed robbery, armed robbery, aggravated assault, and possession of a firearm during the commission of a crime because: (1) the defendant participated in the armed robbery of three people, including the shooting victim, who were sitting in a car on a neighborhood street; (2) during the encounter, the co-indictee fatally shot the victim in the head with a shot gun; (3) one of the two other people in the car testified that, after the shooting, the defendant, with the defendant's hand in the defendant's pocket simulating that the defendant had a gun, took money and drugs from the witness; (4) the co-indictee also took money from the other person; and (5) the defendant and the co-indictee then fled the scene. *Gilyard v. State*, 288 Ga. 800, 708 S.E.2d 329 (2011).

**Evidence negated accident defense.** — Sufficient evidence supported convictions

of aggravated assault, tampering with evidence, and felony misuse of a firearm while hunting, and negated the defense of accident where the victim who was shot by defendant while hunting waved to signal defendant before the gun was fired and where defendant was hunting while on medication that could have caused mental and physical impairment; the jury also could have considered defendant's actions after the shooting in removing the victim's orange vest, hiding two guns, failing to aid the victim, and failing to alert paramedics of the victim's location. *Wilson v. State*, 279 Ga. App. 136, 630 S.E.2d 640 (2006).

**Evidence held sufficient.** — No fatal variance existed between the indictment alleging the defendant committed aggravated assault in either of two different ways and the defendant's conviction for aggravated assault, as the wording of the indictment allowed the state to seek a conviction for either showing that the defendant assaulted another person with intent to murder or with a deadly weapon; the state was not required to prove both methods of assault, and, thus, the trial court's instruction to the jury only as to aggravated assault by use of a deadly weapon did not cause a fatal variance between the indictment and the proof. *Lopez v. State*, 260 Ga. App. 713, 580 S.E.2d 668 (2003).

Because the passenger's testimony demonstrated that the passenger had a reasonable apprehension of a violent injury, the evidence was sufficient to find defendant guilty of aggravated assault where defendant fired several shots at the car in which the passenger was riding. *Richardson v. State*, 261 Ga. App. 55, 581 S.E.2d 694 (2003).

Evidence was sufficient to support all but one of defendant's convictions for burglary, kidnapping, aggravated assault, and possession of a firearm during the commission of a crime because the testimony of the three shooting victims was entirely consistent in all material respects, and any conflicts in the witnesses' testimony raised a credibility issue for jury resolution. *Squires v. State*, 265 Ga. App. 673, 595 S.E.2d 547 (2004).

Victim's testimony and in-court identifi-

**Assault With Gun (Cont'd)**

cation was sufficient evidence to convict defendant of hijacking the victim's motor vehicle at a gas station and of aggravated assault for shooting the victim three times; thus, a photo lineup was not unduly suggestive. *Weeks v. State*, 268 Ga. App. 886, 602 S.E.2d 882 (2004).

Evidence that defendants intentionally fired bullets into a house occupied by three people in an attempt to kill one of them was sufficient to support their conviction of aggravated assault against another occupant, whom they wounded, under the doctrine of transferred intent. It was immaterial that defendants were unaware that the assault victim was in the home. *Culler v. State*, 277 Ga. 717, 594 S.E.2d 631 (2004).

After the defendants were accused of firing into a house, killing one occupant and injuring another; one defendant admitted firing into the home, thinking defendant had killed a man; ballistics reports identified shell casings found at the scene as having been fired from at least two different guns; and DNA testing identified a cap recovered from the scene as having been worn by another defendant, their convictions for felony murder and aggravated assault were supported by sufficient evidence. *Culler v. State*, 277 Ga. 717, 594 S.E.2d 631 (2004).

When the defendant's victim identified the defendant from a photo lineup and at trial as the person who forced the victim to open the vaults in the fast-food restaurant where the victim worked, then duct-taped the victim's limbs and repeatedly struck the victim as the victim lay face down on the floor, the evidence was sufficient beyond a reasonable doubt to allow the jury to convict the defendant of kidnapping with bodily injury, armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of certain crimes. *Banks v. State*, 269 Ga. App. 653, 605 S.E.2d 47 (2004).

Evidence was sufficient to show that defendant was guilty of two counts of aggravated assault, one count of aggravated battery, and one count of possession of a firearm during the commission of a crime, as the evidence showed that defen-

dant shot the victim in the abdomen and the arm with a gun and that defendant intended to cause serious physical harm and disfigurement to the victim. *King v. State*, 269 Ga. App. 658, 605 S.E.2d 63 (2004).

Evidence that the defendant fatally shot the victim during a scuffle in a robbery attempt and told the police that the defendant was shot by a robber was sufficient to support the defendant's conviction for felony murder, aggravated assault, making a false statement to law enforcement officers, and giving a false name to law enforcement officers. *Sampson v. State*, 279 Ga. 8, 608 S.E.2d 621 (2005).

Evidence supported the defendant's aggravated assault conviction as the defendant twice pointed a gun at a victim's neck, ordered the victim to kneel, demanded the victim's wallet and keys, and left with a coin bag and the victim's keys; the victim was scared and covered the victim's head with the victim's forearms so that the defendant would not shoot the victim in the head. *Kirk v. State*, 271 Ga. App. 640, 610 S.E.2d 604 (2005).

Evidence was sufficient to support defendant's conviction for aggravated assault because: (1) the victim heard an unidentified voice scream defendant's name, tell defendant "don't do it," and tell defendant that defendant was going to kill the victim, as a gun was cocked and fired at the victim; and (2) the victim unequivocally identified defendant as the victim's assailant. *Sharif v. State*, 272 Ga. App. 660, 613 S.E.2d 176 (2005).

Evidence was sufficient to support a jury's verdict convicting defendant of aggravated assault under O.C.G.A. § 16-5-21(c), and possession of a firearm during the commission of a crime under O.C.G.A. § 16-11-106, because, through the testimony of someone whom defendant threatened with a gun after the defendant shot a police officer, the evidence showed that the person saw defendant fire a gun at the officer and recognized the gun later recovered as the weapon the defendant used. *Milton v. State*, 272 Ga. App. 908, 614 S.E.2d 140 (2005).

Evidence was sufficient to support a juvenile court's finding that a minor had committed aggravated assault under

O.C.G.A. § 16-5-21 because it showed that the minor blocked the victim's flight, assisted a friend in pushing the victim into the bedroom, and committed sexual battery, all while the friend remained armed with the gun that the friend had pointed at the victim's head; since defendant was concerned in the commission of the crime, defendant could be convicted of it under O.C.G.A. § 16-2-20. In the Interest of A.J., 273 Ga. App. 51, 614 S.E.2d 159 (2005).

Because defendant shot a victim with a rifle as the victim attempted to flee and the victim at first thought that defendant had a BB gun, but realized otherwise when defendant shot at the victim's cousin, the evidence supported defendant's conviction for aggravated assault based on: (1) defendant's attempt to commit a violent injury to the victim with a deadly weapon; or (2) defendant's shooting at the victim with a deadly weapon, thereby putting the victim in reasonable apprehension of immediately receiving a violent injury. *Harris v. State*, 273 Ga. App. 90, 614 S.E.2d 189 (2005).

Evidence supported defendant's conviction for armed robbery, kidnapping, and aggravated assault as, notwithstanding the absence of an in-court identification of defendant and the state's failure to present fingerprint evidence, a victim's testimony concerning the victim's on-the-scene identification supported the finding that defendant perpetrated the crimes; there was also sufficient evidence that the cash seized from defendant's love interest's house had been put there by defendant. *Oliver v. State*, 273 Ga. App. 754, 615 S.E.2d 846 (2005).

Evidence was sufficient to support defendant's convictions for felony murder, aggravated assault, and possession of a firearm in the commission of a felony in a case because defendant, who had engaged in previous altercations with the victim, got out of defendant's car after seeing the victim on the street, ran up to the victim, shot the victim, returned to defendant's car, ran back to the victim and shot the victim again, and then got in defendant's car and drove off, as all of the elements of those offenses were established. *Hayes v. State*, 279 Ga. 642, 619 S.E.2d 628 (2005).

Evidence was sufficient to support the defendant's aggravated assault, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon convictions where the jury was entitled to give greater weight to the victim's positive contemporaneous identification of the defendant as the shooter and to conclude that the victim's subsequent uncertainty resulted from fear of retaliation by the defendant rather than from any real confusion about who fired the shot; the jury was also entitled to give little weight to a negative gunshot residue test result on defendant's hands as a sergeant regularly ordered gunshot residue tests on the suspects. *Haggins v. State*, 277 Ga. App. 742, 627 S.E.2d 448 (2006).

Because: (1) the jury was authorized to infer that defendant intended to commit a violent injury upon the victim in view of the evidence showing that the defendant demanded to know the victim's location, and then walked directly up to the victim and shot the victim; and (2) this same evidence was sufficient to show that defendant intended to commit an act that placed the victim in reasonable apprehension of immediately receiving a violent injury, defendant's two aggravated assault with a deadly weapon convictions were supported by sufficient evidence. *Smith v. State*, 279 Ga. App. 211, 630 S.E.2d 833 (2006).

In defendant's convictions for armed robbery, kidnapping, and aggravated assault in connection with robbery of a fast food restaurant, sufficient evidence existed to support defendant's convictions based on a restaurant employee identifying defendant as one of two perpetrators who confronted that employee and manager at gunpoint and threatened to shoot if the victims did not comply with defendant's demand for money; also, evidence showed that defendant forced the manager out of the manager's car at gunpoint, ordered the manager back across the parking lot and into the restaurant, and stole over \$300 from the restaurant's safe as well as a cellular phone before fleeing. *Holsey v. State*, 291 Ga. App. 216, 661 S.E.2d 621 (2008).

Eyewitnesses testified that the defendant ordered a man to shoot the victim,

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who was wounded but escaped; later, eyewitnesses saw the defendant and an armed cohort encounter the unarmed victim, who was fatally shot. This evidence was sufficient to support the defendant's convictions for aggravated assault and murder. *Wilcox v. State*, 284 Ga. 414, 667 S.E.2d 603 (2008).

Juvenile court properly denied a juvenile's motion for a new trial with regard to the juvenile's delinquency adjudication finding the juvenile guilty for aggravated assault, criminal property damage, cruelty to children, and reckless conduct arising from the shooting of a BB gun at a passing car. The juvenile was the only Caucasian identified in the group of youth; the juvenile admitted to hiding the BB gun; the juvenile did not dispute that the juvenile encouraged another youth to shoot the gun; and the judge was the final arbiter of the credibility and witness issues and had the province to reject the testimony of the juvenile and a parent that the juvenile did not shoot the gun. *In the Interest of A.A.*, 293 Ga. App. 827, 668 S.E.2d 323 (2008).

Testimony by two victims that the defendant grabbed a purse from one of them and pointed a gun at both of them, and testimony from an eyewitness that the defendant fled from the police, was sufficient to support the defendant's convictions for armed robbery and aggravated assault. *Wallace v. State*, 295 Ga. App. 452, 671 S.E.2d 911 (2009).

Sufficient evidence supported the defendant's convictions of murder, felony murder, and aggravated assault; the evidence revealed that the victim and the defendant got into a physical fight at a bar, and that the victim then left the bar and went to an apartment. The defendant then went home, retrieved a handgun, went to the apartment, knocked on the door, and when one of the people inside opened the door, the defendant shot the victim in the chest, killing the victim. *Rector v. State*, 285 Ga. 714, 681 S.E.2d 157 (2009), cert. denied, U.S. , 130 S. Ct. 807, 175 L. Ed. 2d 567 (2009).

Evidence authorized the jury to find the defendant guilty beyond a reasonable

doubt of murder, felony murder, aggravated assault, and possession of a weapon during the commission of a felony because contrary to the defendant's arguments, the evidence showed that the person who was sitting in the back seat of the victim's car was not sitting directly behind the victim, but instead, that person was in the rear seat on the passenger's side of the car; the forensics testing showed that the murderer was located to the left of the victim, not the right, and there was blood spatter on the seat behind the victim from which the jury could have inferred that no one was sitting there at the time of the shooting. *Julius v. State*, 286 Ga. 413, 687 S.E.2d 828 (2010).

Jury could have found the defendant guilty beyond a reasonable doubt of two counts of aggravated assault because the victim's testimony that the defendant pointed a gun at the victim and that a shot was subsequently fired wounding the victim was sufficient circumstantial evidence that the defendant committed a violent injury to the victim; the victim's testimony that the victim was afraid of being shot when the defendant pointed the gun at the victim sufficed to convict the defendant of aggravated assault by placing the victim in reasonable apprehension of immediately receiving a violent injury. *Wright v. State*, 302 Ga. App. 101, 690 S.E.2d 220 (2010).

Evidence was sufficient to support the defendant's conviction for the aggravated assault of people because there was evidence that the defendant stabbed and shot at the same person, and there was evidence that the defendant and the defendant's accomplice pointed a gun at the people in the house, and an officer testified to their names; the defendant did not show the requisite harm arising out of a claim that the allegations and proof fail to correspond. *Ward v. State*, 304 Ga. App. 517, 696 S.E.2d 471 (2010).

Although under Georgia law, a defendant could not be convicted solely upon the uncorroborated testimony of an accomplice, O.C.G.A. § 24-4-8, the evidence corroborated some particulars of the accomplice's testimony implicating the codefendants in the charged crimes since all three of the victims from the three sepa-

rate gas stations provided descriptions of their assailants that generally matched the codefendants and the accomplice, and all three victims also testified that their assailants brandished a handgun and a shotgun, which were indeed the weapons that were found at the scene where the stolen SUV crashed and where the accomplice was arrested. Accordingly, the evidence corroborating the accomplice's testimony was sufficient to authorize the jury's determination that the codefendants were guilty beyond a reasonable doubt as parties to armed robbery, O.C.G.A. § 16-8-41, hijacking a motor vehicle, O.C.G.A. § 16-5-44.1, aggravated assault, O.C.G.A. § 16-5-21, theft by taking, O.C.G.A. § 16-8-2, theft by receiving, O.C.G.A. § 16-8-7, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106. Daniels v. State, 306 Ga. App. 577, 703 S.E.2d 41 (2010).

Evidence supported the defendant's convictions for felony murder predicated on armed robbery, armed robbery, and aggravated assault because the evidence showed that the defendant and the codefendant, after discussing the idea of stealing marijuana and whatever cash the victim had on the victim, arranged to meet with the victim to buy marijuana from the victim. When the victim got into the back seat of the defendant's vehicle and pulled out a bag of marijuana, the codefendant drew a gun and shot the victim, fatally wounding the victim. Herbert v. State, 288 Ga. 843, 708 S.E.2d 260 (2011).

Evidence was sufficient to prove three counts of aggravated assault against the defendant because testimony that the victims ran from gunfire was sufficient evidence that the defendant and the codefendant placed the victims in reasonable apprehension of immediately receiving a violent injury, and other evidence showed that all of the victims were positioned in or very near the line of fire; one of the victims testified that the victim was sitting on the ground, could have been shot, and would have been if the victim had stood up, and a jury could find that the victim experienced a reasonable apprehension of receiving a violent injury even though the victim affirmatively testified

that the victim was not afraid. Howard v. State, 288 Ga. 741, 707 S.E.2d 80 (2011).

**Identification of defendant sufficient.** — Victim's testimony at trial sufficiently identified the defendant as the assailant who fired shots at the victim, and the evidence was sufficient to support convictions for aggravated assault, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon, since the victim knew the defendant from previous encounter and although it was dark, the victim was able to see the defendant's face during incident because area was illuminated by streetlight. Johnson v. State, 279 Ga. App. 153, 630 S.E.2d 661 (2006).

**Evidence insufficient for conviction.** — Because no eyewitnesses saw a third defendant participate in an armed robbery, a kidnapping, an aggravated assault, or possess a firearm during the commission of the crimes, and because the third defendant was not implicated by the other defendants, did not confess to the crimes, and did not flee the jurisdiction, the evidence was insufficient to support a conviction for the third defendant. Johnson v. State, 277 Ga. App. 499, 627 S.E.2d 116 (2006).

**Testimony as to ultimate issue excluded in assault with gun case.** — In a prosecution for aggravated assault, under O.C.G.A. § 16-2-6, the issue of whether the defendant shot the victim with the intention of assaulting the victim was an issue of ultimate fact to be decided by the jury. Therefore, the state's objection to defense counsel's question to the defendant, "Did you intend to assault the victim?" was properly sustained. Gordon v. State, 294 Ga. App. 908, 670 S.E.2d 533 (2008).

**Sentencing.** — Defendant was entitled to resentencing with regard to the defendant's convictions on one count of aggravated assault and one count of armed robbery arising from the robbery of a restaurant because the two counts were based upon the same conduct, namely pointing a handgun at the restaurant's manager in order to commit a robbery. Fagan v. State, 283 Ga. App. 784, 643 S.E.2d 268 (2007).

### Assault With Automobile

**Trial counsel not ineffective as lenient sentence imposed.** — Trial counsel did not provide ineffective assistance of counsel due to a failure to investigate defendant's mental health history as: (1) defendant did not claim that defendant was insane at the time of the crimes, was incompetent to stand trial, or was otherwise suffering from delusional compulsion; (2) there was no evidence that defendant was guilty, but mentally ill; and (3) felony murder carried a mandatory life sentence, firearm possession required a consecutive five-year sentence, and the trial court was lenient in sentencing defendant to half of the time allowed by law for an aggravated assault, so there was no harm in the failure to introduce more detail about defendant's mental health history at sentencing. *Harris v. State*, 279 Ga. 304, 612 S.E.2d 789 (2005).

**Reckless driving as lesser included offense of aggravated assault.** — Defendant was entitled to a new trial on the charge of aggravated assault upon a police officer in violation of O.C.G.A. § 16-5-21 because the trial court should have given the defendant's requested charge on reckless driving in violation of O.C.G.A. § 40-6-390(a) as a lesser included offense since there was evidence that the defendant did not intend to injure a police officer but that the defendant's decision to drive off suddenly with the officer in close proximity to the defendant's truck was nonetheless an act of criminal negligence, which would have supported a conviction for reckless driving. *Young v. State*, 294 Ga. App. 227, 669 S.E.2d 407 (2008).

**Automobile is not per se deadly weapon**, but may become one depending upon the manner and means of the vehicle's use. *Blalock v. State*, 165 Ga. App. 269, 299 S.E.2d 753 (1983); *Cline v. State*, 199 Ga. App. 532, 405 S.E.2d 524 (1991); *Reynolds v. State*, 234 Ga. App. 884, 508 S.E.2d 674 (1998).

Although an automobile is not per se a deadly or offensive weapon, it may become one depending on the manner and means of the vehicle's use. The question of whether an automobile, or other instrumentality, has been used so as to constitute a deadly or offensive weapon is prop-

erly for the jury's determination. *Butler v. State*, 196 Ga. App. 706, 396 S.E.2d 916 (1990); *Reynolds v. State*, 234 Ga. App. 884, 508 S.E.2d 674 (1998).

Aggravated assault convictions were affirmed after the defendant accelerated toward officers standing in front of the defendant at a roadblock, forcing the officer's to jump out of the way, and causing one to fall. *Williams v. State*, 270 Ga. App. 371, 606 S.E.2d 594 (2004).

Evidence was sufficient to support defendant's conviction for aggravated assault, as a rational trier of fact was authorized to conclude that defendant meant to harm the police officer who stopped defendant's vehicle when defendant fled in the vehicle and the officer had to step out of the way to avoid being struck; although an automobile was not a deadly weapon per se, defendant used it as such and defendant's increasing level of hostility during the stop, coupled with defendant's attempt to run over the officer while fleeing, supported defendant's conviction for aggravated assault. *Young v. State*, 273 Ga. App. 151, 614 S.E.2d 257 (2005).

**Automobile can be a deadly weapon.** — Evidence that defendant hit patrol cars while making a U-turn and appeared to be in full control of the vehicle just prior to the impact was sufficient for the jury to find that defendant attempted to commit a violent injury to another's person and interfered with government property. *Black v. State*, 222 Ga. App. 80, 473 S.E.2d 186 (1996).

Sufficient evidence existed to convict defendant of aggravated assault under O.C.G.A. § 16-5-21(a)(2), since defendant used a vehicle as a deadly or offensive weapon, because when the officer pulled defendant over, defendant turned the vehicle around and accelerated at the officer, forcing the officer to jump behind a patrol car to avoid being hit. *Thomas v. State*, 255 Ga. App. 777, 567 S.E.2d 72 (2002).

Evidence that defendant, a shoplifting suspect, drove off in defendant's vehicle with a police officer hanging only halfway inside defendant's vehicle as the officer attempted to grab defendant's keys, and that defendant continued to drive even though the officer was hanging half-in and half-out of the vehicle was sufficient to

sustain defendant's conviction for aggravated assault of a police officer as the evidence showed that defendant used the vehicle as a deadly weapon and that defendant had the general intent required to sustain an aggravated assault conviction. *Frayall v. State*, 259 Ga. App. 286, 576 S.E.2d 654 (2003).

Evidence was sufficient to support defendant's conviction for aggravated assault on a peace officer as it showed defendant had the general intent to commit the crime against the police officer who had executed a traffic stop on defendant, by using defendant's automobile to commit an offensive act and make it likely the officer would sustain serious bodily injury as defendant was aware that the officer had both hands on defendant when defendant put the car in drive and sped off with the officer hanging on to defendant. *Riels v. State*, 259 Ga. App. 420, 577 S.E.2d 88 (2003).

Evidence that defendant forced a love interest to remain in the love interest's car against the love interest's will, that the defendant chased the love interest with the love interest's car when the love interest tried to escape, that the defendant hit the love interest with the car, and that the love interest suffered a broken ankle was sufficient to sustain defendant's convictions for false imprisonment and aggravated assault. *Scott v. State*, 268 Ga. App. 889, 602 S.E.2d 893 (2004).

Convictions against defendant for aggravated assault and simple assault did not require reversal because the police failed to preserve defendant's car after defendant had engaged in an aggressive car chase, which resulted in the assault charges based on defendant having used the car as a weapon, as there was no showing that the police acted in bad faith in failing to preserve the evidence and no evidence that suggested that the possible exculpatory value of the car was apparent before the car's destruction. *Ransby v. State*, 273 Ga. App. 594, 615 S.E.2d 651 (2005).

**Withdrawal of plea to charge of aggravated assault on police officer** was properly denied because the defendant agreed during the plea colloquy with the state's version of the facts that the defendant

drove toward the officer-victim and rammed a stolen vehicle that the defendant was driving into the officer's car while the officer was in it and admitted to the court that the defendant was in fact guilty of the crime as charged. *Sheffield v. State*, 270 Ga. App. 576, 607 S.E.2d 205 (2004).

**Evidence of intent sufficient.** — Evidence of criminal intent was sufficient to support defendant's conviction of aggravated assault of a peace officer, notwithstanding that defendant might have had a seizure during the police chase, where: (1) defendant exhibited continued hostility of the officers during the chase; (2) defendant eluded rolling backups; (3) defendant maneuvered through stationary roadblocks; and (4) defendant maintained control of defendant's vehicle at high speeds during the chase. *Dupree v. State*, 267 Ga. App. 561, 600 S.E.2d 654 (2004).

Defendant's proceeding pro se after three detailed trial court warnings was not abuse of discretion; the defendant's conviction of two counts of O.C.G.A. § 16-5-21(a)(2) aggravated assault and one count of O.C.G.A. § 16-5-70(c) cruelty to children (using defendant's car as a deadly weapon to run into the defendant's spouse's car with the spouse and child inside) was supported by sufficient evidence. *Bush v. State*, 268 Ga. App. 200, 601 S.E.2d 511 (2004).

Adjudications as to two counts of aggravated assault and two counts of failing to stop at or return to an accident scene were supported by sufficient evidence detailing the juvenile's act of striking two individuals with a car, and then leaving the scene of said accident; moreover, decisions as to the credibility of witnesses were in the province of the juvenile court, which apparently determined that the state disapproved the juvenile's defense. In the Interest of J.L., 281 Ga. App. 105, 635 S.E.2d 393 (2006).

Trial court did not err by denying the defendant's motion for a directed verdict on an aggravated assault charge based on evidence that a deputy stood visibly in the roadway with the deputy's arms raised and yelling for defendant to stop the defendant's vehicle at a roadblock, defendant drove the vehicle at 40 miles per

**Assault With Automobile (Cont'd)**

hour directly at the deputy who had to quickly jump out of the roadway to avoid being struck by the defendant's vehicle, and the deputy testified that the deputy feared being struck by the defendant's vehicle and receiving serious injuries; the jury was authorized to determine that the defendant had the requisite criminal intent to commit aggravated assault against the deputy, who was placed in reasonable apprehension of immediately receiving a violent injury. *Taul v. State*, 290 Ga. App. 288, 659 S.E.2d 646 (2008).

There was sufficient evidence to support a defendant's conviction for aggravated assault based on the defendant, after panicking from striking a vehicle in a night-club parking lot, drove a vehicle with headlights on toward a sheriff's deputy providing security at the nightclub, accelerated towards the officer, and drove within two or three car lengths of the officer without stopping, at which point the officer ran out of the vehicle's path, which evidence authorized a jury to find that the defendant had the requisite intent to commit injury. Further, there was sufficient evidence to authorize a jury finding that the defendant intended to act in a manner that placed the officer in reasonable apprehension of an immediate violent injury based on the officer jumping to safety to avoid being struck by the vehicle. *Adams v. State*, 293 Ga. App. 377, 667 S.E.2d 186 (2008).

Evidence supported convictions of aggravated assault when the evidence showed that the defendant chased the victims in the defendant's car for about 15 miles, rear-ended their vehicle when the car attempted to make a turn, and ran the defendant's vehicle into their driver's side with enough force to push their vehicle up onto a curb; moreover, one victim testified that during the vehicle chase, it was apparent that the defendant and another person were trying to box the victim in with their vehicles and that the victim was very scared. The jury was not required to believe defendant's testimony that the incident was an accident. *Windham v. State*, 294 Ga. App. 72, 668 S.E.2d 526 (2008).

Aggravated assault by means of a deadly weapon (O.C.G.A. § 16-5-21(a)(2)) is not a specific intent crime; the state is only required to prove a general intent to injure. Therefore, evidence that the defendant threatened to kill the victim and tried to hit the victim with the defendant's car was sufficient to prove that the defendant had the requisite intent to commit aggravated assault. *Barnes v. State*, 296 Ga. App. 493, 675 S.E.2d 233 (2009).

Defendant fled from police in a car, disregarded their orders to stop, and almost ran over one of the officers. Evidence that an officer reasonably feared receiving a violent injury when the defendant backed the car toward the officer, and that the defendant acted in reckless disregard for human life, was sufficient to support the defendant's conviction of aggravated assault by intent to murder. The defendant's defense, that the defendant was resisting an unlawful arrest, was meritless. *Mackey v. State*, 296 Ga. App. 675, 675 S.E.2d 567 (2009).

**Evidence of intent sufficient.** — Evidence was sufficient to enable the trial court to find, beyond a reasonable doubt, that the defendant possessed the intent necessary to commit aggravated assault, O.C.G.A. § 16-5-21(a), and felony murder, O.C.G.A. § 16-5-1(c), because the defendant used a vehicle as an offensive weapon while the defendant was extremely drunk, and the evidence was sufficient to prove both forms of simply assault under O.C.G.A. § 16-5-20(a)(1)-(2) by the defendant against all six of the victims; the defendant engaged in an extended high-speed car chase with a driver, deliberately rammed the other driver's truck, and attempted to smash into the other driver head-on after the truck stalled, and within minutes after the driver escaped, the defendant came upon the other five victims by swerving sharply into oncoming traffic and slamming into a vehicle. *Guye v. State*, 286 Ga. 574, 690 S.E.2d 406 (2010).

**Assault With Hands, Fists, or Other Body Parts**

**Fists are not, per se, deadly weapons.** *Thomas v. State*, 237 Ga. 690, 229 S.E.2d 458 (1976); *Boling v. State*, 244 Ga.

825, 262 S.E.2d 123 (1979); *Meminger v. State*, 160 Ga. App. 509, 287 S.E.2d 296 (1981), rev'd on other grounds, 249 Ga. 561, 292 S.E.2d 681 (1982).

While fists per se are not a deadly weapon within the meaning O.C.G.A. § 16-5-21, they may be found to be a deadly weapon by the jury depending on the manner and means of their use, the wounds inflicted, etc. *Quarles v. State*, 130 Ga. App. 756, 204 S.E.2d 467 (1974); *Guevara v. State*, 151 Ga. App. 444, 260 S.E.2d 491 (1979); *Boling v. State*, 244 Ga. 825, 262 S.E.2d 123 (1979); *Harper v. State*, 152 Ga. App. 689, 263 S.E.2d 547 (1979); *Wright v. State*, 211 Ga. App. 431, 440 S.E.2d 27 (1994).

**Hands as deadly weapons.** — Evidence that defendant beat the victim about the head and face with defendant's hands was sufficient to authorize the jury's verdict that defendant was guilty of aggravated assault. *Scott v. State*, 243 Ga. App. 383, 532 S.E.2d 141 (2000).

While hands are not considered deadly weapons per se within the meaning of O.C.G.A. § 16-5-21(a)(2), the fact finder may find them to be so depending on the circumstances surrounding their use, including the extent of the victim's injuries. *Mallon v. State*, 253 Ga. App. 51, 557 S.E.2d 409 (2001).

**Defense of property not sole defense.** — Trial court did not err in failing sua sponte to instruct the jury on the defense of property defense as the defendant's sole defense as the defendant claimed that the defendant did not cause the victim's injuries, defense counsel attempted to establish that the victim's recollection of the events was impaired by the victim's fading in and out of consciousness and by the victim's consumption of alcohol, and the jury was adequately instructed on witness credibility, the burden of proof, reasonable doubt, and the presumption of innocence. *Strickland v. State*, 267 Ga. App. 610, 600 S.E.2d 693 (2004).

**Fists may constitute weapon likely to produce death.** See *Haygood v. State*, 154 Ga. App. 633, 269 S.E.2d 480 (1980).

**Whether fists are deadly weapons is question for jury.** See *Arnett v. State*, 245 Ga. 470, 265 S.E.2d 771 (1980).

With regard to a defendant's conviction for aggravated assault and other related crimes, sufficient evidence existed to support the conviction since the evidence authorized the jury to find that the defendant beat the victim with the defendant's fists until the victim was rendered unconscious, fracturing bones in the victim's face. *Ferrell v. State*, 283 Ga. App. 471, 641 S.E.2d 658 (2007).

**Fists and feet may be deadly weapons.** — Although fists and feet are not considered deadly weapons within the meaning of former Code 1933, § 26-1302, they may be found to be deadly weapons by the jury depending on the manner and means of their use. *Kirby v. State*, 145 Ga. App. 813, 245 S.E.2d 43 (1978); *Dixon v. State*, 268 Ga. 81, 485 S.E.2d 480 (1997); *Braswell v. State*, 245 Ga. App. 602, 538 S.E.2d 492 (2000) (see O.C.G.A. § 16-5-21).

Jury could find that a defendant's hands and feet, depending upon their use, wounds inflicted, and other surrounding circumstances, were deadly weapons or objects likely to result in serious bodily injury when used offensively against a person for purposes of aggravated assault under O.C.G.A. § 16-5-21(a)(2). *Haugland v. State*, 253 Ga. App. 423, 560 S.E.2d 50 (2002).

Evidence was sufficient to support defendant's conviction under O.C.G.A. § 16-5-21(a)(2) as defendant repeatedly stomped defendant's work boots on the victim's chest and face, driving the victim's head into the floor. *Kemp v. State*, 257 Ga. App. 340, 571 S.E.2d 412 (2002).

While an indictment against defendant failed to state that defendant's hands were used as deadly weapons, this omission did not render the charge flawed, where the allegations set forth that defendant's hand were used as offensive objects, resulting in serious bodily injury to defendant's child. *State v. English*, 276 Ga. 343, 578 S.E.2d 413 (2003).

Sufficient evidence supported convictions of aggravated assault, criminal trespass, and obstruction of a 9-1-1 call as the defendant became irate after a demand for a refund was denied by a store, a store manager told the defendant to leave, but the defendant refused, when the manager

**Assault With Hands, Fists, or Other Body Parts (Cont'd)**

picked up the phone to call 9-1-1, the defendant grabbed the phone and slammed it on the counter, the defendant pushed the bag of brass plates the defendant was trying to return in the manager's face, cutting the manager, and punched the manager in the face. *Hooker v. State*, 278 Ga. App. 382, 629 S.E.2d 74 (2006).

Delinquency finding for acts constituting party to the crimes of aggravated assault and battery was supported by sufficient evidence showing that the appellant was one of a group of youths who punched, kicked, and struck one victim with a shotgun, and participated in the attack; the appellant also knocked another victim to the ground and hit that victim during the fracas. *In the Interest of E.R.*, 279 Ga. App. 423, 631 S.E.2d 458 (2006).

Two defendants were properly convicted of felony murder with aggravated assault, O.C.G.A. § 16-5-21(a)(2), as the predicate felony since the evidence established that the defendants killed the victim by repeatedly striking the victim's face and head, and the jury was authorized to conclude that the defendants' hands and feet were used as deadly weapons. *Dasher v. State*, 285 Ga. 308, 676 S.E.2d 181 (2009).

Victim's testimony that the defendant pushed the victim off a porch railing then came down the stairs and kicked the victim in the mouth, after which the victim was paralyzed from the chest down, was sufficient to support the defendant's conviction for aggravated assault under O.C.G.A. § 16-5-21(a)(2). *Morales v. State*, 305 Ga. App. 569, 699 S.E.2d 864 (2010).

**Hands, fists, and shoe-clad feet are not necessarily or per se deadly weapons**, but may or may not be deadly weapons depending upon the circumstances of the case. *Chafin v. State*, 154 Ga. App. 122, 267 S.E.2d 625 (1980).

**Although hands, feet and a telephone receiver are not deadly weapons per se**, the jury could find them to be deadly depending upon their use, wounds inflicted, and other surrounding circum-

stances. *Wheeler v. State*, 232 Ga. App. 749, 503 S.E.2d 628 (1998).

**Whether defendant's hands were used as a deadly weapon** within the meaning of O.C.G.A. § 16-5-21 was a jury question. *Richards v. State*, 222 Ga. App. 853, 476 S.E.2d 598 (1996).

**Assault with shoe clad feet.** — Evidence supported a conviction of aggravated assault when the indictment alleged that the defendant kicked and stomped the victim with shoe clad feet, a means likely to cause serious bodily injury when used offensively against a person. Whether the defendant's shoe-clad feet constituted objects likely to result in serious injury was a question of fact for the jury, and given that the defendant stomped on and kicked the victim, rendering the victim bruised and unconscious, the jury was authorized to convict the defendant of aggravated assault. *Windham v. State*, 294 Ga. App. 72, 668 S.E.2d 526 (2008).

**It is jury question as to whether or not shoe or boot constitutes deadly weapon**, under all the circumstances surrounding the shoe or boot, its size, weight and construction, and the manner in which it was used. *Williams v. State*, 127 Ga. App. 386, 193 S.E.2d 633 (1972).

**Actual serious injuries not required.** — Evidence was sufficient to convict the defendant of violating of O.C.G.A. § 16-5-21(a)(2), as the indictment alleged that the aggravated assault was committed with objects likely to cause serious bodily injury (a broom handle and defendant's feet and hands), not that serious bodily injury in fact occurred. *Massey v. State*, 278 Ga. App. 303, 628 S.E.2d 706 (2006).

**Photographs of victim's injuries.** — In a prosecution for a violation of O.C.G.A. § 16-5-21(a)(2), as the indictment alleged that the aggravated assault was committed with objects likely to cause serious bodily injury (a broom handle and the defendant's feet and hands), photos depicting the condition of the victim, one of which depicted the defendant's foot print on the victim's face, were relevant to establish the nature and extent of the injury. *Massey v. State*, 278 Ga. App. 303, 628 S.E.2d 706 (2006).

**Denial of motion for acquittal proper.** — Defendant's motion for a directed verdict of acquittal on an aggravated assault of a peace officer charge was properly denied as the evidence supported the conviction since an officer testified that the defendant knocked the officer to the ground, attempted to remove the officer's firearm from its holster, told the officer that defendant "was going to take care of (the officer)," indicated that the defendant wanted the defendant's drugs back, grabbed the drugs, and ran away; a videotape of the incident was also admitted at trial. Bolden v. State, 281 Ga. App. 258, 636 S.E.2d 29 (2006).

**Jury instructions.** — Since defendant's aggravated assault conviction merged as a matter of law into defendant's malice murder conviction, any complaint by defendant about the jury instruction on aggravated assault was rendered moot. Mason v. State, 279 Ga. 636, 619 S.E.2d 621 (2005).

**Biting victim with risk of transmitting HIV virus.** — When defendant was tried for aggravated assault with intent to murder after biting a police officer, the jury could rationally find the risk of transmitting the HIV virus through a human bite rendered defendant's bite, if not defendant's spittle, a "deadly" weapon beyond a reasonable doubt. Scroggins v. State, 198 Ga. App. 29, 401 S.E.2d 13 (1990), cert. denied, 198 Ga. App. 898, 401 S.E.2d 13 (1991).

**Hands likely to cause serious bodily injury sufficient for indictment.** — Trial court erred in quashing an aggravated assault count against defendant because the indictment was sufficient where it alleged that defendant assaulted defendant's spouse with defendant's hands, which, when used offensively were likely to cause serious bodily injury; further, the indictment did not need to additionally charge in the language of simple assault under O.C.G.A. § 16-5-20 in order to withstand demurrer. State v. Tate, 262 Ga. App. 311, 585 S.E.2d 224 (2003).

**Sixth Amendment violation was harmless error.** — Although the admission of a victim's statements to a deputy violated defendant's Sixth Amendment

rights, the error was harmless as to defendant's aggravated assault and battery convictions in light of the photographs of the victim's injuries and the defendant's admission that the defendant grabbed the victim around the neck and that the defendant might have hit the victim in the face. Miller v. State, 273 Ga. App. 761, 615 S.E.2d 843 (2005).

**Choking victim and slamming her around room.** — Evidence supported defendant's rape, aggravated sodomy, aggravated assault, criminal trespass, misdemeanor obstruction of a law enforcement officer, felony obstruction of a law enforcement officer, and possession of marijuana conviction because: (1) a victim testified that defendant choked the victim, slammed the victim around a room, and raped and sodomized the victim, then drank a beer, took some BC powder packets, and cell phone, and left; (2) defendant fled from the police, kicked two officers, and had marijuana, BC packets, and a cell phone; (3) defendant's DNA matched the DNA on the beer can; (4) a nurse testified that the victim's bruise was consistent with strangulation; and (5) a doctor testified that the victim's injuries were consistent with rape and sodomy. Lewis v. State, 271 Ga. App. 744, 611 S.E.2d 80 (2005).

**No merger with family violence battery.** — Aggravated assault under O.C.G.A. § 16-5-21 with fists only and family violence battery under O.C.G.A. § 16-5-23.1(f) with fists and a bottle upon the defendant's then live-in love interest were not required to be merged under O.C.G.A. § 16-1-7(a) because there were two separate incidents separated by the love interest's visit to a store and because the aggravated assault did not require the use of a bottle. Collins v. State, 277 Ga. App. 381, 626 S.E.2d 513 (2006).

**Evidence sufficient to show beating.** — Evidence that the defendant beat the victim about the head and face with the defendant's hands was sufficient to authorize the jury's verdict that the defendant was guilty, beyond a reasonable doubt, of aggravated assault, particularly in light of the victim's concussion and fractured face bone caused by the defendant's punches. Sims v. State, 296 Ga. App. 461, 675 S.E.2d 241 (2009).

### Assault With Hands, Fists, or Other Body Parts (Cont'd)

**Evidence sufficient for assault on infant.** — Evidence was sufficient to convict defendant of aggravated assault, given the defendant's own admissions to the police that the defendant had shaken the defendant's love interest's infant; the jury was entitled to reject the defendant's version of events and credit the testimony of the state's multiple medical experts, as each of the experts testified that the child's severe injuries were inconsistent with the defendant's explanation for the injuries. Sullivan v. State, 277 Ga. App. 738, 627 S.E.2d 437 (2006).

Sufficient circumstantial evidence supported the defendant's conviction of aggravated assault in violation of O.C.G.A. § 16-5-21 upon the eight-month-old victim, as a jury could have concluded that the other children, ages four and five, could not have injured the victim; medical testimony indicated that such shaken baby injuries could not have been caused by the other children, and the defendant was the only adult with the child at the time the injuries were allegedly sustained. Mahan v. State, 282 Ga. App. 201, 638 S.E.2d 366 (2006).

### Assault With Other Objects

**Knife with two blades each three and one-fourth inches in length** was deadly weapon. Powell v. State, 140 Ga. App. 36, 230 S.E.2d 90 (1976).

**Defensive use of knife.** — O.C.G.A. § 16-5-21 does not differentiate between offensive and defensive threats of immediate bodily harm, and a knife may constitute a "deadly weapon" even though the victim was out of striking range and the defendant maintained a defensive posture. Davis v. State, 184 Ga. App. 230, 361 S.E.2d 229 (1987).

**Box cutter.** — Evidence did not support finding that defendant had committed aggravated assault because the state did not show that a box cutter was a deadly weapon; the state showed only that the defendant hit the victim with the blunt side of a box cutter, inflicting minor injuries, but there was no evidence that the blade was ever exposed or that defen-

dant threatened the victim with an exposed blade. Ware v. State, 289 Ga. App. 860, 658 S.E.2d 441 (2008).

**Chain.** — Evidence supported defendant's conviction of aggravated assault on a peace officer in violation of O.C.G.A. § 16-5-21(a)(2) where the evidence, when viewed in the light most favorable to the state, showed that defendant, after being sprayed with pepper spray during a confrontation with a police officer, grabbed a long chain and swung it over defendant's head while moving toward the officer; defendant's testimony that defendant had been backing away with the chain raised an issue of credibility for the jury to resolve. Chancey v. State, 258 Ga. App. 319, 574 S.E.2d 383 (2002).

**Ceramic vase is not per se an offensive or deadly weapon.** Banks v. State, 169 Ga. App. 571, 314 S.E.2d 235 (1984).

**Pencil.** — Sufficient evidence supported the finding that the defendant, a juvenile, had committed an act that would have constituted aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2); circumstantial evidence, including cuts on the victim's face, discovery of the pencil in the vicinity of the assault, and the investigating officer's testimony, corroborated the victim's belief that the defendant wielded a broken pencil during the attack. In the Interest of M.V.H., 281 Ga. App. 486, 636 S.E.2d 168 (2006).

**Pen.** — Evidence sufficed to sustain the jury's determination that the defendant was guilty of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) for stabbing a store manager with a pen because the defendant stabbed the manager with the pen with such force that it bent the pen and broke the manager's skin, causing bleeding; the jury viewed the weapon and received testimony and photographic evidence about the nature and extent of the victim's actual injuries and the manner in which the defendant used the pen to stab the manager. Griggs v. State, 303 Ga. App. 442, 693 S.E.2d 615 (2010).

**Metal cane** employed to beat victim's head sufficiently showed the use of an instrumentality in a way that was likely to cause serious injury, so as to prove aggravated assault. Coney v. State, 209 Ga. App. 9, 432 S.E.2d 812 (1993).

**Metal objects.** — Sufficient evidence supported the defendant's conviction of aggravated assault under O.C.G.A. § 16-5-21(a)(2) after the defendant's companions used metal knuckles, a metal pipe, and a gun to beat the victim; the defendant was a party to the offense under O.C.G.A. § 16-2-20(a), as the victim, whose testimony was sufficient to establish a fact under O.C.G.A. § 24-4-8, testified that, during the incident, the defendant summoned the companions to help beat the victim, and the defendant and the companions repeatedly warned the victim not to testify in court in the defendant's criminal case. *Souder v. State*, 281 Ga. App. 339, 636 S.E.2d 68 (2006), cert. denied, No. S07C0113, 2007 Ga. LEXIS 97 (Ga. 2007).

Evidence that the defendant threw a punch at the victim, who punched the defendant back and walked away; and that the defendant followed the victim and aggressively swung a metal rod at the victim, who felt threatened enough to go into a residence, was sufficient to adjudicate the defendant delinquent of committing acts which, if committed by an adult, would have constituted felony aggravated assault, O.C.G.A. § 16-5-21. The trial court was authorized to find that it was the victim, not the defendant, who acted in self defense. *In the Interest of J. W. B.*, 296 Ga. App. 131, 673 S.E.2d 630 (2009).

**Pry bar.** — Testimony indicating that the defendant struck the victim in the head and on the arm with a pry bar, breaking the victim's arm and pulling the flesh away from the victim's head, was sufficient to convict the defendant of aggravated battery under O.C.G.A. § 16-5-24 and aggravated assault under O.C.G.A. § 16-5-21. *Mattis v. State*, 282 Ga. App. 49, 637 S.E.2d 787 (2006).

**Iron.** — Testimony that defendant struck the victim with a hot iron along with photographs of the wounds were sufficient to support finding that defendant used the iron as an offensive weapon. *Hill v. State*, 230 Ga. App. 395, 496 S.E.2d 526 (1998).

**Use of a dog can be considered a deadly weapon.** *Perkins v. State*, 197 Ga. App. 577, 398 S.E.2d 702 (1990).

**Lit cigarette** constituted an offensive weapon likely to cause serious injury

when, after defendant doused the victim, a store clerk, with gasoline, the defendant profanely insisted that the victim give the defendant "the money" or the defendant would burn the victim with the cigarette. *Johnson v. State*, 246 Ga. App. 109, 539 S.E.2d 605 (2000).

**Bludgeon device used as offensive weapon.** — When the testimonies of the victim, a doctor, and other witnesses were a sufficient indication under O.C.G.A. § 24-4-6 of the severity of the blow to show that a bludgeon device was used as an offensive weapon, there was sufficient competent evidence to find defendant guilty of armed robbery and aggravated assault under O.C.G.A. §§ 16-5-21(a) and 16-8-41(a). *Garrett v. State*, 263 Ga. App. 310, 587 S.E.2d 794 (2003).

**Assault with a baseball bat.** — Evidence was sufficient to support defendant's conviction for aggravated assault and attempted robbery; the description of the crimes as they occurred by a witness to a 9-1-1 operator, the 9-1-1 tape transcript of that call, the observations of the police officers who responded to the call of the witness that an African-American person was beating a Hispanic person with a baseball bat while trying to take money out of the Hispanic person's pockets, and the testimony of the witness at trial was sufficient to overcome evidence that the witness gave a false name to police, that the witness was unable to identify defendant at trial, and that the victim did not testify at trial. *Williams v. State*, 275 Ga. App. 491, 621 S.E.2d 512 (2005).

Testimony of the state's witnesses that the defendant struck the victims with a baseball bat, coupled with testimony and photographs depicting the defendants' injuries, amply supported the defendant's conviction of two counts of aggravated assault under O.C.G.A. § 16-5-21(a)(2). *Gray v. State*, 291 Ga. App. 573, 662 S.E.2d 339 (2008).

**Wooden plank.** — Trial court properly denied a defendant's motion for a directed verdict of acquittal following the defendant's conviction for aggravated assault of a romantic friend as the evidence sufficiently established that the defendant's friend sustained serious bodily injury as a result of being attacked with a wooden

**Assault With Other Objects (Cont'd)**

plank with which the defendant struck the friend on the back and head with repeatedly. The testimony and photographs admitted at trial reflected that, as a result of the defendant repeatedly striking the victim with the wooden plank, the victim was bruised on multiple parts of the body and experienced soreness, saw "stars," and fell to the ground. *Reynolds v. State*, 294 Ga. App. 213, 668 S.E.2d 846 (2008).

**Tree limb.** — There was sufficient evidence to support a defendant juvenile's conviction of aggravated assault as the defendant juvenile hit a victim with a "big old broken tree limb," bruising the victim's back; whether the tree limb was a deadly weapon under the aggravated assault statute, capable of causing serious bodily injury, was an issue for the factfinder. *In the Interest of T.W.*, 280 Ga. App. 693, 634 S.E.2d 854 (2006).

Convictions against the defendant for malice murder, burglary, armed robbery, and aggravated assault were supported by evidence that the defendant entered the victim's home, hit the victim multiple times about the head and face with a tree limb with a metal piece on the limb, and wrote a check in defendant's name from the victim's checkbook; evidence included witness testimony from the bank where defendant cashed the check, defendant's confession to police, and physical evidence. *Bell v. State*, 284 Ga. 790, 671 S.E.2d 815 (2009).

**Stick and brick.** — Evidence that the defendant intentionally struck the victim with a stick and that either the defendant or one of the other parties to the assault intentionally struck the victim with their fists and a concrete block supported an aggravated assault conviction; further, although the victim was the only person who testified about having been hit with a concrete block, and was not sure which of the attackers struck that blow, this testimony was sufficient to establish that the victim was hit with a concrete block because it made no difference whether an accomplice, and not the defendant, assaulted the victim in the manner alleged in the indictment. *Oliver v. State*, 278 Ga.

App. 425, 629 S.E.2d 63 (2006).

**Machete.** — There was sufficient evidence to conclude that the defendant, charged with aggravated assault with a deadly weapon resulting in serious bodily injury, pursuant to O.C.G.A. § 16-5-21(a)(2), and aggravated battery by maliciously causing bodily harm and serious disfigurement in violation of O.C.G.A. § 16-5-24(a), was the person who attacked the victim with a machete; the victim and two other persons identified the defendant, and a witness testified that the defendant told the witness that the defendant had hit a person with a machete after someone threw an object at the defendant's car. *Emberson v. State*, 271 Ga. App. 773, 611 S.E.2d 83 (2005).

Convictions for theft, aggravated assault, and making a terroristic threat was supported by evidence because the defendant admitted to taking gas cans, raised a machete to scare or strike the defendant's sibling, the sibling was frightened and ran, and the defendant then threatened the siblings that if either called the sheriff the defendant would return and kill them. *Turner v. State*, 273 Ga. App. 535, 615 S.E.2d 603 (2005).

**Meat cleaver.** — Evidence was sufficient to support a conviction for aggravated assault in a case where the defendant, an occasional houseguest, became angry at a relative, retrieved a meat cleaver, and attacked the relative, who grabbed a pool cue to in self-defense; the defendant's conduct amounted to a reasonable imminent threat of the use of deadly force and the relative, under the circumstances, was entitled to use force in defense of habitation pursuant to O.C.G.A. § 16-3-23. *Robison v. State*, 277 Ga. App. 133, 625 S.E.2d 533 (2006).

**Assault with brick.** — Evidence that, after an officer stopped defendant's car and asked defendant to exit the vehicle, defendant attempted to flee, and, in the ensuing struggle, struck the officer with a brick was sufficient to support defendant's aggravated assault conviction, as any alleged inconsistencies in the victim's testimony were for the jury to resolve, rather than an appellate court. *Monroe v. State*, 273 Ga. App. 14, 614 S.E.2d 172 (2005).

**Pipe.** — Evidence that the defendant struck the victim with a pipe was suffi-

cient to support the defendant's conviction of aggravated assault. *Bilow v. State*, 279 Ga. App. 509, 631 S.E.2d 743 (2006).

**Metal pipe.** — While, at trial, the victim of the defendant's assault disavowed an initial, pre-trial statement to police and medical personnel that the defendant hit the victim with a metal pipe, the jury was authorized to believe the victim's pre-trial statement rather than the victim's in-court disavowal, and sufficient evidence supported the defendant's conviction of aggravated assault, *Leonard v. State*, 279 Ga. App. 192, 630 S.E.2d 804 (2006).

**Lamp.** — When the defendant was accused of felony murder and aggravated assault by throwing a lamp at the victims, because the indictment alleged that the lamp was an object that when used offensively against a person was likely to and actually did result in serious bodily injury, an allegation that the lamp was a deadly weapon was not required. Furthermore, the indictment was not too vague as the defendant clearly was apprised that the defendant would have to defend against the allegation that the defendant struck one victim on and about the head with the lamp, and the defendant admitted to a law enforcement officer that the defendant had thrown the lamp at the other victim. *Hester v. State*, 283 Ga. 367, 659 S.E.2d 600 (2008).

**Glass bowl.** — Evidence was sufficient to convict defendant of aggravated assault under O.C.G.A. § 16-5-21(a)(2) because defendant hurled a glass bowl at a motel manager, which caused injuries when the manager raised a hand in front of the manager's face for protection. *Watson v. State*, 301 Ga. App. 824, 689 S.E.2d 104 (2009).

**Beer bottle.** — Victim was struck from behind with a beer bottle; the victim's head was cut, requiring stitches. The circumstantial evidence was sufficient to convict the defendant of aggravated assault because: (1) the victim saw defendant standing close behind the victim after the blow was struck, and defendant began fighting with the victim; (2) similar transaction evidence showed the defendant's history of making unprovoked attacks on unsuspecting victims; and (3) a

bartender's testimony that someone else committed the crime was internally inconsistent and uncorroborated. *Maiorano v. State*, 294 Ga. App. 726, 669 S.E.2d 678 (2008).

Defendant's act of throwing a beer bottle at a deputy sheriff at close range and with such force that the bottle shattered on impact was sufficient to allow a jury to conclude that the defendant used a bottle offensively against the officer in a manner likely to have resulted in serious bodily injury within the meaning of the aggravated assault statute, O.C.G.A. § 16-5-21(a)(2). *Reese v. State*, 303 Ga. App. 871, 695 S.E.2d 326 (2010).

**Unknown object.** — Defendant was properly convicted of aggravated assault for repeatedly cutting a person's arm. Even though the victim could not identify what kind of weapon inflicted the wound, a treating nurse testified the wound was inflicted by a sharp instrument, like a box cutter, and the victim's testimony established all the other elements of the offense. *Freeman v. State*, 297 Ga. App. 496, 678 S.E.2d 97 (2009).

**Screwdriver.** — Evidence showed aggravated assault because the defendant had a long screwdriver in the defendant's hand, the defendant took a swing at the victim when the victim caught up to the defendant, the victim assumed a fighting stance until the victim noticed the screwdriver and immediately retreated, and the victim did not thereafter try to personally apprehend the defendant but opted to call the police and only trailed the defendant while keeping a safe distance; the jury was not required to view the evidence as the defendant urged. *Davis v. State*, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

### Assault with Intent to Murder

**Definition of assault with intent to murder** is assault without justification and without any circumstances of mitigation made by one person upon another, with a weapon in its nature likely to produce death, with the specific intent at the time unlawfully to take the life of the person assaulted. *Killian v. State*, 19 Ga. App. 750, 92 S.E. 227 (1917).

**Elements of assault with intent to murder.** — To constitute the offense of

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assault with intent to murder, there must be an assault by one person upon another, with a weapon likely to produce death in the manner used, the assault must be actuated by malice, either express or implied, and made by a person making the assault with the specific intent to kill the person assaulted. Reddick v. State, 11 Ga. App. 150, 74 S.E. 901 (1912); Griffin v. State, 50 Ga. App. 213, 177 S.E. 511 (1934); Anderson v. State, 51 Ga. App. 98, 179 S.E. 654 (1935); Dennis v. State, 51 Ga. App. 538, 180 S.E. 909 (1935).

On the trial of one indicted for the offense of assault with intent to murder by the use of a deadly weapon, the burden is on the state to show: (1) the assault; (2) the deadly character of the weapon; (3) the intent to take life; and (4) the commission of the assault under such circumstances that, had death ensued, the party making the assault would have been guilty of the offense of murder. Jackson v. State, 56 Ga. App. 374, 192 S.E. 633 (1937).

**There must be overt act.** Jackson v. State, 103 Ga. 417, 30 S.E. 251 (1898).

**Proof of assault with intent to murder requires proof of all elements of murder except victim's death.** Jackson v. State, 51 Ga. 402 (1874); Caudle v. State, 7 Ga. App. 848, 68 S.E. 343 (1910); Baker v. State, 88 Ga. App. 894, 78 S.E.2d 357 (1953).

**Evidence must show specific intent to kill person assaulted.** — Specific intent to kill is an essential ingredient of the offense of assault with intent to commit murder. Neese v. State, 40 Ga. App. 503, 150 S.E. 451 (1929).

One cannot legally be convicted of an assault with intent to murder unless the evidence shows that the assault was committed with the specific intent to kill the person assaulted. Gresham v. State, 46 Ga. App. 54, 166 S.E. 443 (1932).

To constitute the offense of assault with intent to murder there must be a specific intent to kill, which is not necessarily or conclusively shown by the use of a weapon likely to produce death. Titshaw v. State, 51 Ga. App. 60, 179 S.E. 641 (1935); Jackson v. State, 99 Ga. App. 740, 109 S.E.2d 886 (1959).

**Specific intent to kill will not be presumed.** — When death ensues from the use of a deadly weapon, a specific intent to kill will be presumed; but when death does not ensue, such an intent will not be presumed. In a charge of assault with intent to murder, proof of the specific intent to kill is a necessary ingredient of the crime. Hawks v. State, 51 Ga. App. 317, 180 S.E. 363 (1935).

**Single shot assaulting two individuals.** — Firing of a single shotgun blast at a car containing two persons in the front seat of the car authorized defendant's conviction for the offense of aggravated assault as to both individuals. Cavender v. State, 208 Ga. App. 61, 429 S.E.2d 711 (1993).

**Indictment must allege intent to kill.** — In an indictment for assault with intent to murder, the intent to kill cannot be implied or inferred by the state, but must be specifically alleged; and the jury may or may not infer such intention from the facts proved. Minge v. State, 45 Ga. App. 197, 164 S.E. 68 (1932) (decided under former Penal Code 1910, § 97).

**Indictment sufficient.** — Indictment which alleged that defendant assaulted another person "with a handgun, a deadly weapon" was sufficient to inform defendant of the charge defendant had to defend, and the trial court properly overruled defendant's special demurrer alleging that the indictment was deficient because it did not specify whether defendant committed the assault by shooting the victim, pointing the gun at the victim, or beating the victim with the gun. Arthur v. State, 275 Ga. 790, 573 S.E.2d 44 (2002).

**Allegation that act was committed "with malice aforethought" is not equivalent to allegation of "intent to kill,"** which must be specifically alleged in an indictment for assault with intent to murder. Minge v. State, 45 Ga. App. 197, 164 S.E. 68 (1932).

**Intent to kill may be gathered from circumstances and is jury question.** — Existence of intent to murder is matter of fact to be ascertained by the jury from all the evidence before the jury, and not a matter for legal inference or presumption. Minge v. State, 45 Ga. App. 197, 164 S.E. 68 (1932).

Intention of the defendant is a question for determination by the jury under the facts and circumstances surrounding the occurrence. *Vickery v. State*, 48 Ga. App. 851, 174 S.E. 155 (1934).

While the intent to kill is not conclusively shown by the use of a weapon likely to produce death, such intent may be gathered from circumstances and is a matter for the determination of the jury. *Griffin v. State*, 50 Ga. App. 213, 177 S.E. 511 (1934); *Dennis v. State*, 51 Ga. App. 538, 180 S.E. 909 (1935); *Jackson v. State*, 56 Ga. App. 374, 192 S.E. 633 (1937).

In prosecution for assault with intent to murder, the court, in passing upon the intent, may take into consideration all the facts and circumstances of the case at the time of the attack, and also the nature of the wound inflicted. *Breland v. State*, 80 Ga. App. 575, 56 S.E.2d 921 (1949).

**Proving intent.** — Intent to kill may be established by proving, to satisfaction of jury, reckless disregard of human life. *Minge v. State*, 45 Ga. App. 197, 164 S.E. 68 (1932).

**Intent to kill may be inferred.** — While to authorize a conviction for assault with intent to murder a deliberate intent to kill must be shown at the time of the assault, such intent may be inferred by the jury from the nature of the instrument used in making the assault, the manner of its use, and the nature of the wounds inflicted. *Reece v. State*, 60 Ga. App. 195, 3 S.E.2d 229 (1939); *Tanner v. State*, 86 Ga. App. 767, 72 S.E.2d 549 (1952).

**Jury may consider brutality and duration of assault** as circumstances from which intent to kill may be inferred. *Reece v. State*, 60 Ga. App. 195, 3 S.E.2d 229 (1939).

**Evidence sufficient to show intent.** — When the defendant was tried for aggravated assault with intent to murder after biting a police officer, the jury's finding of "intent to murder" was supported by evidence that the defendant sucked up excess sputum before biting the officer — this being evidence of a deliberate, thinking act rather than purely spontaneous — and that the defendant laughed when the officer asked the defendant if the defendant had AIDS. *Scroggins v. State*, 198 Ga. App. 29, 401 S.E.2d 13 (1990), cert.

denied, 198 Ga. App. 898, 401 S.E.2d 13 (1991).

Evidence was sufficient to adjudicate a juvenile a delinquent for aggravated assault with intent to murder when: (1) the juvenile was willingly present when the victim was beaten and stabbed; (2) the juvenile was part of a group carrying bricks, sticks, and bats on a mission of revenge; and (3) the juvenile fled the crime scene and gave police false information moments after the incident, because, under O.C.G.A. § 16-2-20, whether the juvenile actually stabbed the victim was not controlling, as the juvenile was an accomplice of those who did, and it could be inferred from the juvenile's conduct before and after the crime that the juvenile shared the perpetrators' criminal intent. *In the Interest of N.L.G.*, 267 Ga. App. 428, 600 S.E.2d 401 (2004).

Jury was authorized to find that the defendant intended to murder a kidnapping victim since the defendant strangled the victim after the defendant's spouse told the defendant to get rid of the victim, the defendant's conduct caused the victim to lose consciousness and created such pressure in the victim's neck that both eyes hemorrhaged, and the defendant then threw the victim into the back of the defendant's car trunk and drove away. *Moody v. State*, 279 Ga. App. 440, 631 S.E.2d 485 (2006).

Evidence supported a defendant's conviction for malice murder and assault as: (1) the defendant told a first witness that the defendant had killed a man; (2) the defendant had tried to sell the victim's car; (3) the defendant admitted to police that the defendant had the key to the victim's car; and (4) the defendant told a fellow prisoner that the defendant and an accomplice strangled the victim, beat the victim, stabbed the victim, cut the victim's throat, and tore out the victim's fingernails. *Richard v. State*, 281 Ga. 401, 637 S.E.2d 406 (2006).

**Aggravated assault merged into felony murder.** — Evidence was sufficient to support defendant's conviction for aggravated assault based on the non-fatal beating of the victim where: (1) the victim had been beaten, but had died from strangulation; (2) the victim's clothing was

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found in defendant's apartment complex's trash bin; and (3) the victim's DNA was present in blood on defendant's bedspread. Thus, the aggravated assault conviction merged into the felony murder conviction; however, a separate aggravated assault conviction based on the non-fatal beating of the victim did not merge. *Scott v. State*, 276 Ga. 195, 576 S.E.2d 860 (2003).

**Erroneous charge to jury that assault with intent to murder linked to possibility of murder conviction.** — Charge to jury that if it finds that defendant would have been guilty of murder if victim of assault had died (which the victim did not) that defendant would now be guilty of assault with intent to murder is erroneous, but it is not always reversible error to give such charge. *Bradford v. State*, 69 Ga. App. 856, 26 S.E.2d 848 (1943).

**Failure to charge jury on law of assault with intent to murder when victim died of wounds.** — When in trial for murder, whether or not the evidence demanded a finding that the deceased died of a wound inflicted by defendant, it showed conclusively and without dispute that the deceased died as a result of a wound or wounds inflicted by one or more of the persons jointly indicted, the court did not err in failing to charge the jury on the law of assault with intent to murder. *Fudge v. State*, 190 Ga. 340, 9 S.E.2d 259 (1940).

**Evidence sufficient for aggravated assault conviction.** — Evidence that the defendant shot the victim with a gun in a dispute over money the victim allegedly owed to the defendant was sufficient to support the defendant's conviction for aggravated assault as it showed the defendant used a deadly weapon to inflict serious bodily injury on the victim. *Render v. State*, 257 Ga. App. 477, 571 S.E.2d 493 (2002).

**Maximum sentence properly imposed.** — When the defendant was convicted of aggravated assault, burglary, theft by taking, and carrying a concealed weapon, the trial court properly imposed a

111-year sentence of imprisonment, which was within the statutory limits and which was the maximum possible. The presumption of vindictiveness was absent when a trial court imposed a greater penalty after trial than the court would have after a guilty plea; furthermore, the trial court explained that the court imposed the sentence because the defendant's actions were life-threatening, because the jury convicted the defendant of entering the dwelling with intent to commit murder, because the defendant's actions against one victim, the defendant's parent, had escalated from the defendant's previous misdemeanor crimes against the parent, and because the defendant displayed no remorse. *Townes v. State*, 298 Ga. App. 185, 679 S.E.2d 772 (2009).

**Assault with Intent to Rob**

**Offender may be convicted of assault with intent to murder and assault with intent to rob** where the evidence supports an intent to murder and an intent to rob. Under the provisions of the state Constitution they are not the same offenses, although they include the same occasion, time, and place. *Martin v. State*, 77 Ga. App. 297, 48 S.E.2d 485 (1948).

**Assault with intent to rob person of money may be committed though person assaulted may not have money in their pocket, or on person, at the time and place the crime is attempted.** *Alexander v. State*, 66 Ga. App. 708, 19 S.E.2d 353 (1942).

**No fatal variance.** — Defendant's conviction for aggravated assault was affirmed since there was not a fatal variance between the evidence and the indictment, which alleged that the defendant unlawfully made an assault with intent to rob, with a knife, by holding the knife in a threatening manner while demanding money; the defendant was a conspirator in an armed robbery and the demands for money could be attributed to the defendant as the defendant entered the apartment without permission and held the knife at the defendant's side with the blade exposed as the defendant's partner demanded money, and the victims were afraid that the defendant "would do some-

thing." *Brown v. State*, 281 Ga. App. 523, 636 S.E.2d 709 (2006), cert. denied, No. S07CO168 , 2007 Ga. LEXIS 99 (Ga. 2007).

**No merger of related offenses.** — As separate facts were used to prove each crime, the trial court did not err by refusing to merge the offenses of armed robbery, aggravated assault, and possession of a firearm during the commission of the felonies. *Blocker v. State*, 265 Ga. App. 846, 595 S.E.2d 654 (2004).

There was sufficient evidence to uphold a defendant's convictions for malice murder, aggravated assault, and possession of a firearm during the commission of a crime in connection with the fatal shootings of two men, and the wounding of four other men, as the jury was authorized to accept an accomplice's version of events, including that robbery was the initial motive and that the defendant fired the shots that killed and wounded the victims. The fact that conflicts in the evidence were resolved adversely to the defendant did not render the evidence insufficient and there was ample evidence that the defendant acted with implied malice, therefore, there was no error in determining that the killings were malice murders rather than felony murders. *Jackson v. State*, 282 Ga. 668, 653 S.E.2d 28 (2007).

Defendant was properly denied merger of a charge of criminal attempt to commit armed robbery and aggravated assault of a store victim as the offense of attempted armed robbery under, *inter alia*, O.C.G.A. § 16-4-1 was complete when the defendant pointed the gun at the victim and aggravated assault occurred when the victim was struck in the face with the gun. *Stubbs v. State*, 293 Ga. App. 692, 667 S.E.2d 905 (2008).

**Merger required.** — Because all of the facts used to prove the offense of aggravated assault with intent to rob were used up in proving the armed robbery, merger was required. *Mercer v. State*, 289 Ga. App. 606, 658 S.E.2d 173 (2008).

Because the assault element of a defendant's aggravated assault with intent to rob conviction under O.C.G.A. § 16-5-21(a) was contained within the "use of an offensive weapon" element of armed robbery under O.C.G.A. § 16-8-41,

and both crimes shared the "intent to rob" element, the defendant's aggravated assault conviction merged into the armed robbery conviction. *Lucky v. State*, 286 Ga. 478, 689 S.E.2d 825 (2010).

Defendant's aggravated assault conviction should have merged into defendant's armed robbery conviction for sentencing purposes because the defendant's use of the defendant's handgun against the victim was the same conduct in both offenses, designed to immobilize the victim while the victim was robbed. The aggravated assault was established by proof of the same or less than all the facts required to establish the commission of the armed robbery. *Herrera v. State*, 306 Ga. App. 432, 702 S.E.2d 731 (2010).

**Defendant's testimony sufficient to authorize conviction.** — Where defendant testified that codefendant conceived of the robbery without defendant's knowledge or participation and that only the codefendant was armed, defendant did acknowledge pretending to have a gun and giving orders to the store occupants, defendant's own testimony was sufficient to authorize a conviction for armed robbery and aggravated assault, and insufficient to support a defense of coercion. *House v. State*, 203 Ga. App. 55, 416 S.E.2d 108, cert. denied, 203 Ga. App. 906, 416 S.E.2d 108 (1992).

**Different jury decisions supported.** — Defendant's conviction was based on direct evidence, corroborated by circumstantial evidence; the jury's decision on the gun charge did not alter the fact that the aggravated assault charge was well-supported by the record. *Murray v. State*, 256 Ga. App. 736, 569 S.E.2d 636 (2002).

**Evidence sufficient for conviction of robbery and assault.** — Evidence was sufficient to support defendants' convictions for aggravated assault with intent to rob and aggravated battery. *Autry v. State*, 230 Ga. App. 773, 498 S.E.2d 304 (1998).

Ample evidence supported defendant's convictions of two counts of armed robbery in violation of O.C.G.A. § 16-8-41(a), and one count of aggravated assault in violation O.C.G.A. § 16-5-21(a)(1), (a)(2), where defendant was identified by defen-

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dant's companions in statements to the police, and also by two victims at trial, as the person who drove with the three companions to a store and, while pointing a gun at the various victims, robbed one person of money and lottery tickets, demanded and obtained money from a second person and shot that person, demanded money from the second person's spouse, and then fled with the three companions. *Bates v. State*, 259 Ga. App. 232, 576 S.E.2d 619 (2003).

Defendant was properly found guilty of aggravated assault under O.C.G.A. § 16-5-21, aggravated assault with intent to rob under O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106 where the footprints observed along the path between the crime scene and the area where defendant was apprehended matched the size and soles of defendant's shoes and defendant was identified as the robber based on defendant's clothing, shoes and "build." *Mack v. State*, 263 Ga. App. 186, 587 S.E.2d 132 (2003).

Evidence was sufficient to support defendant's convictions for armed robbery, aggravated assault, and possession of a firearm during the commission of the felonies because the only evidence of coercion came from defendant personally. To disprove the coercion defense, the victim testified that defendant did not appear nervous, that the robbery occurred very quickly, with no "fumbling" or "bumbling" on defendant's part, and that defendant commented that the defendant was robbing the victim because the defendant needed a place to stay. *Blocker v. State*, 265 Ga. App. 846, 595 S.E.2d 654 (2004).

Evidence was sufficient to support defendant's conviction for aggravated assault as defendant approached a fast food manager in a parking lot, demanded money at gunpoint, and shot the victim in a struggle; the victim and the victim's spouse identified defendant as the assailant. *Clark v. State*, 271 Ga. App. 534, 610 S.E.2d 165 (2005).

Evidence supported defendant's conviction for aggravated assault under

O.C.G.A. § 16-2-20 as: (1) defendant and codefendant tried to convince a victim to participate in a fake armed robbery; (2) defendant told the victim that they would take the bullets out of the gun if it would make the victim feel better; (3) defendant watched over the victim while codefendant retrieved the gun; (4) defendant informed the victim that the victim would not get hurt if the victim cooperated with codefendant; and (5) defendant left in the car with codefendant. *Broome v. State*, 273 Ga. App. 273, 614 S.E.2d 807 (2005).

Because the person who stole the victim's vehicle had a distinctive hairstyle, and the defendant, who had the same hairstyle, was apprehended while in possession of the vehicle soon after the crime was committed, there was sufficient evidence to support a conviction for armed robbery in violation of O.C.G.A. § 16-8-41, aggravated assault with intent to rob in violation of O.C.G.A. § 16-5-21, and possessing a firearm during commission of a felony in violation of O.C.G.A. § 16-11-106. *Hall v. State*, 277 Ga. App. 413, 626 S.E.2d 611 (2006).

Acceptance of the juveniles' admissions to an aggravated assault with intent to rob under O.C.G.A. § 16-5-21 was proper because the defendants' argument that, while they threatened to take the victim's vehicle, they failed to take any steps to consummate the taking of the vehicle was rejected because, clearly, the defendants were parties to the assault, and there merely had to be an intent to rob, as a substantial step toward a robbery was unnecessary. *In the Interest of T.K.L.*, 277 Ga. App. 461, 627 S.E.2d 98 (2006).

Sufficient evidence supported convictions of felony murder, armed robbery, aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm in the commission of a felony where, upon pulling into an apartment complex to turn around and ask for directions, the victims were approached by defendant and another man, where defendant pulled out a gun and told the victims to "give it up," where, when one of the victims hesitated, defendant shot him, where defendant then stole that victim's money and jewelry, where, later, the gunshot victim died, where the second victim

described defendant, who was wearing a specific jersey at the time of the crimes, and where two witnesses who knew defendant testified that defendant robbed and shot the victim while wearing that jersey. *Davis v. State*, 280 Ga. 442, 629 S.E.2d 238 (2006).

Convictions for kidnapping and aggravated assault were supported by sufficient evidence, including testimony from the victim that, when the victim stopped the victim's car at a stop sign, the defendant jumped in the car, held a knife to the victim's throat and demanded money, that, as the victim drove, the defendant held the knife on the victim and continued to demand money, that, when the victim spotted a police station, the victim sped into its parking lot, at which point, the defendant fled on foot. *Adcock v. State*, 279 Ga. App. 473, 631 S.E.2d 494 (2006).

Convictions for armed robbery, aggravated assault, fleeing to elude a police officer, and reckless driving were all upheld on appeal, given the sufficiency of the identification evidence supplied by the victim, an investigating officer, and the arresting officer, as well as observations made by the latter in apprehending the defendant; moreover, the defendant's failure to object to the admission of a photographic lineup and show-up as impermissibly suggestive precluded appellate review of the same. *Newton v. State*, 280 Ga. App. 709, 634 S.E.2d 839 (2006).

Jury was entitled to find the defendant guilty of aggravated assault, charged in the indictment "with the intent to rob," based on the corroboration of the defendant's admission to going on a "lick," which meant to go find someone to rob, and that the defendant knew what a passenger was going to do when that passenger reached out of the car window in an attempt to snatch the elderly victim's purse, resulting in the victim being struck by the car and falling to the ground; hence, the trial court did not err in denying the defendant's amended motion for a new trial. *Jackson v. State*, 281 Ga. App. 506, 636 S.E.2d 694 (2006).

Given the defendant's confession, the victim's identification of the defendant as the person who robbed the victim, testimony by the victim and others that the

robber had a gun, and testimony that the defendant was not at the nightclub where the defendant claimed to be, the jury was authorized to find the defendant guilty of armed robbery and aggravated assault in violation of O.C.G.A. §§ 16-8-41(a) and 16-5-21(a). *Burns v. State*, 288 Ga. App. 507, 654 S.E.2d 405 (2007).

There was sufficient evidence to support a defendant's convictions of armed robbery, aggravated assault, burglary, false imprisonment, and possession of a firearm during the commission of a felony when the state showed that the defendant intentionally aided and abetted a home invasion in which the home was burglarized and the homeowner's teenage child was detained and robbed by use of a handgun. Even in the absence of evidence sufficient to show that the defendant directly committed the charged offenses, there was sufficient evidence that the defendant was a party to the offenses in that the defendant and a person armed with a gun loaded a truck with property stolen from the home during the two-hour home invasion, the defendant was present speaking with the armed person during the home invasion, and the defendant confirmed that the child was home alone. *Whitley v. State*, 293 Ga. App. 605, 667 S.E.2d 447 (2008).

Testimony that the defendant's passenger pointed a gun at the victim's head, while attempting to gain control of the victim's vehicle sufficed to prove both counts of aggravated assault. Moreover, the jury could have found the defendant guilty beyond a reasonable doubt of two counts of aggravated assault based on the defendant's involvement as a party to the crimes or as a coconspirator. *Johnson v. State*, 299 Ga. App. 706, 683 S.E.2d 659 (2009).

Trial court did not err in denying the defendant's motion for directed verdict of acquittal on the defendant's aggravated assault with intent to rob convictions because the jury was authorized to conclude that the defendant fired a gun at the victims to further a robbery, and the indictment did not charge the defendant with a specific intent to rob the victims but only with a general intent to rob; the defendant approached the victims,

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pointed a gun toward the head of one of the victims, and demanded money, and after robbing that victim, the defendant fled and fired several shots at the porch where the victims had been standing and at the victims once the victims began chasing the defendant. Johnson v. State, 304 Ga. App. 371, 696 S.E.2d 396 (2010).

Trial court did not err in denying the defendant's motion for directed verdict of acquittal because there was ample evidence of the defendant's guilt of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(1) based on the defendant's act of firing two shots in the victim's direction, wounding the victim in the chest and leg. Nyane v. State, 306 Ga. App. 591, 703 S.E.2d 53 (2010).

**Assault with Intent to Rape**

**Elements of crime of assault with intent to rape are:** (1) an assault; (2) an intent to have carnal knowledge of the female; and (3) a purpose to carry into effect this intent with force and against the consent of the female. Dorsey v. State, 108 Ga. 477, 34 S.E. 135 (1899); McCullough v. State, 11 Ga. App. 612, 76 S.E. 393 (1912); Fitchett v. State, 52 Ga. App. 87, 182 S.E. 412 (1935); Pickett v. State, 53 Ga. App. 478, 186 S.E. 206 (1936); Scott v. State, 63 Ga. App. 353, 11 S.E.2d 64 (1940); Moody v. State, 91 Ga. App. 138, 85 S.E.2d 61 (1954).

**Crime of aggravated assault with intent to rape is complete** when there is substantial step toward battery of the victim, i.e., an assault coupled with an intent to rape. Bissell v. State, 153 Ga. App. 564, 266 S.E.2d 238 (1980).

**Substantial step requirement relates to assault,** the first element of O.C.G.A. § 16-5-21, and not to the second element, the intent to rape. Bissell v. State, 153 Ga. App. 564, 266 S.E.2d 238 (1980); Young v. State, 181 Ga. App. 587, 353 S.E.2d 82 (1987).

**Substantial step toward committing battery.** — Since assault is an attempted battery, there must be a substantial step toward committing a battery before there can be an assault. Bissell v.

State, 153 Ga. App. 564, 266 S.E.2d 238 (1980).

**If there is substantial step toward rape,** crime would become attempted rape. Bissell v. State, 153 Ga. App. 564, 266 S.E.2d 238 (1980).

**Evidence sufficient to supply "substantial step" requirement.** — When the evidence authorized a finding that the defendant tricked the victim into a building, ostensibly to use a telephone, then seized the victim, stated an intention of kissing the victim, and attempted to get the victim to lie on a bed and the ensuing struggle was interrupted by a third party and the victim was then able to escape, the evidence supplied the "substantial step" requirement as it relates to the offense of assault with intent to rape. Lester v. State, 173 Ga. App. 300, 325 S.E.2d 912 (1985).

When a defendant was charged with assault with intent to commit rape but did not actually have carnal knowledge of the victim as defined by § 16-6-1, there was evidence, although circumstantial insofar as intent is concerned, sufficient to establish that the defendant assaulted the victim with intent to commit rape. Butler v. State, 194 Ga. App. 895, 392 S.E.2d 324 (1990); Whitehill v. State, 247 Ga. App. 267, 543 S.E.2d 470 (2000).

Convictions of criminal attempt to commit kidnapping, O.C.G.A. § 16-5-40(a), and aggravated assault with intent to rape, O.C.G.A. § 16-5-21(a)(1), were supported by sufficient evidence since the victim positively identified the defendant as the attacker when the defendant was captured and again at trial, and since a store owner also identified the defendant at trial and testified that the store owner maintained sight of the defendant from when the store owner saw the defendant attacking the victim until the defendant's capture; additionally, since the defendant made no attempt to take the victim's purse or keys, and the evidence showed that the defendant had pornographic photos of someone who looked similar to the victim, the jury was authorized to find that the defendant had the requisite intent to detain, abduct, and rape the victim as charged. Mobley v. State, 279 Ga. App. 476, 631 S.E.2d 491 (2006).

**Solicitation alone** will not constitute offense of assault with intent to rape. *Tiller v. State*, 101 Ga. 782, 29 S.E. 424 (1897).

**Battery is not essential.** *Owens v. State*, 9 Ga. App. 441, 71 S.E. 680 (1911).

**Intent not abrogated by defendant's statement that defendant lacked time for offense.** — Defendant's statement to the victim that defendant did not have time to actually attempt to rape the victim did not abrogate defendant's intent. *Young v. State*, 181 Ga. App. 587, 353 S.E.2d 82 (1987).

**Distinguishing assault with intent to rape and assault with intent to kill.**

— Assault with intent to rape involves attempted sexual intercourse with the victim while assault with intent to murder involves striking the victim in the head with the admitted intent of killing the victim. Both of these offenses require proof of distinct essential elements, each of which separately or together will sustain a conviction, and both are aimed at prohibiting specific conduct, and, accordingly, are not offenses established by the same conduct. *Guthrie v. State*, 147 Ga. App. 351, 248 S.E.2d 714 (1978).

**Female under 14 years of age.** — It is not necessary to show that attempt was forcible and against female's will where one is charged with assault with intent to rape upon a female under the age of 14 years. *Vickery v. State*, 48 Ga. App. 851, 174 S.E. 155 (1934).

In an assault with an intent to rape upon a female under the age of 14 years it is only necessary to show an intent to have carnal knowledge of the female, and that some overt act was done towards the accomplishment of that purpose. *Vickery v. State*, 48 Ga. App. 851, 174 S.E. 155 (1934).

When female is under age 14, law conclusively presumes that engaging in intercourse is against her will, she being unable to consent. *Moody v. State*, 91 Ga. App. 138, 85 S.E.2d 61 (1954).

**Evidence sufficient for finding defendant guilty of assault with intent to rape.** — When appellant crawled under the door of the ladies' room stall in which victim was changing her clothes, pulled his pants down to his knees,

grabbed her by the throat and pulled at her clothes, all the while warning her not to make any noise, this was sufficient to authorize rational triers of fact to find appellant guilty beyond a reasonable doubt of assault with intent to rape. *Middlebrooks v. State*, 156 Ga. App. 319, 274 S.E.2d 643 (1980).

When the jury could find that the victim consented to intercourse after being assaulted by the defendant, the evidence was sufficient to authorize a finding of assault with the intent to commit rape. *Terry v. State*, 166 Ga. App. 632, 305 S.E.2d 170 (1983).

Evidence that the defendant held women at gunpoint and attempted to remove or did remove some of their underclothes was sufficient to support convictions for assault with intent to rape. *Hardy v. State*, 240 Ga. App. 115, 522 S.E.2d 704 (1999).

Evidence that the defendant entered the victim's home, crawled onto the victim's back as the victim slept in bed, pressed a knife to the victim's neck, and then began fondling the victim's genital area was sufficient to authorize the jury to find intent to rape. *Brown v. State*, 242 Ga. App. 858, 531 S.E.2d 409 (2000).

Evidence showing that defendant threatened and struck the victim, combined with the evidence showing that defendant unsuccessfully tried to rape the victim, was sufficient to sustain defendant's conviction for aggravated assault with intent to rape. *Jackson v. State*, 257 Ga. App. 817, 572 S.E.2d 360 (2002).

Evidence that defendant touched the inside of the first victim's breasts, that the victim feared the victim was going to be raped, and that the defendant fled and turned to the second victim only after being foiled in the defendant's first attempt was sufficient for the jury to have concluded that the defendant was guilty of aggravated assault with intent to rape two people. *De'Mon v. State*, 262 Ga. App. 10, 584 S.E.2d 639 (2003).

Evidence provided by the victim that defendant was the person who threatened the victim with a knife and then raped the victim was sufficient to support both the rape and aggravated assault with intent to rape convictions. *Wilson v. State*, 267 Ga. App. 491, 600 S.E.2d 440 (2004).

**Assault with Intent to Rape (Cont'd)**

Denial of a motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, was proper because the evidence was sufficient to support the defendant's conviction of aggravated assault with intent to rape, in violation of O.C.G.A. § 16-5-21; defendant came to the home of the victim, who was a former love interest, and the victim claimed that the defendant physically and sexually assaulted the victim, causing multiple serious injuries and bruises. *Goodall v. State*, 277 Ga. App. 600, 627 S.E.2d 183 (2006).

Defendant's convictions of rape, aggravated sodomy, false imprisonment, and two counts of aggravated assault were supported by sufficient evidence in the form of the victim's injuries, and the victim's testimony that, among other things, after the victim refused the defendant's request for sex, the defendant threw the victim on the bed, hit the victim in the back and on the arms with hedge clippers, ordered the victim to remove the victim's clothes, dragged the victim by the hair back into the house after the victim had escaped through a window, grabbed the victim, twisted the victim's arm, and said, "I'm trying — bitch, I'm going to kill you," hit the victim in the arm and leg with the hedge clippers, punched the victim on the lips and on the forehead, threw the victim on the bed and raped the victim and made the victim perform oral sex on the defendant. *Tarver v. State*, 280 Ga. App. 89, 633 S.E.2d 415 (2006).

Sufficient evidence supported the defendant's conviction of aggravated assault under O.C.G.A. § 16-5-21; the victim's testimony that the defendant pinned the victim down while touching the victim underneath the victim's clothes against the victim's will and that the defendant was really rough was sufficient to convict. *Clark v. State*, 282 Ga. App. 248, 638 S.E.2d 397 (2006).

Defendant ripped off a 15-year-old child's shorts, tried to force the victim's legs open, and when the victim resisted, beat the victim, rammed the victim's head to the floor, and choked the victim; police found the victim on the floor, bloody, naked, and sobbing, and the defendant clad

only in underwear. This evidence was sufficient to convict the defendant of aggravated assault with intent to rape. *Murray v. State*, 293 Ga. App. 516, 667 S.E.2d 382 (2008).

Because the victim, a resident, and a police officer all testified that defendant was attempting to have sex with the victim against the victim's will, the evidence was sufficient to convict defendant of aggravated assault with intent to rape in violation of O.C.G.A. § 16-5-21(a)(1). *Cubia v. State*, 298 Ga. App. 746, 681 S.E.2d 195 (2009).

Because the jury was authorized to infer that the defendant had the requisite intent to rape the victim as charged, the jury was also authorized to find that he was guilty of aggravated assault with intent to rape in violation of O.C.G.A. § 16-5-21(a)(1); the state presented evidence that the defendant removed the victim's underwear while on top of her in her bed and then licked her genital and anal areas, and the evidence also showed that defendant only stopped sexually assaulting the victim after she pleaded with him and offered him money. *Mattox v. State*, 305 Ga. App. 600, 699 S.E.2d 887 (2010).

Evidence presented at trial was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt of rape, aggravated sodomy, aggravated assault with intent to rape, and simple battery because the victim's testimony, standing alone, could sustain the convictions; the jury was entitled to take into account similar transaction evidence for the purpose of showing the defendant's intent, bent of mind, and course of conduct, and while the defendant testified to a different version of what transpired, it was the exclusive role of the jury to determine witness credibility and to choose what evidence to believe and what to reject. *Alvarez v. State*, No. A11A0101, 2011 Ga. App. LEXIS 340 (Apr. 19, 2011).

**Admissibility of proof of similar offenses in rape cases.** — It is well settled in rape cases that proof of similar offenses committed by the accused in the same locality, about the same time, and where similar methods were employed by the accused in commission of such offenses, is

admissible in defendant's trial for the purpose of identifying the defendant as the guilty party and to show motive, plan, scheme, bent of mind and course of conduct. The separate crimes must, of course, be logically related to the offense being tried and must tend to establish an element of the state's case. *Burnett v. State*, 137 Ga. App. 183, 223 S.E.2d 232 (1976).

Trial court properly admitted the similar acts evidence of other women who were also attacked by the defendant and who all identified defendant as their attacker. The evidence was highly probative of defendant's intent to rape, a necessary element of the charged offense. *Henderson v. State*, 204 Ga. App. 884, 420 S.E.2d 813 (1992).

**Pushing rape victim into furniture.** — Nurse was properly allowed to testify as to a rape victim's statement to the nurse that her assailant had blindfolded her and pushed her into furniture because the victim's statement to the nurse was given to explain the nature and origin of some of her injuries. This evidence was sufficient to allow the jury to find that the rape victim had been pushed into furniture as she was pushed and dragged through her home while blindfolded, supporting the defendant's aggravated assault convictions. *Bryant v. State*, 304 Ga. App. 456, 696 S.E.2d 439 (2010).

**Conviction of aggravated assault is legal conviction upon indictment for rape.** *Jones v. Smith*, 228 Ga. 648, 187 S.E.2d 298 (1972).

**On indictment for rape, defendant can be convicted of assault with intent to rape,** although the indictment does not contain an allegation of an assault. *Long v. State*, 84 Ga. App. 638, 66 S.E.2d 837 (1951).

**Failure to charge on assault with intent to rape not error.** — Conviction of assault with intent to rape may be had on an indictment for rape since the act was attempted but not completed. The jury should be instructed that the defendant may be found guilty of the lesser offense necessarily involved in the graver offense, if under any view of the evidence submitted a conviction of the lesser offense would be authorized. If all of the evidence, however, shows that the defen-

dant, if guilty at all, was guilty of the completed major offense, it is not error to fail to charge as to the lesser offense. *Rider v. State*, 196 Ga. 767, 27 S.E.2d 667 (1943).

**Guilty verdict on rape charge and not guilty verdict on aggravated assault charge are inconsistent.** *Martin v. State*, 157 Ga. App. 304, 277 S.E.2d 300, cert. denied, 454 U.S. 833, 102 S. Ct. 133, 70 L. Ed. 2d 112 (1981).

**Conviction for rape and aggravated assault.** — Evidence consisting mostly of testimony from the victim, that the victim was awakened by defendant when the defendant broke into the victim's home, placed the defendant's hand around the victim's neck, and forced the victim to shut up or die, as the defendant threw the victim onto a couch and engaged in sexual intercourse with the victim without the victim's consent, was sufficient to uphold defendant's rape conviction, pursuant to O.C.G.A. § 16-6-1, aggravated assault conviction, pursuant to O.C.G.A. § 16-5-21, and burglary conviction, pursuant to O.C.G.A. § 16-7-1. *Lowe v. State*, 259 Ga. App. 674, 578 S.E.2d 284 (2003).

Despite the victim's recantation of the events that occurred leading up to the rape, kidnapping and aggravated assault committed by defendant, the evidence presented of the victim's statements and the testimony of the other state witnesses and medical personnel as to the extent of the victim's injuries, was sufficient to support the convictions. *Hambrick v. State*, 278 Ga. App. 768, 629 S.E.2d 442 (2006).

Defendant's conviction for aggravated assault with intent to rape did not merge into the defendant's rape conviction as the defendant's fondling the victim while threatening to kill the victim were separate and distinct acts of force and intimidation beyond that necessary to accomplish the rape. *Williams v. State*, 295 Ga. App. 9, 670 S.E.2d 828 (2008).

Because the requirement under the rape statute, O.C.G.A. § 16-6-1, that defendant have forcible carnal knowledge of the victim against the victim's will was not a fact required under the aggravated assault statute, O.C.G.A. § 16-5-21, the aggravated assault with intent to rape charge merged with the rape charge;

**Assault with Intent to Rape (Cont'd)**

therefore, the trial court erred in sentencing defendant separately for aggravated assault. *Johnson v. State*, 298 Ga. App. 639, 680 S.E.2d 675 (2009).

**Conviction upheld on appeal.** — Aggravated assault with intent to rape conviction was upheld on appeal, given the overwhelming evidence of the defendant's guilt, as the jury charges on intent and unanimity were proper; the victim's identification testimony was sufficient; the sentencing judge's comments did not show bias; and trial counsel was not ineffective. *Williams v. State*, 290 Ga. App. 829, 661 S.E.2d 563 (2008).

**Sentence not void.** — Trial court did not err in denying the defendant's motion for out-of-time appeal to vacate a void sentence because the defendant's sentence of 40 years imprisonment for aggravated assault with intent to rape in violation of O.C.G.A. § 16-5-21(a)(1) and kidnapping in violation of O.C.G.A. § 16-5-40(a) fell within the statutory range and was not void; the offenses of aggravated assault and kidnapping both carry maximum sentences of 20 years, O.C.G.A. §§ 16-5-21(b) and 16-5-40(b)(1). *Shelton v. State*, 307 Ga. App. 599, 705 S.E.2d 699 (2011).

**Jury Instructions**

**Charge including element not alleged in indictment.** — Even though a jury charge included reference to the intent to rob, which element was not contained in the indictment, defendant was not denied a fair trial since the jury was given a copy of the indictment, and there was no reasonable possibility that the jury did not believe defendant committed aggravated assault in the manner alleged in the indictment. *Green v. State*, 221 Ga. App. 694, 472 S.E.2d 457 (1996).

Charging the jury on two alternative methods of committing aggravated assault, while the indictment charged only that aggravated assault was committed because the assault was with "intent to rob," was not reversible error because there was no reasonable possibility that the jury would have convicted defendant of committing the crime in a way not alleged in the indictment. *Harwell v.*

*State*, 231 Ga. App. 154, 497 S.E.2d 672 (1998).

When the indictment charged the defendant with having committed an aggravated assault on the victim by assaulting the victim with intent to rape, even though the trial court charged the jury that aggravated assault also may be committed by the use of a deadly weapon, there was no error because the court additionally instructed that there was no basis to find the defendant guilty on this theory since the indictment charged the defendant with commission of an aggravated assault with intent to rape. *Gordon v. State*, 244 Ga. App. 265, 535 S.E.2d 289 (2000).

Although the court read the charge as set forth in the indictment, because the court did not instruct the jury to limit its consideration of aggravated assault to only the method set forth in the indictment, and not to consider aggravated assault as having occurred in another manner charged, the conviction of the defendants was defective. *Chapman v. State*, 273 Ga. 865, 548 S.E.2d 278 (2001).

There was no need to instruct the jury on the use of hands as deadly weapons as the defendant alleged, given that that method of aggravated assault was not alleged nor pursued by the state. *Boyd v. State*, 289 Ga. App. 342, 656 S.E.2d 864 (2008), cert. denied, 2008 Ga. LEXIS 498 (Ga. 2008).

**Instruction on reckless conduct charge not warranted.** — Defendant did not receive ineffective assistance of counsel for the failure to request an instruction on reckless conduct as defendant testified at trial and trial counsel testified at the new trial hearing that the defense strategy was to portray the stabbing of the former love interest as an accident; thus, the incident was either an accident or an aggravated assault and a charge on reckless conduct was unwarranted. *Alston v. State*, 277 Ga. App. 117, 625 S.E.2d 475 (2005).

After threatening to kill the victim, because the defendant's actions in continuing to drive away, as the victim was caught on the outside of the car screaming, supported the crime of either aggravated or simple assault, and not simple

negligence, the trial court did not err in rejecting a reckless conduct instruction. *Martin v. State*, 283 Ga. App. 652, 642 S.E.2d 340 (2007).

Because the evidence in the defendant's felony murder trial, with aggravated assault as the underlying felony, showed without dispute that, although the defendant might not have intended to kill the victim, the defendant intentionally gunned the engine and then drove at the victim, who was acting aggressively and was armed with a knife, the trial judge did not err in denying the defendant's request for a reckless conduct instruction, but properly instructed the jury on the issue of justification. *Berry v. State*, 282 Ga. 376, 651 S.E.2d 1 (2007).

Defendant admitted firing a gun to frighten the victims, but asserted the affirmative defense of justification. The defendant was not entitled to a jury charge on reckless conduct as a lesser included offense of the charged offense of aggravated assault as the evidence established either the commission of an aggravated assault, or no offense at all. *Hudson v. State*, 296 Ga. App. 692, 675 S.E.2d 578 (2009).

**Jury's consideration limited to facts alleged in indictment.** — Trial court's recharge to the jury that an aggravated assault could be committed in a way not set forth in the indictment, without giving a remedial instruction limiting the jury's consideration to the facts alleged in the indictment, was reversible error. *Elrod v. State*, 238 Ga. App. 80, 517 S.E.2d 805 (1999).

Because the indictment charged defendant with aggravated assault by using a deadly weapon, the trial court's inclusion in the instruction of the definition of simple assault was superfluous and potentially misleading; however, the charge as a whole was not erroneous because, at the beginning, the court read the indictment to the jurors verbatim. *Salahuddin v. State*, 241 Ga. App. 168, 525 S.E.2d 422 (1999).

Because actual injury is not an essential element of aggravated assault under Georgia law, the trial court's failure to explicitly charge the jury that it had to find that defendant shot the victims was

not a federal due process violation. *Salahuddin v. State*, 241 Ga. App. 168, 525 S.E.2d 422 (1999).

Because the indictment did not charge the defendant with using a deadly weapon, but with using objects, specifically, hands and feet, which when used offensively are likely to and actually do result in serious bodily injury, it was not necessary for the court to define the term "deadly weapon." *Johnson v. State*, 245 Ga. App. 761, 538 S.E.2d 850 (2000).

Trial court erred in its charge on aggravated assault because even though defendant was indicted for aggravated assault by use of a handgun, the court instructed the jury that intent to murder, rape or rob are alternative methods by which a person commits aggravated assault. *Boone v. State*, 250 Ga. App. 133, 549 S.E.2d 713 (2001).

When the defendant was indicted for two counts of aggravated assault, the assault of one victim by shooting that person with a pistol and the assault of another victim by striking that person on the head with a pistol, the court properly instructed that a person commits the offense of aggravated assault when he or she assaults another person with intent to murder or with any instrument that, when used offensively, is likely to result in serious bodily injury. *Scott v. State*, 274 Ga. 153, 549 S.E.2d 338 (2001), cert. denied, 535 U.S. 929, 122 S. Ct. 1301, 152 L. Ed. 2d 212 (2002).

When the defendant was charged with aggravated assault with a deadly weapon, the trial court's jury instruction that aggravated assault could occur both by an assault with intent to murder or by an assault with a deadly weapon was error because the instruction deviated from the indictment, which had not alleged assault with intent to murder. *Doomes v. State*, 261 Ga. App. 442, 583 S.E.2d 151 (2003).

Upon a charge in an indictment alleging that the defendant committed an aggravated assault by holding a razor blade against the victim's neck, and the only weapon shown to be used by the defendant was a razor blade, the question as to whether the razor blade constituted a deadly weapon or an instrument likely to inflict serious bodily harm had nothing to

**Jury Instructions (Cont'd)**

do with the manner in which the crime was committed; hence, a charge and recharge given to the jury could not reasonably be deemed to have presented the jury with an alternative basis for finding the defendant guilty of a crime not charged in the indictment. *Dudley v. State*, 283 Ga. App. 86, 640 S.E.2d 677 (2006).

Because the trial court's additional instructions confined the aggravated assault charge to O.C.G.A. § 16-5-21(a)(2), which was alleged in the indictment, the jury was not misled; the trial court did not err in failing to give a charge concerning whether hands and feet were deadly weapons *per se* since it would not have been adjusted to the facts and circumstances of the case. *Stevens v. State*, 293 Ga. App. 845, 668 S.E.2d 467 (2008).

**Reference to both paragraphs of O.C.G.A. § 16-5-21(a).** — Trial court's reference to both paragraphs of O.C.G.A. § 16-5-21(a) in its recharge on aggravated assault did not violate defendant's due process rights because its initial charge limited the jury's consideration to the method of committing the offense alleged in the indictment. *Martin v. State*, 268 Ga. 682, 492 S.E.2d 225 (1997).

Even though the trial court recited both O.C.G.A. § 16-5-21(a)(1) and (a)(2) in its charge to the jury, the court properly limited the elements of the crime to those charged in the indictment by reading the indictment verbatim and also instructing the jury that the state had the burden of proving every material allegation of the indictment. *Johnson v. State*, 245 Ga. App. 761, 538 S.E.2d 850 (2000).

**Knowledge as essential element.** — Knowledge is an essential element to the offense of the aggravated assault of a police officer, and the jury must be charged that knowledge is an essential element to the crime. *Britt v. State*, 184 Ga. App. 445, 361 S.E.2d 710 (1987); *Hudson v. State*, 189 Ga. App. 201, 375 S.E.2d 475 (1988).

The charge was inadequate, and the convictions of the indictment were vacated where the court defined the elements of the charges of aggravated assault and aggravated battery without any

reference to the element of defendant's knowledge that the victim was a police officer. *Chandler v. State*, 204 Ga. App. 816, 421 S.E.2d 288 (1992).

**Knowledge element adequately covered.** — Deficiency in conveying to the jury the requirement that the accused must have acted with knowledge that the victim was a police officer did not require reversal, since the knowledge element of the offense was adequately covered in an earlier portion of the charge. *Cornwell v. State*, 193 Ga. App. 561, 388 S.E.2d 353, cert. denied, 193 Ga. App. 909, 388 S.E.2d 353 (1989).

Defendant's contention that the trial court failed to properly instruct the jury on the definition of a deadly weapon and on the requisite knowledge that the victim of the aggravated assault was a police officer was rejected on appeal because the argument was waived, in that defendant neither made nor reserved any objection to any of the jury charges; nonetheless, the trial court's charge and recharge mirrored the aggravated assault statute, including the requirement of O.C.G.A. § 16-5-21(c) that the person "knowingly" commit the offense, and there could be no dispute that the gun defendant fired at the officer was a deadly weapon. *Milton v. State*, 272 Ga. App. 908, 614 S.E.2d 140 (2005).

**"Mere presence" charge unwarranted.** — Defendant's aggravated assault with a deadly weapon conviction was upheld, and an amended motion for a new trial was properly denied, as the defendant was not entitled to a jury instruction on a claimed defense of "mere presence" as such was not a recognized defense, and the charge given to the jury covered all legal principles relevant to the determination of guilt; any confusion was cleared up by the court's further instruction that in order for the jury to convict defendant of aggravated assault under a party to a crime theory, it would have to find that the defendant directly committed or intentionally helped in the commission of aggravated assault with a deadly weapon. *Kelley v. State*, 279 Ga. App. 187, 630 S.E.2d 783 (2006).

Evidence elicited at trial did not support a charge on mere presence because

the defendant took an active role in the crime; the defendant drove the codefendants to the crime scene with the intent to rob, the defendant turned off the car's lights to assist in accosting the victims by surprise, the defendant drove defendant's comrades away from the crime, and the defendant tried to get rid of the stolen car. *Huckabee v. State*, 287 Ga. 728, 699 S.E.2d 531 (2010).

**Parties to a crime charge.** — In a prosecution for aggravated assault, the trial court did not err in denying the defendant's requested jury instruction on a "parties to a crime" issue, as the overall jury charge the trial court gave, which included the applicable portions of the pattern instruction on parties to a crime, and generally tracked the statutory language of O.C.G.A. § 16-2-20, as well as the entire pattern instruction on "mere presence," substantially covered the principles necessary. *Morales v. State*, 281 Ga. App. 18, 635 S.E.2d 325 (2006).

**Defense of justification and character of defendant.** — Assertion of the defense of justification does not, in and of itself, have the effect of placing the defendant's character in issue. *Moon v. State*, 202 Ga. App. 500, 414 S.E.2d 721 (1992).

**Defendant could not argue justification as a defense** since defendant denied firing the weapon into the crowd; thus, defendant did not meet the elements of justification whereby the defendant admitted acting with the intent to inflict an injury, but claimed doing so while in reasonable fear of suffering immediate serious harm. *Broussard v. State*, 276 Ga. 216, 576 S.E.2d 883 (2003).

**Failure to charge jury on justification and duty to retreat.** — Defendant's convictions for voluntary manslaughter, aggravated assault, and two related counts of possession of a firearm in the commission of a crime required reversal because the trial court erred by not charging the jury on the principle of no duty to retreat since the defense of justification was raised by the evidence, via defendant's testimony that the victim tried to stab the defendant, and the state placed the issue of retreat before the jury. As a result of defendant making out a *prima facie* case of justification, the trial court

erred by concluding otherwise. *Lewis v. State*, 292 Ga. App. 257, 663 S.E.2d 721 (2008), cert. denied, No. S08C1869, 2008 Ga. LEXIS 885 (Ga. 2008).

**Basing deadly weapon determination on victim's apprehensions not error.** — When the charge given the jury required an analysis of the concept of the "deadly weapon" be conducted in terms of the reasonable apprehensions of the victim rather than those of the hypothetical prudent person the court found no error in the charge. *Moore v. State*, 169 Ga. App. 24, 311 S.E.2d 226 (1983).

**Victim's reasonable belief.** — Error in a jury instruction, its failing to state that the victim's belief that a shotgun was a deadly weapon had to be reasonable, was harmless error. *Brown v. State*, 211 Ga. App. 267, 438 S.E.2d 713 (1993).

**Improper charge on eyewitness testimony.** — Eyewitness testimony identifying the defendant as the perpetrator of an assault was sufficient to support a conviction; a new trial was required, however, because the trial judge should not have instructed the jurors to take into account the certainty shown by the eyewitness in making the identification. *Brown v. State*, 277 Ga. App. 396, 626 S.E.2d 596 (2006).

**Essential element of simple assault must be stated in jury instructions** in defining aggravated assault. *Smith v. State*, 140 Ga. App. 395, 231 S.E.2d 143 (1976); *Harper v. State*, 157 Ga. App. 480, 278 S.E.2d 28 (1981), but see *Quong v. State*, 157 Ga. App. 532, 278 S.E.2d 122 (1981); *McKibben v. State*, 212 Ga. App. 370, 441 S.E.2d 895 (1994).

**Term "assault" is legal word of art** and the term's meaning must be explained to the jury by the judge. *Smith v. State*, 140 Ga. App. 395, 231 S.E.2d 143 (1976).

**It is not necessary to define or explain "assault"** in charging aggravated assault. *Zachery v. State*, 158 Ga. App. 448, 280 S.E.2d 860 (1981).

**Meaning of "assault" in aggravated assault** was not equivalent to definition of simple assault in former Code 1933, § 26-1301. *Zachery v. State*, 158 Ga. App. 448, 280 S.E.2d 860 (1981) (see O.C.G.A. § 16-5-20).

**Defining "assault" in charge.** — When charging on essential elements of

**Jury Instructions (Cont'd)**

aggravated assault, "assault" should be defined by statutory elements of simple assault. *Emmons v. State*, 142 Ga. App. 553, 236 S.E.2d 536 (1977).

**No definition of simple assault is necessary in charge on aggravated assault.** *Bundren v. State*, 155 Ga. App. 265, 270 S.E.2d 807 (1980), rev'd on other grounds, 247 Ga. 180, 274 S.E.2d 455 (1981); *Quong v. State*, 157 Ga. App. 532, 278 S.E.2d 122 (1981), but see *Harper v. State*, 157 Ga. App. 480, 278 S.E.2d 28 (1981).

**Charge on simple assault authorized.** — Trial court was authorized to give an instruction on the lesser-included offense of simple assault because some evidence showed that the defendant attempted to violently injure a store manager by stabbing the manager with a pen with such force that defendant bent the pen; the fact that actual contact occurred did not diminish the fact that there was evidence of a simple assault. *Griggs v. State*, 303 Ga. App. 442, 693 S.E.2d 615 (2010).

**Charge on simple assault need not be given to complete definition of aggravated assault.** *Sutton v. State*, 245 Ga. 192, 264 S.E.2d 184 (1980); *Petouvis v. State*, 165 Ga. App. 409, 301 S.E.2d 483 (1983).

Trial court does not necessarily err in failing to charge upon the definition of simple assault in charging on aggravated assault as a charge on simple assault need not be given in order to complete the definition of aggravated assault. *Willis v. State*, 167 Ga. App. 626, 307 S.E.2d 133 (1983).

There is no merit in defendant's contention that a charge on simple assault under O.C.G.A. § 16-5-20 must be given in order to complete the definition of aggravated assault under O.C.G.A. § 16-5-21, as the latter does not need the former to make it complete. *Spaulding v. State*, 185 Ga. App. 812, 366 S.E.2d 174, cert. denied, 185 Ga. App. 911, 366 S.E.2d 174 (1988).

Trial court's jury instructions in defendant's criminal trial on multiple charges arising out of a domestic dispute were proper, as: (1) there was no requirement

that the jury be instructed on the element of assault (O.C.G.A. § 16-5-20) in order to be properly instructed on the crime of aggravated assault (O.C.G.A. § 16-5-21); (2) the methods of committing an aggravated battery, pursuant to O.C.G.A. § 16-5-24(a), were properly defined based on the methods asserted in the indictment; (3) there was no support for a requested charge on the lesser included offense of reckless conduct, pursuant to O.C.G.A. § 16-5-60(b); and (4) there was no possibility of a lesser included conviction for false imprisonment (O.C.G.A. § 16-5-41), such that instruction only on the indicted offense of kidnapping (O.C.G.A. § 16-5-40) was proper. *Brown v. State*, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

In a prosecution for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2), as the jury charge provided guidelines for determining guilt or innocence, the defendant waived any other error by failing to request, in writing, a charge on the lesser-included offense of battery. *Massey v. State*, 278 Ga. App. 303, 628 S.E.2d 706 (2006).

In a prosecution for aggravated assault, the trial court did not err in failing to give a charge on the lesser-included offense of simple battery, as the defendant failed to request the same in writing, at or before the close of the evidence, and an oral request to give such a charge was insufficient. *Morales v. State*, 281 Ga. App. 18, 635 S.E.2d 325 (2006).

In the defendant's prosecution for aggravated assault under O.C.G.A. § 16-5-21(a)(2), the defendant was not entitled to a jury instruction on the lesser included offense of simple assault under O.C.G.A. § 16-5-20 because the defendant's wife could have reasonably apprehended that the black microrecorder allegedly in the defendant's hand was a gun. *Dixon v. State*, 285 Ga. App. 694, 647 S.E.2d 370 (2007).

Trial court did not commit reversible error, much less "plain error" pursuant to O.C.G.A. § 17-8-58(b), by failing to inform the jury of the definition of simple assault because the defendant's defense was mistaken identity, and the undisputed evidence showed that the perpetrators inten-

tionally fired the perpetrators' guns through a parking lot occupied by many pedestrians and in the direction of a vehicle; neither negligence nor reckless conduct was an issue and, thus, any error in the charge would not have affected the outcome of the case. *Howard v. State*, 288 Ga. 741, 707 S.E.2d 80 (2011).

During the defendant's trial for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2), the trial court did not err in failing to instruct the jury on simple assault, O.C.G.A. § 16-5-20(a), as an essential element of aggravated assault because the record failed to indicate that the defendant submitted a written request to charge on simple assault, and the trial court's instruction was sufficient to define the offense charged and provided a proper guideline for the determination of the defendant's guilt or innocence. *Williams v. State*, 307 Ga. App. 577, 705 S.E.2d 332 (2011).

Trial counsel's performance was not deficient due to counsel's failure to request a jury charge on simple assault as a lesser included offense of the charged crime of aggravated assault because there was no evidence showing that the defendant committed merely simple assault; the evidence showed that the defendant's assault upon the victim was with a screwdriver within the purview of the aggravated assault statute, O.C.G.A. § 16-5-21(a)(2). *Davis v. State*, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

**Failure to charge jury on simple assault** when the defendant is charged with aggravated assault is not reversible error in the absence of a proper request. *Glover v. State*, 153 Ga. App. 74, 264 S.E.2d 554 (1980).

Defendant was accused of hitting the victim in the head with a beer bottle, cutting the victim's head and requiring stitches. The evidence allowed the jury to either find that the defendant had not committed an aggravated assault, or to find the defendant guilty as charged; the defendant was not entitled to an instruction on the lesser-included charge of simple assault as there was no evidence to support that charge. *Maiorano v. State*, 294 Ga. App. 726, 669 S.E.2d 678 (2008).

**Charging jury on aggravated assault.** — It is not error for a judge to

charge on aggravated assault in the same language as former Code 1933, § 26-1302, even though that language contains means of committing the offense other than that for which a defendant is indicted, if it does not confuse the jury. *Pitts v. State*, 128 Ga. App. 827, 198 S.E.2d 377 (1973) (see O.C.G.A. § 16-5-21).

When, in charging the jury on aggravated assault, the trial court fails to include that portion of O.C.G.A. § 16-5-21 which prohibits an individual from knowingly committing aggravated assault on a peace officer while the peace officer is engaged in or on account of the performance of the officer's official duties, but the trial court communicates that knowledge was an essential element of the offense, it is not reversible error. *Glover v. State*, 153 Ga. App. 74, 264 S.E.2d 554 (1980); *Bright v. State*, 238 Ga. App. 876, 520 S.E.2d 48 (1999).

Curative recharge on aggravated assault with intent to rape eliminated any possibility that the jury convicted the defendant of the crime in a manner not charged in the indictment. *Cook v. State*, 210 Ga. App. 323, 436 S.E.2d 61 (1993).

Requested charge of reckless conduct as a lesser included offense was properly denied where the evidence was that defendant was guilty of two offenses of aggravated assault, as averred, or was not guilty of any crime under this particular indictment for aggravated assault. *Morris v. State*, 228 Ga. App. 90, 491 S.E.2d 190 (1997).

Charge on aggravated assault given in conjunction with a charge on felony murder and in substantial conformity with pattern jury instructions was not reversible error. *Robinson v. State*, 268 Ga. 175, 486 S.E.2d 156 (1997).

Jury instruction on aggravated assault, in violation of O.C.G.A. § 16-5-21, which tracked the language of the statute in the statute's entirety, was not error, although it was a better practice to conform the jury charge to the evidence; however, there was no possibility that the jury was misled by reading the entire statute. *Morris v. State*, 280 Ga. 179, 626 S.E.2d 123 (2006).

Defendant's aggravated assault and cruelty to children convictions were upheld on appeal as: (1) the prosecutor's

**Jury Instructions (Cont'd)**

closing argument comments did not inject a personal opinion as to the veracity of the witnesses and the appeal to the jury was to make the community safer; (2) the trial court charged the jury fully on defendant's justification and self-defense claims, and thus, did not err in declining to instruct the jury on mistake of fact; and (3) the appeals court failed to see how jury charges on guilt by association, bare suspicion, or mere presence were appropriate. *Navarro v. State*, 279 Ga. App. 311, 630 S.E.2d 893 (2006).

Two charged methods of committing simple assault, as an element of aggravated assault, did not provide an improper basis for the jury to convict the defendant of aggravated assault, and the trial court did not charge a separate, unalleged method of committing aggravated assault, but simply defined both methods of committing simple assault, a lesser included offense; hence, because the jury's charge did not authorize a conviction in a manner other than that alleged in the indictment, the charge was not erroneous. *Opio v. State*, 283 Ga. App. 894, 642 S.E.2d 906 (2007).

Trial court properly instructed the jury on aggravated assault when the court charged that an assault was an attempt to commit a violent injury to the person of another or an act which placed another person in a reasonable apprehension of immediately receiving a violent injury and that a person committed aggravated assault when the person assaulted another person with a deadly weapon or with any object, device, or instrument which, when used offensively against a person, was likely to or actually did result in serious bodily injury. *Cail v. State*, 287 Ga. App. 547, 652 S.E.2d 190 (2007).

Trial court did not err by giving a charge on aggravated assault that permitted the jury to convict if the jury found that the defendant placed the intruder in reasonable fear of receiving a violent injury, even though the indictment specified that the defendant, while in the commission of an aggravated assault, caused the victim's death by shooting at the victim. *Warren v. State*, 283 Ga. 42, 656 S.E.2d 803 (2008).

Trial court erred by failing to provide the statutory definition of assault, pursuant to O.C.G.A. § 16-5-20, in a jury charge, which resulted in the final charge being fatally insufficient since the charge did not instruct on substantive points and issues involved in the case and allowed the jury to find defendant guilty of aggravated assault based merely on criminal negligence. As a result, defendant's conviction for aggravated assault was reversed and a retrial was ordered since there was sufficient evidence to support defendant's conviction. *Coney v. State*, 290 Ga. App. 364, 659 S.E.2d 768 (2008).

Since the defendant was charged with aggravated assault with a deadly weapon, the trial court did not mislead the jury by charging all of the aggravated assault statute, O.C.G.A. § 16-5-21, as the court read the indictment to the jury; charged the jury that the state had the burden to prove every allegation in the indictment, and that the jury could convict only if the jury found beyond a reasonable doubt that the defendant committed the offense alleged in the indictment; and the court sent the indictment out with the jury during the jury's deliberations. *Turner v. State*, 293 Ga. App. 869, 668 S.E.2d 268 (2008).

Trial court's jury charges on both simple assault and aggravated assault were proper in the defendant's criminal trial on charges of, *inter alia*, aggravated assault as the instructions that defined aggravated assault by using the simple assault definition and including the manner in which the assault had to be committed in order to be an aggravated assault did not improperly expand the indictment. *Deleon v. State*, 285 Ga. 306, 676 S.E.2d 184 (2009).

Trial court did not err in the court's jury instructions on aggravated assault because the instruction, which stated that the jury had to find that the assault was made with an object when used offensively against a person was likely to result in serious bodily injury, substantially covered the principle that the jury had to consider the manner and means of the object's use. *Griggs v. State*, 303 Ga. App. 442, 693 S.E.2d 615 (2010).

**Instructions on felony murder and aggravated assault moot in light of**

**malice murder conviction.** — Any issue concerning the trial court's issuance of instructions to the jury on the offenses of felony murder and aggravated assault became moot when a defendant was convicted and sentenced on a charge of malice murder. *Parker v. State*, 282 Ga. 897, 655 S.E.2d 582 (2008).

**Sequential charges on aggravated assault and reckless battery** were proper since the jury's finding that defendant committed aggravated assault required a finding of an intentional infliction of injury, which precluded the element of criminal negligence in reckless conduct. *Sheats v. State*, 210 Ga. App. 622, 436 S.E.2d 796 (1993).

**Issuance of sequential jury charge in trial for malice murder, felony murder, and aggravated assault.** — In a prosecution for malice murder, felony murder, and aggravated assault, although no error resulted from the trial court's issuance of a sequential jury charge, because the jury found in the defendant's favor on the defense of justification as to the malice murder count, the finding also applied to the felony murder charge. Thus, the trial court erred in finding the defendant guilty of both felony murder and the underlying felony of aggravated assault. *Turner v. State*, 283 Ga. 17, 655 S.E.2d 589 (2008).

**Instruction on voluntary manslaughter not warranted.** — When evidence established either that the defendant intentionally shot and killed the victim or that a pistol discharged accidentally and no offenses occurred, this showed either the commission of felony murder and aggravated assault or commission of no offense, and the trial court did not err in refusing to give the lesser included offense charge on involuntary manslaughter based on reckless conduct. *Lashley v. State*, 283 Ga. 465, 660 S.E.2d 370 (2008).

**Three separate assaults did not merge.** — Defendant-B's punches to the victim's face upon defendant-A's demand for the victim's property amounted to an assault with attempt to rob, which justified one of defendant-B's convictions for aggravated assault, the formulation of a plan to rob someone at a convenience store

with defendant-A and defendant-A's aggravated assault in pointing a gun at the victim constituted a second aggravated assault, and an armed robbery of the victim's property constituted the armed robbery; as each of the three crimes was proven by three different sets of facts, there was no error in the trial court's failure to have merged defendant-B's aggravated assault convictions in violation of O.C.G.A. § 16-5-21, into the armed robbery conviction in violation of O.C.G.A. § 16-8-41. *Johnson v. State*, 279 Ga. App. 182, 630 S.E.2d 778 (2006).

**Refusal to give a requested charge on the misdemeanor offense of reckless conduct**, O.C.G.A. § 16-5-60, as a lesser included offense of aggravated assault was not error where defendant admitted firing a gun with the intent to scare the victim, although defendant testified that defendant did not intend to hit the victim, since using a deadly weapon to commit an act which places another in reasonable apprehension of immediately receiving a violent injury amounts to an aggravated assault, absent justification. The act testified to by defendant was either justified as an act of self-defense or constituted a felony. *Riley v. State*, 181 Ga. App. 667, 353 S.E.2d 598 (1987).

Because the defendant failed to make a written request for a lesser included offense instruction on reckless conduct in the trial for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2), there could be no error found on appeal for the trial court's failure to give such an instruction. *Barber v. State*, 273 Ga. App. 129, 614 S.E.2d 105 (2005).

Because witnesses established that, during a dispute with the victim over drugs, defendant pointed a gun at the victim, struck the victim in the head, and shot the victim, there was no evidence that defendant was simply negligent in pointing or firing the gun and thus no evidence of reckless conduct; it was not error for the trial court to refuse to charge the jury on reckless conduct as a lesser included offense of aggravated assault. *Anthony v. State*, 276 Ga. App. 107, 622 S.E.2d 450 (2005).

Trial court did not err in refusing a request to instruct the jury on the lesser

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included offense of reckless conduct, in violation of O.C.G.A. § 16-5-60, in a criminal trial on a charge of aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), as the essential elements of the assault charge were all shown by the evidence; the defendant's firing of a gun into a crowded parking lot, and in the direction of the victim, was not criminal negligence that would have supported a reckless conduct charge, but rather, was deemed intentional. *Thompson v. State*, 277 Ga. App. 323, 626 S.E.2d 825 (2006).

**Variance from indictment.** — Jury instruction on aggravated assault did not vary from the indictment since the indictment charged that the defendant shot the victim with intent to rob the victim and the instruction stated that a person commits aggravated assault when the person assaults another person with the intent "to rob with a deadly weapon"; as the shooting of the victim was a material element as set forth in the indictment, the trial court properly charged an aggravated assault with a deadly weapon. *Isaac v. State*, 269 Ga. 875, 505 S.E.2d 480 (1998).

Trial court did not authorize a conviction in a manner not alleged in the indictment as the indictment alleged that a defendant assaulted an assault victim by striking the assault victim with a gun, and that the defendant assaulted a murder victim by shooting the murder victim with a gun; the jury instruction on the assault of the assault victim was proper as it did not charge a separate, unalleged method of committing aggravated assault, but simply defined both methods of committing simple assault, a lesser included offense. *Johnson v. State*, 281 Ga. 229, 637 S.E.2d 393 (2006).

**Charge in exact language of O.C.G.A. § 16-5-21 shows no error.** *Zilinmon v. State*, 234 Ga. 535, 216 S.E.2d 830 (1975), overruled by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006).

In the absence of a request for a further charge, a charge in the language of O.C.G.A. § 16-5-21 is correct. *Griffin v. State*, 168 Ga. App. 696, 310 S.E.2d 278 (1983).

Charging O.C.G.A. § 16-5-21(a)(1) and (a)(2) in their entirety does not succumb to the argument that there was a problem because of an incomplete definition of "deadly weapon" in jury instructions. *Spaulding v. State*, 185 Ga. App. 812, 366 S.E.2d 174, cert. denied, 185 Ga. App. 911, 366 S.E.2d 174 (1988).

It is not usually reversible error that an entire Code section or subsection is charged even though a part of the charge may be inapplicable under the facts in evidence. *Diaz v. State*, 194 Ga. App. 577, 391 S.E.2d 140 (1990).

Trial court erred in the court's charge of O.C.G.A. § 16-5-21 in its entirety given the indictment's specific language; however, this error did not warrant reversal of defendant's conviction. *Hunley v. State*, 227 Ga. App. 234, 488 S.E.2d 716 (1997).

**O.C.G.A. § 16-5-21(a)(1) need not be charged where such possibilities not raised by evidence.** — Where no evidence introduced at trial indicated that defendant assaulted victim with intent to murder, rape, or rob, trial court's definition of aggravated assault omitting any reference to specific intent possibilities of O.C.G.A. § 16-5-21 was permissible. *Harper v. State*, 157 Ga. App. 480, 278 S.E.2d 28 (1981).

**Charge to jury on both paragraphs of O.C.G.A. § 16-5-20(a)** was warranted by an indictment charging that defendant made an assault upon the victim with a deadly weapon, by pointing the weapon at the victim, threatening to kill the victim, and firing at the victim's car, thereby placing the victim in reasonable apprehension of immediately receiving a violent injury. *Cannon v. State*, 223 Ga. App. 248, 477 S.E.2d 381 (1996).

**Charging jury as to deadly weapon.** — When in a prosecution for aggravated assault, the jury was charged that a deadly weapon is any weapon which when used in the manner in which the jury finds it to have been used is capable of causing death or great bodily injury, and told that it was the jury's duty to determine whether the "night stick" was a deadly weapon or not, the court did not err in not instructing that a night stick was not a deadly weapon per se. *Howard v. State*, 151 Ga. App. 759, 261 S.E.2d 483 (1979).

When the court instructed that "the mere fact" that the defendant did not initiate the confrontation "does not necessarily show" that defendant was not guilty of assault "with a knife, a deadly weapon," but this language was immediately preceded by the correct and clear instruction that "whether or not a weapon is a deadly weapon is an issue to be determined by you ... based on the character of the weapon and the nature of the wounds inflicted ..." in the context of the instruction as a whole, and of the undisputed facts in evidence, the language could not have been understood by reasonable jurors as a usurpation of their prerogative to determine whether the knife with which appellant stabbed the victim was or was not a deadly weapon. *Doss v. State*, 166 Ga. App. 361, 304 S.E.2d 484 (1983).

Court did not err in charging jury that it must first determine if the knife used by the defendant was a deadly weapon "likely to cause great bodily injury" instead of "likely to produce death or great bodily injury". *Johnson v. State*, 185 Ga. App. 167, 363 S.E.2d 773 (1987).

Trial courts inclusion of the phrase "weapon or any object, device or instrument," in its charges rather than limiting the charge to the knife specifically referred to in the indictment did not mislead the jury because the court charged the jury properly with respect to the manner in which aggravated assault was allegedly committed by the defendant, i.e., with a deadly weapon. *Oseni v. Hambrick*, 207 Ga. App. 166, 427 S.E.2d 559 (1993).

In aggravated assault prosecution, because the trial court did not err in instructing the jury on the issue of whether a weapon could be considered deadly when used in an intentional and threatening manner, defendant's conviction on this charge was upheld on appeal; hence, the trial court did not err in instructions by taking the deadliness issue from the jury. *Chappell v. State*, 290 Ga. App. 691, 659 S.E.2d 919 (2008).

**"Levels of certainty."** — In a prosecution on four counts of aggravated assault and possession of a firearm during the commission of a crime, given that the state did not rely upon eyewitness identification alone, but presented other evi-

dence linking the defendant to the crimes charged, the trial court did not err in giving the "level of certainty" portion of an identity charge to the jury, which the defendant requested, *Creamer v. State*, 282 Ga. App. 411, 638 S.E.2d 832 (2006).

**Charging presumption of intent to kill.** — It was not error to charge that the law presumes the intent to kill when a person uses a deadly weapon or instrumentality in the manner in which such weapon or instrumentality is ordinarily employed to produce death. *Hardy v. State*, 242 Ga. 702, 251 S.E.2d 289 (1978).

**Use of "the law presumes" in deadly weapon charge.** — Use of the phrase "the law presumes" in the deadly weapon charge is improper; the proper charge authorizes the jury to "infer the intent to kill" from the intentional and unjustified use of a deadly weapon. The words "the law presumes" cannot, however, be considered in a vacuum, but must be viewed in the context of the overall charge. *Wilson v. Jones*, 251 Ga. 23, 302 S.E.2d 546 (1983).

**Use of "or actually did" in jury charge.** — Defendant asserts that the trial court erred by charging the jury that the jury could find defendant guilty of aggravated assault if the flashlight was "likely to or actually [did] result in serious bodily injury." Defendant objected to the inclusion of "or actually did" because this phrase was not included in the indictment. However, a charge on a code section in the statute's entirety is not error if a part thereof is applicable and it does not appear that the inapplicable part misled the jury or erroneously affected the verdict; thus, since the charge was taken from O.C.G.A. § 16-5-21, and, immediately after giving the charge, the court correctly instructed the jury to determine whether the flashlight was "likely to cause serious bodily injury," using evidence of actual injury as part of this inquiry. *Gibson v. State*, 283 Ga. 377, 659 S.E.2d 372 (2008).

**Use of "actually does" in instruction.** — Trial court properly charged the jury on only that part of the aggravated assault statute relating to the allegations of the indictment, and the court's use of the language "actually does" was extraneous. Further, the trial court was also

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within the court's province to instruct the jury as to the state's burden of proof. Jackson v. State, 288 Ga. App. 432, 654 S.E.2d 232 (2007).

**Cautionary instruction on potential danger of weapon as exhibit held proper.** — An instruction given by the trial court cautioning the jury as to the potential danger presented by the weapon allegedly used in the assault that is an exhibit which still contains a round of ammunition is wholly proper and is not error even though the weapon appears to be inoperable. Drayton v. State, 167 Ga. App. 477, 306 S.E.2d 731 (1983).

**Court should not authorize jury to convict for lesser crime of simple assault** in every case of aggravated assault. Smith v. State, 140 Ga. App. 395, 231 S.E.2d 143 (1976).

**When there is uncontradicted evidence that the victim died,** it is not necessary to charge on the lesser included crimes of aggravated assault and aggravated battery. Sanders v. State, 251 Ga. 70, 303 S.E.2d 13 (1983).

**Failure to give jury charge on accident as harmful error.** — When the defendant's testimony is sufficient to raise a jury question as to whether a physical encounter is an accident or an aggravated assault with a deadly weapon, it is harmful error for the court to fail to give any charge to the jury on accident. Dotson v. State, 144 Ga. App. 113, 240 S.E.2d 238 (1977).

**Charge on simple battery, lesser included offense of aggravated assault.** — Since the jury was authorized to decide defendant's fists and hands were not used as deadly weapons as required for aggravated assault, there was no error in charging on simple battery, which was a lesser included offense of aggravated assault. Guevara v. State, 151 Ga. App. 444, 260 S.E.2d 491 (1979).

Because the defendant's conduct put the officer-victim in reasonable apprehension of immediately sustaining a violent injury, which satisfied the elements required to prove simple assault under O.C.G.A. § 16-5-20(a)(2), the trial court properly charged the jury on simple assault as a

lesser-included offense of aggravated assault upon a police officer. Bostic v. State, 289 Ga. App. 195, 656 S.E.2d 546 (2008).

Trial court did not err in failing to give an instruction on the lesser-included offense of simple battery because the defendant failed to request such an instruction. Griggs v. State, 303 Ga. App. 442, 693 S.E.2d 615 (2010).

Defendant failed to demonstrate that the defendant's trial counsel erred by failing to request a jury charge on simple battery as a lesser included offense of the charged crime of aggravated assault because there was no evidence that the defendant made physical contact with the victim or caused physical harm to the victim; since the state's evidence establishes all of the elements of an offense, and there is no evidence raising the lesser offense, there is no error in failing to give a charge on the lesser offense. Davis v. State, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

**Even though defendant was not charged as anything other than a direct perpetrator** in a prosecution for aggravated assault, an instruction that defendant could be convicted under a theory of indirect concern was proper since defendant had notice of the testimony of a defense witness authorizing the jury to find that defendant was an aider and abettor. Upshaw v. State, 221 Ga. App. 655, 472 S.E.2d 484 (1996).

**Charge on simple battery not required.** — Court's refusal to give the requested instruction on simple battery was proper because the evidence did not authorize an instruction on this lesser offense since there was no conflict in the evidence concerning defendant's act and its result and the state proved aggravated assault with a deadly weapon beyond a reasonable doubt. Doss v. State, 166 Ga. App. 361, 304 S.E.2d 484 (1983).

With regard to defendant's conviction for aggravated battery of a taxi driver, defendant was not entitled to a jury instruction on the lesser included offense of battery based on defendant's argument that the jury could have found under the facts of the case that the gun was not used as a deadly weapon as the evidence showed without conflict that defendant's

physical assault upon the taxi driver with the handgun caused the taxi driver to bleed from the head and the entire right side of the face, and the taxi driver testified that, during the attack, the taxi driver was very afraid of being killed. Thus, the pistol in the case, if used in the manner testified to by the taxi driver, was per se a deadly weapon, and the offense was either aggravated assault or no offense at all. *Ortiz v. State*, 292 Ga. App. 378, 665 S.E.2d 333 (2008), cert. denied, No. S08C1851, 2008 Ga. LEXIS 928 (Ga. 2008).

**Charge on maliciously in aggravated battery trial.** — Trial court did not err in charging the jury on the meaning of “maliciously” in the context of the elements of aggravated battery because the court charged the jury quite extensively on the element of intent as that element related to the crimes charged, and the court properly advised the jury of the state’s requisite burden of proof; therefore, the additional charge on the definition of maliciously did not, in the context of the charge as a whole, prejudice the defendant. *Mubarak v. State*, 305 Ga. App. 419, 699 S.E.2d 788 (2010).

**Lesser included offense of pointing gun at another.** — Trial court properly refused a requested charge on the lesser included offense of pointing a gun at another, given the victim’s testimony and defendant’s own statement that defendant drew the firearm in response to the violence of a confrontation between defendant and the victim. *Watson v. State*, 199 Ga. App. 825, 406 S.E.2d 509 (1991).

With regard to a defendant’s conviction for the felony murder of the defendant’s wife, with aggravated assault as the underlying felony, the trial court erred by refusing the defendant’s requested charge on involuntary manslaughter with pointing a pistol at another as the predicate misdemeanor, which entitled the defendant to a new trial based on the defendant testifying that the shooting occurred inadvertently when, in the course of horseplay with the pistol, the defendant pulled the trigger while pointing the pistol at the victim’s head, not knowing there was a round in the chamber. *Manzano v. State*, 282 Ga. 557, 651 S.E.2d 661 (2007).

**No merger with armed robbery.** — Because: (1) evidence presented against the second of two defendants, jointly charged, that the victim was beaten over the head with a pistol showed a completed aggravated assault prior to the armed robbery; and (2) possession of a firearm during the commission of an aggravated assault did not merge with armed robbery, as there was an expressed legislative intent to impose double punishment for conduct which violated both O.C.G.A. § 16-11-106 and other felony statutes, the offenses did not merge. *Bunkley v. State*, 278 Ga. App. 450, 629 S.E.2d 112 (2006).

**Merger of assault with deadly weapon and assault with intent to rob.** — Under O.C.G.A. § 16-1-7(a), a trial court erred in convicting and sentencing the defendant for both aggravated assault with a deadly weapon and aggravated assault with the intent to rob, as those two offenses merged since the same facts were used to prove both offenses. *Adcock v. State*, 279 Ga. App. 473, 631 S.E.2d 494 (2006).

**Declining defendant’s requested instruction held not error.** — Trial court did not err in refusing defendant’s requested instruction that, in order to convict, the state must show affirmatively an intention to aid and abet or an active involvement in the two crimes charged since the charge given covered fully (even to overflowing) each and every applicable principle of law concerning the crimes of armed robbery and aggravated assault and the law of principals as well as intent and participation only under coercion. *August v. State*, 180 Ga. App. 510, 349 S.E.2d 532 (1986).

In a prosecution for felony involuntary manslaughter, the trial court did not err in refusing the defendant’s requested jury charge on unlawful-act involuntary manslaughter, because the jury considered the defendant’s theories of self-defense and accident and rejected them, and evidence in opposition to these defenses showed that the defendant struck the victim with the barrel of the gun, which went off, killing the victim, and the evidence presumed that the defendant committed an aggravated assault under O.C.G.A. § 16-5-21(a)(2). *Gore v. State*, 272 Ga. App. 156, 611 S.E.2d 764 (2005).

**Jury Instructions (Cont'd)**

There was sufficient evidence to convict a defendant of felony murder under O.C.G.A. § 16-5-1 based upon the actions of participating in the attack by hitting the victim with the bat even though the defendant did not actually shoot the victim; thus, instructions tracking O.C.G.A. § 16-5-21(a)(2) aggravated assault could properly be based on another perpetrator's use of a gun but the victim's acts of self-defense were not provocation that justified an O.C.G.A. § 16-5-3(a) involuntary manslaughter instruction. *Ros v. State*, 279 Ga. 604, 619 S.E.2d 644 (2005).

In a trial for voluntary manslaughter, aggravated assault, and battery, it was not error to refuse to charge on the lesser included offense of involuntary manslaughter under O.C.G.A. § 16-5-3(a). Such a charge required an unlawful act that was not a felony, and the only such act supported by the evidence was the striking of the victim with a gun, which constituted the felony of aggravated assault under O.C.G.A. § 16-5-21. *Moon v. State*, 291 Ga. App. 499, 662 S.E.2d 283 (2008).

**Charge on intent not "closely connected" to charge on aggravated assault.** — Court of appeals would not consider the argument when the defendant contended the trial court failed to properly charge the jury on the intent necessary to commit aggravated assault, not arguing that the court's charge on intent was incorrect, but contending that the charge on intent was not "closely connected" with the charge on aggravated assault and thus, the jury could not properly understand the charge on intent, since the court charged the jury fully and correctly on intent, and there was nothing in the transcript to support the defendant's contention that the jury could not, or did not, understand the charge on intent as applied to aggravated assault. *Cade v. State*, 180 Ga. App. 314, 348 S.E.2d 769 (1986).

**Charge on intent was sufficient where a reasonable juror** would only have understood it to mean that if the victim was reasonably apprehensive of receiving bodily injury, the crime of aggravated assault has been committed regard-

less of whether defendant intended to injure the victim or whether the gun was loaded or could be fired. *Head v. State*, 233 Ga. App. 655, 504 S.E.2d 499 (1998).

**Trial court did not sua sponte err in failing to charge jury on identity** as: (1) there was Georgia law requiring a trial judge to warn the jury against the possible dangers of mistaken identification of an accused as the person committing a crime; and (2) such was not required after the jury had already been charged as to the presumption of innocence, reasonable doubt, burden of proof, credibility of witnesses, and impeachment of witnesses. *Lee v. State*, 281 Ga. 776, 642 S.E.2d 835 (2007).

**Self-defense instruction based on statutory language upheld.** — When the defendant contended the trial court erred by failing to give the defendant's requested charge on self-defense, since the court charged the jury on self-defense in the language of O.C.G.A. §§ 16-5-21 and 16-3-23, which is the law in Georgia, and those code provisions cover the same principles requested by the defendant, it was not error to deny the defendant's request to charge. *Cade v. State*, 180 Ga. App. 314, 348 S.E.2d 769 (1986).

**Accident and self-defense.** — Defenses of accident and self-defense are inconsistent, and a defendant generally is not entitled to a charge on both. Regardless of the reason why defendant drew a weapon, when the discharge of the weapon inside the victim's truck was the result of either an intentional or an unintentional act by defendant, there was no error in the trial court's refusal to give requested charges on both accident and self defense. *Watson v. State*, 199 Ga. App. 825, 406 S.E.2d 509 (1991).

**Failure to give jury charge on accident was error.** — Defendant's convictions for voluntary manslaughter, aggravated assault, and possession of a knife during the commission of a felony were reversed because the trial court erred in failing to charge the jury on the defense of accident as requested when that defense was raised by the evidence, and the Court of Appeals could not find that it was highly probable that the failure to give the requested charge did not contribute to the

verdict; at least slight evidence supported the theory that the defendant armed oneself with a knife in order to fend off the victim's attack with a pipe wrench and that although the defendant was prepared to intentionally stab the victim in self-defense, the defendant did not do so, but the victim lunged at the defendant and impaled oneself on the knife. Hill v. State, 300 Ga. App. 210, 684 S.E.2d 356 (2009).

**Jury charge on defense of habitation.** — In a prosecution for aggravated assault, while the trial court charged the jury regarding the details of the defense of justification, because the evidence did not authorize the charge of defense of habitation, the instruction was properly denied; moreover, no evidence was presented to suggest that the victim used coercion or threats to gain entry into the defendant's residence. Brimidge v. State, 287 Ga. App. 23, 651 S.E.2d 344 (2007).

**Flight charge was not expression of court's opinion.** — When in a trial for aggravated assault defendant complained that part of the court's charge on intent was an improper comment on the evidence because the court charged in terms of inferences allowed to be made by the jury, if it so chose, from the evidence of flight, it was held that the flight charge, either standing alone or taken in the context of the whole charge, could not have been taken by the jury as an expression or intimation of the court's opinion. Alexander v. State, 180 Ga. App. 640, 350 S.E.2d 284 (1986).

**Charge excluding "when used offensively" from definition.** — Trial court did not err in failing to use the phrase "when used offensively" in the court's definition of the crime when defendant was indicted specifically for using a hand gun and was not charged with the alternative method of committing the crime. Green v. State, 209 Ga. App. 274, 433 S.E.2d 383 (1993); Diaz v. State, 255 Ga. App. 288, 564 S.E.2d 872 (2002).

O.C.G.A. § 16-5-21(a)(2) defined aggravated assault as an assault with a deadly weapon or with any object which, when used offensively, was likely to result in serious bodily injury. The phrase "when used offensively" described an alternative

method of committing aggravated assault, i.e., by use of an object other than one considered a deadly weapon; therefore, a trial judge did not err in omitting to charge this alternative language in a case in which the defendant was charged with using a deadly weapon. Finley v. State, 286 Ga. 47, 685 S.E.2d 258 (2009).

**Recharge as to applicable definition.** — When the trial court's original charge to the jury with respect to the statutory definition of aggravated assault included the language of O.C.G.A. § 16-5-21(a)(1), but at the state's suggestion, the trial court recalled the jury for the purpose of giving clarifying instructions to the effect that only O.C.G.A. § 16-5-21(a)(2) applied, and the record clearly showed that the trial court's recharge informed the jury to disregard only the previously given inapplicable definition of aggravated assault contained in O.C.G.A. § 16-5-21(a)(1), there was no error. Rashada v. State, 180 Ga. App. 773, 350 S.E.2d 323 (1986); Cail v. State, 194 Ga. App. 584, 391 S.E.2d 444 (1990).

**Recharge not error.** — Because the jury in the defendant's criminal matter requested clarification for purposes of their deliberations, whereupon the trial court recharged them on the offense of aggravated assault, in violation of O.C.G.A. § 16-5-21, such was not error under O.C.G.A. § 5-5-24(c) or under the holding in Dukes, as the initial charge and the recharge were not based on the entire aggravated assault statute but instead, were only based on that part of the O.C.G.A. § 16-5-21 that related to the allegations in the indictment. Johnson v. State, 279 Ga. App. 669, 632 S.E.2d 688 (2006).

**Charge which created an unconstitutional burden-shifting presumption** as to intent was harmless error, since the defendant's defense was alibi and misidentification, and in the alternative, insanity, and such defenses did not put into issue criminal intent. Williams v. State, 180 Ga. App. 893, 350 S.E.2d 768 (1986).

**Charge as to justification not misleading or confusing.** — In a trial for aggravated assault, jury charge as to justification was not misleading or confusing;

**Jury Instructions (Cont'd)**

charge made it clear that state bore burden of proving both elements of aggravated assault under the indictment and that defendant's use of force was not justified beyond a reasonable doubt. *White v. State*, 291 Ga. App. 249, 661 S.E.2d 865 (2008).

In an aggravated assault case in which the defense was justification under O.C.G.A. § 16-3-21(a), trial counsel was not ineffective for failing to request a charge defining aggravated battery under O.C.G.A. § 16-5-24(a) as a forcible felony for which the use of force was justified. Also, there was no showing that the outcome of the trial would have been different if such a charge had been given. *Lewis v. State*, 302 Ga. App. 506, 691 S.E.2d 336 (2010).

**Curative instructions prevented prejudice and obviated mistrial.** — In the prosecution of the defendant for ag-

gravated assault with a deadly weapon and resisting arrest, because the trial court's curative instructions to the jury obviated the need for a mistrial with respect to statements from a potential juror and cured any prejudice which might have resulted from the prosecutor's closing argument, convictions of those crimes were upheld on appeal. *Mitchell v. State*, 284 Ga. App. 209, 644 S.E.2d 147 (2007).

**Harmless error.** — When the defendant was tried for aggravated assault with intent to murder after biting a police officer, the trial court's error in charging the jury that, in order to convict of the offense, the jury must find the use of a deadly weapon and intent to murder, caused the defendant no harm; it simply placed an extra burden of proof upon the state and therefore enured to the defendant's benefit. *Scroggins v. State*, 198 Ga. App. 29, 401 S.E.2d 13 (1990), cert. denied, 198 Ga. App. 898, 401 S.E.2d 13 (1991).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Assault and Battery, §§ 32, 33, 35, 62.

**C.J.S.** — 6A C.J.S., Assault and Battery, §§ 86, 87.

**ALR.** — Recovery for physical consequences of fright resulting in a physical injury, 11 ALR 1119; 40 ALR 983; 76 ALR 681; 98 ALR 402.

Cane as a deadly weapon, 30 ALR 815.

Assault with intent to ravish or rape consenting female under age of consent, 81 ALR 599.

Effect of failure or refusal of court, in robbery prosecution, to instruct on assault and battery, 58 ALR2d 808.

Civil liability of one instigating or inciting an assault or assault and battery notwithstanding primary or active participant therein has been absolved of liability, 72 ALR2d 1229.

Intent to do physical harm as essential element of crime of assault with deadly or dangerous weapon, 92 ALR2d 635.

What constitutes attempted murder, 54 ALR3d 612.

Assault and battery: sexual nature of physical contact as aggravating offense, 63 ALR3d 225.

What constitutes penetration in prosecution for rape or statutory rape, 76 ALR3d 163.

Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 ALR3d 245.

Automobile as dangerous or deadly weapon within meaning of assault or battery statute, 89 ALR3d 1026.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 ALR3d 287.

Walking cane as deadly or dangerous weapon for purpose of statutes aggravating offenses such as assault and robbery, 8 ALR4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 ALR4th 1268.

Criminal responsibility of husband for rape, or assault to commit rape, on wife, 24 ALR4th 105.

Fact that gun was unloaded as affecting criminal responsibility, 68 ALR4th 507.

Criminal assault or battery statutes

making attack on elderly person a special or aggravated offense, 73 ALR4th 1123.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 ALR4th 660.

Sufficiency of bodily injury to support charge of aggravated assault, 5 ALR5th 243.

Stationary object or attached fixture as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 8 ALR5th 775.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing

in criminal or military discipline case, 13 ALR5th 628.

Kicking as aggravated assault, or assault with dangerous or deadly weapon, 19 ALR5th 823.

Attempt to commit assault as criminal offense, 93 ALR5th 683.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 124 ALR5th 657.

Cigarette lighter as deadly or dangerous weapon, 22 ALR6th 533.

When is federal officer assaulted "while engaged in, or on account of, performance of official duties" for purposes of offense of assaulting, resisting, or impeding federal officer under 18 USCS § 111, 36 ALR Fed. 2d 475.

## **16-5-22. Conviction of assault with intent to commit a crime if intended crime actually committed.**

A person may be convicted of the offense of assault with intent to commit a crime if the crime intended was actually committed as a result of the assault but may not be convicted of both the assault and completed crime. (Code 1933, § 26-1303, enacted by Ga. L. 1968, p. 1249, § 1.)

### **JUDICIAL DECISIONS**

**Legislative intent.** — It is the intent of the legislature that, although an assault may be a criminal attempt, and even though the criminal act intended be completed, a conviction for an assault is authorized. Williams v. State, 141 Ga. App. 201, 233 S.E.2d 48 (1977).

**"Assault" during brief investigatory stop.** — When defendant attempted to push past federal officers during a brief investigatory stop, making contact with one of the officers, the officers had probable cause to arrest the defendant for battery and obstruction of an officer, and defendant could be fully searched in connection with such an arrest. Alex v. State, 220 Ga. App. 754, 470 S.E.2d 305 (1996).

**Conviction for assault lawful though battery was committed.** — Recognizing the fact that an assault is nothing more than an attempted battery, and that every battery necessarily includes an assault, it is lawful to convict for

simple assault even though the proof shows that a battery was committed. Webb v. State, 156 Ga. App. 623, 275 S.E.2d 707 (1980); C.L.T. v. State, 157 Ga. App. 180, 276 S.E.2d 862 (1981).

**Conviction of aggravated assault was legal conviction upon indictment for rape** under the provisions of former Code 1933, §§ 26-1302 and 26-1303. Jones v. Smith, 228 Ga. 648, 187 S.E.2d 298 (1972) (see O.C.G.A. §§ 16-5-21 and 16-5-22).

**Lesser included offenses to murder.** — Aggravated assault with intent to commit murder and with a deadly weapon may be charged as lesser included offenses of murder. Hall v. State, 163 Ga. App. 515, 295 S.E.2d 194 (1982).

**Failure to charge on lesser included crime where evidence shows completed crime.** — While former Code 1933, § 26-1303 authorized the conviction of a lesser crime on evidence of the com-

pleted crime, where the evidence showed the completed crime, it was not error to fail to charge on a lesser included crime. Payne v. State, 231 Ga. 755, 204 S.E.2d 128 (1974) (see O.C.G.A. § 16-5-22).

Where the testimony of the victim, considered with the testimony of the medical doctor who examined the victim immediately after the attack on the victim as to the nature of the injuries received, established that the offense committed was rape, and not attempted rape, the trial judge did not err in failing to instruct on the lesser included offense of attempted rape. Payne v. State, 231 Ga. 755, 204 S.E.2d 128 (1974).

**Evidence sufficient for finding of assault with intent to commit rape.** — If the jury can find that the victim consented to intercourse after being as-

saulted by the defendant, the evidence is sufficient to authorize a finding of assault with the intent to commit rape. Terry v. State, 166 Ga. App. 632, 305 S.E.2d 170 (1983).

Cited in Ward v. State, 231 Ga. 484, 202 S.E.2d 421 (1973); Echols v. State, 134 Ga. App. 216, 213 S.E.2d 907 (1975); Scott v. State, 141 Ga. App. 848, 234 S.E.2d 685 (1977); Brooks v. State, 143 Ga. App. 523, 239 S.E.2d 207 (1977); Tuggle v. State, 145 Ga. App. 603, 244 S.E.2d 131 (1978); Riner v. State, 147 Ga. App. 707, 250 S.E.2d 161 (1978); Harper v. State, 157 Ga. App. 480, 278 S.E.2d 28 (1981); Price v. State, 160 Ga. App. 245, 286 S.E.2d 744 (1981); Blount v. State, 172 Ga. App. 120, 322 S.E.2d 323 (1984); Neal v. State, 219 Ga. App. 891, 467 S.E.2d 219 (1996).

#### RESEARCH REFERENCES

**ALR.** — Attempt to commit assault as criminal offense, 93 ALR5th 683.

#### 16-5-23. Simple battery.

(a) A person commits the offense of simple battery when he or she either:

- (1) Intentionally makes physical contact of an insulting or provoking nature with the person of another; or
- (2) Intentionally causes physical harm to another.

(b) Except as otherwise provided in subsections (c) through (i) of this Code section, a person convicted of the offense of simple battery shall be punished as for a misdemeanor.

(c) Any person who commits the offense of simple battery against a person who is 65 years of age or older or against a female who is pregnant at the time of the offense shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature.

(d) Any person who commits the offense of simple battery in a public transit vehicle or station shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature. For purposes of this Code section, "public transit vehicle" has the same meaning as in subsection (c) of Code Section 16-5-20.

(e) Any person who commits the offense of simple battery against a police officer, law enforcement dog, correction officer, or detention officer

engaged in carrying out official duties shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature.

(f) If the offense of simple battery is committed between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons excluding siblings living or formerly living in the same household, the defendant shall be punished for a misdemeanor of a high and aggravated nature. In no event shall this subsection be applicable to corporal punishment administered by a parent or guardian to a child or administered by a person acting in loco parentis.

(g) A person who is an employee, agent, or volunteer at any facility licensed or required to be licensed under Code Section 31-7-3, relating to long-term care facilities, or Code Section 31-7-12.2, relating to assisted living communities, or Code Section 31-7-12, relating to personal care homes, or who is required to be licensed pursuant to Code Section 31-7-151 or 31-7-173, relating to home health care and hospices, who commits the offense of simple battery against a person who is admitted to or receiving services from such facility, person, or entity shall be punished for a misdemeanor of a high and aggravated nature.

(h) Any person who commits the offense of simple battery against a sports official while such sports official is officiating an amateur contest or while such sports official is on or exiting the property where he or she will officiate or has completed officiating an amateur contest shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature. For the purposes of this Code section, the term "sports official" means any person who officiates, umpires, or referees an amateur contest at the collegiate, elementary or secondary school, or recreational level.

(i) Any person who commits the offense of simple battery against an employee of a public school system of this state while such employee is engaged in official duties or on school property shall, upon conviction of such offense, be punished for a misdemeanor of a high and aggravated nature. For purposes of this Code section, "school property" shall include public school buses and stops for public school buses as designated by local school boards of education. (Laws 1833, Cobb's 1851 Digest, p. 788; Code 1863, § 4262; Code 1868, § 4297; Code 1873, § 4363; Code 1882, § 4363; Penal Code 1895, § 102; Penal Code 1910, § 102; Code 1933, § 26-1408; Code 1933, § 26-1304, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1987, p. 557, § 1; Ga. L. 1991, p. 971, §§ 5, 6; Ga. L. 1992, p. 2055, § 1; Ga. L. 1993, p. 91, § 16; Ga. L. 1997, p. 907, § 1; Ga. L. 1999, p. 381, § 4; Ga. L. 1999, p. 562, § 3; Ga. L. 2000, p. 16, § 1; Ga. L. 2004, p. 621, § 2; Ga. L. 2005, p. 60, § 16/HB 95; Ga. L. 2011, p. 227, § 3/SB 178.)

**The 2011 amendment**, effective July 1, 2011, inserted “or Code Section 31-7-12.2, relating to assisted living communities,” in the middle of subsection (g).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1992, subsection (d) as added by Ga. L. 1992, p. 2066, § 1, was redesignated as subsection (e), since this Code section already had a subsection (d).

**Editor's notes.** — Ga. L. 1999, p. 381, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Crimes Against Family Members Act of 1999.’”

Ga. L. 1999, p. 381, § 7, not codified by the General Assembly, provides that: “Nothing herein shall be construed to validate a relationship between people of the same sex as a ‘marriage’ under the laws of this State.”

Ga. L. 1999, p. 562, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Crimes Against Elderly Act of 1999.’”

Ga. L. 2000, p. 16, § 2, not codified by the General Assembly, provides that the 2000 amendment to this Code section is applicable to offenses committed on or after July 1, 2000.

Ga. L. 2004, p. 621, § 9(b), not codified by the General Assembly, provides that the amendment by that Act shall apply to offenses committed on or after July 1, 2004.

**Law reviews.** — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article, “Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System,” see 8 Georgia St. U.L. Rev. 539 (1992). For article, “Misdemeanor Sentencing in Georgia,” see 7 Ga. St. B.J. 8 (2001). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007).

For note on 2000 amendment of O.C.G.A. § 16-5-23, see 17 Georgia St. U.L. Rev. 89 (2000).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION JURY INSTRUCTIONS

#### General Consideration

**Assault and battery defined.** — Any act of physical violence inflicted on the person of another, which is not necessary, is not privileged, and which constitutes a harmful or offensive contact constitutes an assault and battery. *Brown v. State*, 57 Ga. App. 864, 197 S.E. 82 (1938).

**Domestic relationship did not need to be an element of predicate offense.** — Defendant's conviction for violating the Georgia battery statute, O.C.G.A. § 16-5-23(a)(1), qualified as a predicate offense for 18 U.S.C. § 922(g)(9) purposes even though the conviction did not require as an element the existence of a domestic relationship because a domestic relationship had to exist as part of the facts giving rise to the prior offense, but it did not need to be an element of that offense. *United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006).

**Conviction for violating statute qualified as a predicate offense for 18 U.S.C. § 922(g)(9) purposes.** — Defendant's conviction for violating the Georgia battery statute, O.C.G.A. § 16-5-23(a)(1), qualified as a predicate offense for 18 U.S.C. § 922(g)(9) purposes and satisfied the definition of a “misdemeanor crime of domestic violence” under 18 U.S.C. § 921(a)(33)(A) even though the crime did not have as an element the use or attempted use of physical force, or the threatened use of a deadly weapon because a person could not make physical contact, particularly of an insulting or provoking nature, with another without exerting some level of physical force. Therefore, under the plain meaning rule, the “physical contact of an insulting or provoking nature” made illegal by the Georgia battery statute satisfied the “physical force” requirement of 18 U.S.C.

§ 921(a)(33)(A)(ii), which was defined in 18 U.S.C. § 922(g)(9). *United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006).

**Simple battery a crime of violence under 18 U.S.C. § 16(a) for removal purposes under 8 U.S.C. § 1227(a)(2).**

— Because an alien's conviction under O.C.G.A. § 16-5-23(a)(2) required intentionally causing physical harm through physical contact, the conviction constituted a crime of violence under 18 U.S.C. § 16(a), making the alien properly removable under 8 U.S.C. § 1227(a)(2), as reviewed under 8 U.S.C. § 1252. The alien was also sentenced to a 12-month term to constitute an aggravated felony under 8 U.S.C. § 1101(a)(43). *Hernandez v. United States AG*, 513 F.3d 1336 (11th Cir. 2008), cert. denied, 129 S. Ct. 44, 172 L.Ed.2d 22 (2008).

**Simple battery a crime of violence for purposes of cancellation of removal.** — Simple battery under O.C.G.A. § 16-5-23 contained an element of use of physical force as required for a crime of violence under 18 U.S.C. § 16(a) and 8 U.S.C. § 1101(a)(43). Thus, an alien with a prior conviction for that crime was ineligible for cancellation of removal under 8 U.S.C. § 1229b or for discretionary relief under 8 U.S.C. § 1182(h). *Irabor v. United States AG*, No. 06-13535, 2007 U.S. App. LEXIS 5797 (11th Cir. Mar. 13, 2007) (Unpublished).

**Attitude of victim not an element of offense.** — It is the act, intent, and results of the defendant's act which constitute the crimes as charged; the attitude of the victim is not called into issue by these elements. *Ramey v. State*, 203 Ga. App. 650, 417 S.E.2d 699 (1992).

**Evidence of victim's alcoholism.** — Defendant's convictions of aggravated battery and simple battery were affirmed as the trial court properly refused to admit evidence of the victim's alcoholism prior to the victim's involvement with defendant since the defendant failed to show any nexus between the victim's alcoholism and the conclusion that the victim had falsely accused defendant of battery. *Harris v. State*, 263 Ga. App. 329, 587 S.E.2d 819 (2003).

**Evidence of victim's alleged infidelity.** — Evidence that a battery victim

cheated on the defendant was properly excluded as the victim's alleged infidelity had no bearing on the victim's veracity, was intended only to impugn the victim's character, and had no relevance to any disputed issues in the case. *Burrowes v. State*, 296 Ga. App. 629, 675 S.E.2d 518 (2009).

**Battery against a police officer.** — Defendant's convictions for simple battery and the sale of marijuana were upheld on appeal as sufficient evidence was presented that the defendant spat in the face of another and the undercover officer who the defendant sold the marijuana to testified regarding the sale; further, the trial court properly admitted similar transaction evidence as the evidence was probative of defendant's bent of mind to become belligerent with police officers when arrested. *Williams v. State*, 287 Ga. App. 40, 651 S.E.2d 347 (2007).

**Evidence sufficient to support conviction for hijacking, battery, and kidnapping.** — Defendants convictions of hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b), battery, O.C.G.A. § 16-5-23, and two counts of kidnapping with bodily injury, O.C.G.A. § 16-5-40(b), were affirmed because sufficient evidence was presented at trial to support the charges as the victim testified that defendant forced a way into the victim's car at gunpoint while the victim and an infant child were in the vehicle and then sexually assaulted the victim after threatening to harm the child, defendant's wallet was found in the abandoned car, and defendant admitted to the hijacking. *Adams v. State*, 276 Ga. App. 319, 623 S.E.2d 525 (2005).

**Contact proceeding from rudeness** is as offensive and harmful as that from anger or lust, and in law constitutes an assault and battery. *Brown v. State*, 57 Ga. App. 864, 197 S.E. 82 (1938).

**Physical contact is required for simple battery** but not for aggravated assault, and hence the crime of simple battery is not necessarily included in the crime of aggravated assault. *Tuggle v. State*, 145 Ga. App. 603, 244 S.E.2d 131 (1978); *Anderson v. State*, 170 Ga. App. 634, 317 S.E.2d 877 (1984).

Physical contact is required to prove

**General Consideration (Cont'd)**

simple battery. Hancock v. State, 188 Ga. App. 870, 374 S.E.2d 757, cert. denied, 188 Ga. App. 911, 374 S.E.2d 757 (1988).

**There is no requirement that victim receive great bodily harm** in a case of simple battery. Mize v. State, 135 Ga. App. 561, 218 S.E.2d 450 (1975).

Simple battery consists of all forms of prohibited contact and is not limited to contact that causes substantial or visible harm like battery. Thus defendant was not prejudiced when the trial court gave a lesser-included offense instruction on simple battery. Lawson v. State, 274 Ga. 866, 561 S.E.2d 72 (2002).

**Mere pain** is sufficient to show physical harm for purposes of simple battery. Meja v. State, 232 Ga. App. 548, 502 S.E.2d 484 (1998).

**Manner in which act committed irrelevant.** — Defendant's contention that the "tweaking" of his estranged wife's breast was not done in an insulting or provoking manner so as to constitute the crime of simple battery was rejected and the victim's testimony that the defendant pinched her breast without consent was sufficient to authorize the trial court's finding that the defendant was guilty of simple battery. Wells v. State, 204 Ga. App. 90, 418 S.E.2d 450 (1992).

**Act causing physical harm must be done intentionally or with criminal negligence.** — Act which causes the physical harm can be active or passive, and done directly or indirectly through an agency, as long as the act is done intentionally, or with criminal negligence. J.A.T. v. State, 133 Ga. App. 922, 212 S.E.2d 879 (1975).

**Committing battery through use of animal.** — As a matter of law, the offense of simple battery can be committed through the use of a dog if it is shown that the defendant's conduct was a substantial factor in the causation. J.A.T. v. State, 133 Ga. App. 922, 212 S.E.2d 879 (1975).

**Indictment need not allege defendant violated some other statute.** — In an indictment for assaulting a named person by running that person down with an automobile, it is not essential for the indictment to allege that the defendant also

violated some other statute, such as those prohibiting speeding or driving while under the influence of intoxicants. Bailey v. State, 101 Ga. App. 81, 113 S.E.2d 172 (1960).

Three counts of an indictment charging defendant with "family violence battery (felony)" in violation of O.C.G.A. §§ 16-5-21(f), 16-5-23(f), and 16-5-23.1(f)(2), respectively, were sufficient as the indictment informed defendant of the charges and protected against double jeopardy; mere surplusage did not vitiate an otherwise sufficient indictment, and since the indictment did not reference the sentencing for the offense charged, the indictment did not inject the issue of punishment and was not subject to demurrer. State v. Barnett, 268 Ga. App. 900, 602 S.E.2d 899 (2004).

**Accusation not vague and uncertain.** — An accusation which charges a defendant with the offense of simple battery and states that defendant "beat" the victim on a certain day in the county is not too vague and uncertain even when it does not state an offense in the language of the Code or specify any Code section. Tomlinson v. State, 123 Ga. App. 738, 182 S.E.2d 320 (1971).

**Municipal court lacks jurisdiction.** — Since the municipal court lacked jurisdiction to try defendant pursuant to a Uniform Traffic Citation charging defendant with "simple battery" in violation of O.C.G.A. § 16-5-23, prosecution of the offense before such court was void; accordingly, trial of defendant for simple battery in the state court was not barred on the ground of double jeopardy or prior prosecution. Rangel v. State, 217 Ga. App. 152, 456 S.E.2d 739 (1995).

**Allegation of exact means of battery or language of section not required in indictment.** — An indictment for battery is not required to allege the exact manner and means of the battery, or to express the language of the charge in the exact language of the Code. J.A.T. v. State, 133 Ga. App. 922, 212 S.E.2d 879 (1975).

**Indictment alleging offensive use of fists.** — After a defendant was indicted for aggravated assault and convicted of simple battery, language of the indictment

tracking the aggravated assault statute by alleging that the offensive use of fists and feet resulted in bodily injury was also a sufficient allegation of simple battery. Buchanan v. State, 173 Ga. App. 554, 327 S.E.2d 535 (1985).

**When an assault is committed with a deadly weapon, simple battery is not a lesser included offense under aggravated assault.** Powell v. State, 140 Ga. App. 36, 230 S.E.2d 90 (1976).

**Simple battery and DUI.** — Simple battery charge did not “arise from the same conduct” as a driving under the influence (DUI) charge, so as to come within the prohibition of the multiple prosecution bar, where the battery occurred 40 minutes after defendant’s arrest for DUI and at a different location, the officer who made the DUI arrest was not the same person allegedly struck by defendant and the DUI involved defendant’s operation of a motor vehicle, but the battery did not. State v. Littler, 201 Ga. App. 527, 411 S.E.2d 522 (1991).

**Simple battery not lesser crime included in child molestation.** — Simple battery, as defined in former Code 1933, chapter 26-13 (see O.C.G.A. § 16-5-23), is not a lesser crime included in the crime of child molestation, as defined in former Code 1933, chapter 26-20 (see O.C.G.A. § 16-6-4). State v. Stonaker, 236 Ga. 1, 222 S.E.2d 354, cert. denied, 429 U.S. 833, 97 S. Ct. 98, 50 L. Ed. 2d 98 (1976).

Trial court’s refusal to charge on simple battery as a lesser included offense of child molestation was not error, where the victim testified to defendant’s commission of acts of fondling which, if believed by the jury, would clearly show that defendant had committed the crime of child molestation. Brooks v. State, 197 Ga. App. 194, 397 S.E.2d 622 (1990).

**Involuntary manslaughter based on battery verdict not inconsistent with felony murder/cruelty to children verdict.** — In a shaken baby death, an involuntary manslaughter verdict was not mutually exclusive of a guilty verdict for felony murder/cruelty to children because, consistent with the jury’s guilty verdict on the felony murder charge, an offense requiring criminal intent, the jury predicated the jury’s involuntary man-

slaughter verdict on a misdemeanor involving criminal intent, battery, or simple battery under O.C.G.A. §§ 16-5-23(a) and 16-5-23.1(a), although the jury was also instructed on reckless conduct, a misdemeanor committed by criminal negligence, O.C.G.A. § 16-5-60(b). Drake v. State, 288 Ga. 131, 702 S.E.2d 161 (2010).

**Corporal punishment.** — Trial court erred in finding that a guardian proved by a preponderance of the evidence, as required under O.C.G.A. § 19-13-3(a), that a parent committed an act of family violence pursuant to O.C.G.A. § 19-13-1, as there was insufficient evidence that the parent committed an act of violence, specifically simple battery in violation of O.C.G.A. § 16-5-23, as opposed to administering reasonable discipline in the form of corporal punishment, as O.C.G.A. § 16-5-23 specifically exempted corporal punishment from the definition of battery, and the appellate court determined after considering O.C.G.A. §§ 16-3-20 and 20-2-731 that the alleged action of the parent in slapping the child did not arise to the level of unreasonable discipline. Buchheit v. Stinson, 260 Ga. App. 450, 579 S.E.2d 853 (2003).

**Sufficiency of testimony to sustain conviction of simple battery.** — Testimony by a youth, who testified that a group of four other youths accosted the youth in a public park and that the two defendants on trial had used abusive language, and slapped and hit the youth, is sufficient to sustain a conviction of simple battery as to each of the defendants. Scott v. State, 123 Ga. App. 675, 182 S.E.2d 183 (1971).

**Simple battery not offense included in robbery by force.** — Since simple battery focuses on injury to the person while robbery by force involves the taking of property from the person of another by doing physical violence to the victim, simple battery is not as a matter of law an offense included in robbery by force. Givens v. State, 184 Ga. App. 498, 361 S.E.2d 830, cert. denied, 184 Ga. App. 909, 361 S.E.2d 830 (1987).

**Simple battery and robbery convictions merged.** — Because the single continuous act of simple battery, O.C.G.A. § 16-5-23(a)(1), was the evidence required

**General Consideration (Cont'd)**

to show the "force" used to accomplish a robbery, O.C.G.A. § 16-8-40(a)(1), the defendant's battery convictions merged with the robbery conviction; the "use of force" charged in connection with the robbery was "hitting," which was the same type of force used in the continuous battery. *Bonner v. State*, No. A10A1670, 2011 Ga. App. LEXIS 298 (Mar. 28, 2011).

**Simple battery not a crime of moral turpitude.** — Simple battery, a misdemeanor, has been recognized to be a crime not involving moral turpitude, and a plea of nolo contendere to a charge of simple battery is admissible for impeachment of the defendant in the subsequent trial of the civil suit stemming from the battery. *Jabaley v. Mitchell*, 201 Ga. App. 477, 411 S.E.2d 545 (1991).

**Simple battery is not a lesser included offense of false imprisonment.** — See *Reynolds v. State*, 231 Ga. App. 22, 497 S.E.2d 580 (1998).

**Simple battery is not a lesser included offense of felony obstruction**, because it is a separate and independent offense wherein the intent is to make physical contact or cause physical harm. *Pearson v. State*, 224 Ga. App. 467, 480 S.E.2d 911 (1997).

Defendant failed to show error in refusing to merge offenses because defendant failed to show that aggravated assault was established by the same facts used to prove simple battery; evidence that defendant entered a store wearing a mask, opened the cash drawer, tried to wrangle a key to the drawer from the employee's hand, demanded money, banged on the register, and appeared to have had a gun supported the aggravated assault conviction, but none of this evidence was needed to prove simple battery, which was established by evidence of defendant's bruising blows to the employee's arm. *Lawson v. State*, 275 Ga. App. 334, 620 S.E.2d 600 (2005).

**Inclusion in offense of rape.** — Offense of rape necessarily includes contact of insulting or provoking nature. *Hardy v. State*, 159 Ga. App. 854, 285 S.E.2d 547 (1981); *Humphrey v. State*, 207 Ga. App. 472, 428 S.E.2d 362 (1993).

Assault, or assault and battery, is necessarily involved in every case of rape. *Hardy v. State*, 159 Ga. App. 854, 285 S.E.2d 547 (1981).

**Registration as sex offender not required.** — Trial court erred in ordering defendant to register as a sexual offender based on a conviction for the non-sexual offense of simple battery for having placed defendant's hands on the breasts and between the legs of a fifteen-year-old girl. *Sequeira v. State*, 243 Ga. App. 718, 534 S.E.2d 166 (2000).

**Every battery necessarily includes an assault**, which is but an attempted battery. *Anderson v. State*, 170 Ga. App. 634, 317 S.E.2d 877 (1984).

**Recently conceived fetus not a "child" under O.C.G.A. § 16-5-23(f).** — O.C.G.A. § 16-5-23(f) did not cover the relationship the defendant shared with the victim, a person the defendant had sexual relations with but did not know was pregnant, because the victim's testimony suggested that the victim was only a few weeks into the pregnancy at the time of the incident, and that the victim had "lost" the child; such a recently conceived fetus was not a "child" under O.C.G.A. § 16-5-23(f). *Gillespie v. State*, 280 Ga. App. 243, 633 S.E.2d 632 (July 3, 2006).

**Evidence sufficient to support delinquency adjudication.** — There was sufficient evidence to support an adjudication of delinquency based on simple battery. The juvenile defendant's parent testified that the defendant slapped the parent's finger, hit the parent, and pushed the parent with sufficient force that the parent fell on the floor and dislodged the parent's prosthesis; the fact that the defendant had a different account of the altercation and that the parent did not remain passive during the altercation did not require a different result. *In the Interest of B.B.*, 298 Ga. App. 432, 680 S.E.2d 497 (2009).

Evidence was sufficient to find a juvenile committed the lesser included offense of simple battery because the juvenile's act of placing the juvenile's hands in the victim's pockets despite the victim's protests to remove the juvenile's hands was a prohibited act under O.C.G.A. § 16-5-23(a)(1). *In the Interest of D.M.*,

No. A10A2353, 2011 Ga. App. LEXIS 239 (Mar. 21, 2011).

**Evidence sufficient to support conviction.** — See *Manus v. State*, 180 Ga. App. 658, 350 S.E.2d 41 (1986); *Jackson v. State*, 182 Ga. App. 826, 357 S.E.2d 143 (1987); *Conejo v. State*, 189 Ga. App. 14, 374 S.E.2d 826 (1988); *Bedley v. State*, 189 Ga. App. 90, 374 S.E.2d 841 (1988); *Mitchel v. State*, 193 Ga. App. 146, 387 S.E.2d 390 (1989); *Huffman v. State*, 201 Ga. App. 642, 411 S.E.2d 787 (1991); *Waddell v. State*, 224 Ga. App. 172, 480 S.E.2d 224 (1996); *Basu v. State*, 228 Ga. App. 591, 492 S.E.2d 329 (1997); *Miller v. State*, 230 Ga. App. 73, 495 S.E.2d 329 (1998); *Eberhart v. State*, 241 Ga. App. 164, 526 S.E.2d 361 (1999); *Shaw v. State*, 247 Ga. App. 867, 545 S.E.2d 399 (2001); *In re W.B.*, 255 Ga. App. 192, 564 S.E.2d 816 (2002); *Miller v. State*, 271 Ga. App. 524, 610 S.E.2d 156 (2005).

Evidence that defendant held the victim against the victim's will while defendant made physical advances against the victim and physically caused the victim harm was sufficient to convict defendant of false imprisonment and simple battery. *Reynolds v. State*, 231 Ga. App. 22, 497 S.E.2d 580 (1998).

Testimony of a single witness was sufficient to authorize a jury's verdict that defendant was guilty beyond a reasonable doubt of committing aggravated assault with a deadly weapon and that defendant committed simple battery by intentionally kicking the victim on the ankle, causing a bruise. *Ringo v. State*, 236 Ga. App. 38, 510 S.E.2d 893 (1999).

Evidence was sufficient to support defendant's convictions of two counts of armed robbery, two counts of theft by taking, three counts of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2), three counts of simple battery, three counts of kidnapping, and two counts of possessing a firearm during the commission of a crime since: (1) there was evidence that defendant entered a store, placed a knife to the neck of one of the three victims, forced that victim to the back of the store, aided another assailant who was armed with a gun to bind the victims and drag the victims to the back of the store, and stole money and other items

from two of the victims; (2) defendant confessed to the crimes during interviews with law enforcement officials; and (3) defendant's confessions were corroborated by the testimony of one of the victims who, despite earlier being unable to identify the robbers, ultimately identified defendant as one of the robbers. The corroborating victim's initial inability to identify defendant posed an issue of credibility for the jury's resolution and did not require reversal. *Phanamixay v. State*, 260 Ga. App. 177, 581 S.E.2d 286 (2003).

Evidence was sufficient to find defendant committed simple battery on the victim, defendant's ex-spouse, pursuant to O.C.G.A. § 16-5-23(a), as defendant struck and kicked the victim repeatedly over a 26-hour period, leaving the ex-spouse with severe injuries to the face, arms, and neck coupled with broken bones. *Hammonds v. State*, 263 Ga. App. 5, 587 S.E.2d 161 (2003).

Evidence supported a simple battery conviction because, in responding to a 9-1-1 call, a deputy saw the defendant holding the victim down on a bed and the victim screamed as the defendant held the victim down. *Pitts v. State*, 272 Ga. App. 182, 612 S.E.2d 1 (2005), aff'd, 280 Ga. 288, 627 S.E.2d 17 (2006).

Delinquency finding for acts constituting party to the crimes of aggravated assault and battery was supported by sufficient evidence showing that the appellant was one of a group of youths who punched, kicked, and struck one victim with a shotgun, and participated in the attack; the appellant also knocked another victim to the ground and hit that victim during the fracas. *In the Interest of E.R.*, 279 Ga. App. 423, 631 S.E.2d 458 (2006).

Because the victim's testimony, standing alone, was sufficient to establish the defendant's guilt beyond a reasonable doubt, when the evidence showed: (1) two separate aggravated assaults, one with a knife and one with a hammer; (2) two separate instances of simple battery; and (3) a hours-long detention of the victim by the defendant, said evidence amply supported the jury's conviction on the charges of false imprisonment, aggravated assault, and simple battery. *Brigman v.*

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State, 282 Ga. App. 481, 639 S.E.2d 359 (2006).

Because sufficient evidence was presented via the testimony of the victim regarding the defendant's attack with a screwdriver, which was corroborated by the defendant's own admissions at trial, the defendant's simple battery conviction was upheld on appeal; moreover, the defendant's characterization of the incident as one involving mutual argument did not in and of itself justify the actions. Rainey v. State, 286 Ga. App. 682, 649 S.E.2d 871 (2007).

Despite waiving error regarding a show up identification because: (1) a victim's identification of the defendant as one of the perpetrators of a burglary, robbery, and battery was sufficient and non-suggestive; and (2) the corroborating testimony from the defendant's two accomplices was admissible to support the defendant's convictions as both accomplices testified as to the defendant's involvement in the crimes, those convictions were upheld on appeal; thus, a new trial was properly denied. Carr v. State, 289 Ga. App. 875, 658 S.E.2d 419 (2008).

Evidence supported a simple battery conviction under O.C.G.A. § 16-5-23 when the defendant slammed a door on the victim, the defendant's lessor, knocking the victim down a short flight of stairs. As the defendant's oral tenancy had always been subject to the right of realtors to enter the residence, the victim, who sought to enter the home upon two hours' notice to show the property to a new realtor, was within the victim's rights to enter the premises; even if this were not the case, because the defendant might have simply denied the victim reentry by warning the victim not to proceed further and closing the door, the defendant's use of force exceeded that permissible under O.C.G.A. § 16-3-23 had there been no right of reentry. Young v. State, 291 Ga. App. 460, 662 S.E.2d 258 (2008).

There was sufficient evidence to support a defendant's conviction for involuntary manslaughter of the defendant's romantic friend given the evidence of the defendant's admission that the defendant

placed the friend in a headlock during a fight, and the medical examiner's findings that the friend was strangled to death. As a result, the jury was authorized to exclude all other reasonable hypotheses and conclude that the defendant unintentionally caused the friend's death while committing simple battery. Lemon v. State, 293 Ga. App. 488, 667 S.E.2d 654 (2008).

Evidence was sufficient to support a verdict of simple battery when the defendant grabbed the victim by the hair and dragged the victim by the hair. Eller v. State, 294 Ga. App. 77, 668 S.E.2d 755 (2008).

Evidence that showed that during an argument with the victim, the defendant dragged the victim off a couch by the victim's hair and threw a table at the victim, that the victim fled on foot and attempted to make a 9-1-1 call, that the defendant pursued the victim in the defendant's truck, reached the victim, and held a knife to the victim, retreating only after another vehicle drove up, was sufficient to convict the defendant of family violence simple battery. Stone v. State, 296 Ga. App. 305, 674 S.E.2d 31 (2009).

Testimony that the defendant hit the victim and pinned the victim to the floor was sufficient to convict the defendant of simple battery beyond a reasonable doubt. Burrowes v. State, 296 Ga. App. 629, 675 S.E.2d 518 (2009).

When two witnesses testified that the defendant fought with at least one rival gang member outside of a restaurant and another witness testified that the rival gang member had scratches and bruises on the rival's face as a result of the fight, the evidence was sufficient to allow the jury to find the defendant guilty of simple battery. Lopez v. State, 297 Ga. App. 618, 677 S.E.2d 776 (2009), overruled on other grounds, State v. Gardner, 286 Ga. 633, 690 S.E.2d 164 (2010).

Defendant's simple battery conviction under O.C.G.A. § 16-5-23 was supported by evidence that the defendant was in the room when the codefendant was striking the victim with a baseball bat. Wilkinson v. State, 298 Ga. App. 190, 679 S.E.2d 766 (2009).

Defendant's simple battery conviction was supported by evidence from the inves-

tigating officer that the victim told the officer that the defendant struck the victim in the face with a closed fist, although at trial, the victim testified that the victim had lied to police about being punched in the face because the victim was angry with the defendant. *Miller v. State*, 300 Ga. App. 652, 686 S.E.2d 302 (2009).

Evidence was sufficient to support defendant's conviction for simple battery because during an argument defendant grabbed the defendant's girlfriend by one arm, pulled her into the living room, threw her chest first against the back of a couch, handcuffed her hands behind her back, and did not release her from the handcuffs despite her requests to be released. *Turner v. State*, 307 Ga. App. 376, 705 S.E.2d 177 (2010).

Defendant's convictions for family violence battery and simple battery were supported by evidence from the victim that the defendant had slapped the victim and choked the victim, an officer's observation of red marks around the victim's neck, and evidence of the defendant's two prior guilty pleas to batteries against the defendant's spouse. Evidence of the victim's fear of retrieving the victim's children from the house and the defendant's threats to spread the victim's brains on the wall supported the simple assault conviction. *Cuzzort v. State*, 307 Ga. App. 52, 703 S.E.2d 713 (2010).

**Evidence insufficient for conviction.** — Evidence was not sufficient to support a conviction under O.C.G.A. § 16-5-23(f) as: (1) the state failed to prove the existence of a familial relationship between defendant and the victim; (2) the legislature failed to include sexual partners in the list of persons who constituted a family under the purview of § 16-5-23(f); and (3) defendant and the victim did not enjoy any other special familial relationship outlined under § 16-5-23. *Gillespie v. State*, 280 Ga. App. 243, 633 S.E.2d 632 (2006).

**Defendant not deprived of Sixth Amendment right to counsel.** — In a battery prosecution, setting aside the defendant's failure to object to a second attorney's representation at trial, a denial from the defendant's first attorney of an alleged promise to represent the defen-

dant after that counsel's suspension had expired gave the trial court sufficient grounds for finding that no such promise occurred, eliminating the defendant's denial of the right to counsel claim; moreover, inasmuch as the defendant failed to challenge the trial court's finding that the second attorney's representation was effective, the defendant was not entitled to a new trial. *Northington v. State*, 287 Ga. App. 96, 650 S.E.2d 760 (2007).

**Multiple charges resulting from single attack.** — Evidence that defendant hit defendant's love interest on the head, pushed the love interest around, grabbed the love interest by the hair, jerked the love interest to the ground, and stuck a knife to the love interest's throat supported the trial court's judgment finding defendant guilty of two counts of battery, and the trial court did not err by imposing separate sentences for each conviction or by ordering defendant to serve those sentences consecutively. *McFalls v. State*, 260 Ga. App. 578, 580 S.E.2d 328 (2003).

When the victim attempted to intervene to break up a fight between the defendant and another but the defendant aggressively hit the victim causing the victim to bleed above the eye, the evidence was sufficient to show lack of justification and to sustain the defendant's conviction for simple battery. *Cobble v. State*, 259 Ga. App. 236, 576 S.E.2d 623 (2003).

Evidence that showed that the defendant attacked the defendant's spouse and the spouse's parent and broke the windshield and at least one other window on the spouse's car was sufficient to sustain the defendant's convictions on two counts of simple battery and one count of criminal trespass, and the defendant was not subjected to cruel and unusual punishment because the trial court imposed a sentence of 12 months' incarceration for simple battery and 12 months' incarceration for criminal trespass, and ordered that the defendant serve the sentences consecutively. *Hill v. State*, 259 Ga. App. 363, 577 S.E.2d 61 (2003).

**Sentence.** — Defendant's sentence to three consecutive twelve month terms for three simple battery convictions, with eight months to serve in confinement and

**General Consideration (Cont'd)**

the rest on probation, did not constitute cruel and unusual punishment. *Dudley v. State*, 242 Ga. App. 53, 527 S.E.2d 912 (2000).

**Charge dismissed on basis of immunity.** — Trial court properly held that the defendant, who was charged with family violence battery and simple battery under O.C.G.A. §§ 16-5-23.1(f) and 16-5-23, was immune from prosecution under O.C.G.A. § 16-3-24.2. The testimony of the defendant's friend that the defendant restrained the friend after the friend broke the defendant's windshield and kicked a car seat, knocking the defendant into the steering wheel, provided some evidence that the defendant's actions were justified under O.C.G.A. § 16-3-21(a). *State v. Yapo*, 296 Ga. App. 158, 674 S.E.2d 44 (2009).

**Simple battery conviction merged into family violence battery conviction.** — Defendant's conviction for simple battery, O.C.G.A. § 16-5-23(a)(2), should have been merged into the defendant's conviction for family violence battery, O.C.G.A. § 16-5-23.1, because each battery was not a separate and complete criminal act but rather was part of a continuous criminal act, committed at the same time and place and inspired by the same criminal intent. *Clement v. State*, No. A11A0241, 2011 Ga. App. LEXIS 344 (Apr. 20, 2011).

**Cited in** *Barrett v. State*, 123 Ga. App. 210, 180 S.E.2d 271 (1971); *Newton v. State*, 127 Ga. App. 64, 192 S.E.2d 526 (1972); *Williams v. State*, 127 Ga. App. 386, 193 S.E.2d 633 (1972); *Smith v. State*, 127 Ga. App. 468, 193 S.E.2d 921 (1972); *Clark v. State*, 131 Ga. App. 68, 205 S.E.2d 71 (1974); *Mize v. State*, 131 Ga. App. 538, 206 S.E.2d 530 (1974); *Echols v. State*, 134 Ga. App. 216, 213 S.E.2d 907 (1975); *Taylor v. State*, 135 Ga. App. 916, 219 S.E.2d 629 (1975); *Harper v. State*, 135 Ga. App. 924, 219 S.E.2d 636 (1975); *Fountain v. York*, 237 Ga. 784, 229 S.E.2d 629 (1976); *Williams v. State*, 144 Ga. App. 72, 240 S.E.2d 591 (1977); *Hunter v. Clardy*, 558 F.2d 290 (5th Cir. 1977); *Barber v. State*, 146 Ga. App. 523, 246 S.E.2d 510 (1978); *Riner v. State*, 147 Ga. App. 707, 250

S.E.2d 161 (1978); *State v. Burroughs*, 149 Ga. App. 183, 254 S.E.2d 144 (1979); *State v. Burroughs*, 244 Ga. 288, 260 S.E.2d 5 (1979); *P.D. v. State*, 151 Ga. App. 662, 261 S.E.2d 413 (1979); *Jinks v. State*, 155 Ga. App. 925, 274 S.E.2d 46 (1980); *Radney v. State*, 156 Ga. App. 442, 274 S.E.2d 800 (1980); *Ables v. State*, 156 Ga. App. 678, 275 S.E.2d 750 (1980); *Hicks v. State*, 157 Ga. App. 79, 276 S.E.2d 129 (1981); *Duncan v. State*, 163 Ga. App. 148, 294 S.E.2d 365 (1982); *Watkins v. State*, 254 Ga. 267, 328 S.E.2d 537 (1985); *Cater v. State*, 176 Ga. App. 388, 336 S.E.2d 314 (1985); *McCravy v. State*, 176 Ga. App. 683, 337 S.E.2d 442 (1985); *Jackson v. State*, 177 Ga. App. 718, 341 S.E.2d 274 (1986); *Patterson v. State*, 181 Ga. App. 68, 351 S.E.2d 503 (1986); *McCord v. State*, 182 Ga. App. 586, 356 S.E.2d 689 (1987); *Johnson v. State*, 185 Ga. App. 167, 363 S.E.2d 773 (1987); *Smith v. State*, 186 Ga. App. 303, 367 S.E.2d 573 (1988); *Hudgins v. State*, 186 Ga. App. 883, 369 S.E.2d 54 (1988); *Howe v. State*, 202 Ga. App. 462, 414 S.E.2d 748 (1992); *Hussey v. State*, 206 Ga. App. 122, 424 S.E.2d 374 (1992); *Bryant v. State*, 226 Ga. App. 135, 486 S.E.2d 374 (1997); *Vaughn v. State*, 226 Ga. App. 318, 486 S.E.2d 607 (1997); *In re A.C.*, 226 Ga. App. 369, 486 S.E.2d 646 (1997); *Dunn v. State*, 234 Ga. App. 623, 507 S.E.2d 170 (1998); *Cook v. State*, 255 Ga. App. 578, 565 S.E.2d 896 (2002); *Maynor v. State*, 257 Ga. App. 151, 570 S.E.2d 428 (2002); *Strickland v. State*, 265 Ga. App. 533, 594 S.E.2d 711 (2004); *Lloyd v. State*, 280 Ga. 187, 625 S.E.2d 771 (2006); *Martin v. State*, 278 Ga. App. 465, 629 S.E.2d 134 (2006); *Glanton v. State*, 283 Ga. App. 232, 641 S.E.2d 234 (2007); *In the Interest of B.M.*, 289 Ga. App. 214, 656 S.E.2d 855 (2008); *Armstrong v. State*, 292 Ga. App. 145, 664 S.E.2d 242 (2008); *Whatley v. State*, 296 Ga. App. 72, 673 S.E.2d 510 (2009); *Greene v. State*, 295 Ga. App. 803, 673 S.E.2d 292 (2009).

**Jury Instructions**

**Charging the language of O.C.G.A. § 16-5-23(a)(1) and (a)(2)** clearly identified "physical contact" as an element of the crime and the court was not obligated to give defendant's requested charge that "physical contact is required to prove a

simple battery." *Brinkworth v. State*, 222 Ga. App. 288, 474 S.E.2d 9 (1996).

**Instructions not required on simple battery where not reasonably raised by evidence.** — When the offense of simple battery is not reasonably raised by the evidence, it is not in issue so as to require instructions. *Guthrie v. State*, 147 Ga. App. 351, 248 S.E.2d 714 (1978).

**Charging as a lesser included offense of cruelty to children.** — Trial court did not err in refusing to charge on simple battery under O.C.G.A. § 16-5-23 as a lesser included offense of cruelty to children; there was no evidence to support the offense of simple battery because the defendant claimed that the child accidentally fell while the defendant was playing with the child. *Moore v. State*, 283 Ga. 151, 656 S.E.2d 796 (2008).

**Charging lesser included offense of aggravated assault.** — Since the jury was authorized to decide defendant's fists and hands were not used as deadly weapons as required for aggravated assault, there was no error in charging on simple battery, which was a lesser included offense of aggravated assault. *Guevara v. State*, 151 Ga. App. 444, 260 S.E.2d 491 (1979).

Defendant failed to demonstrate that the defendant's trial counsel erred by failing to request a jury charge on simple battery as a lesser included offense of the charged crime of aggravated assault because there was no evidence that the defendant made physical contact with the victim or caused physical harm to the victim; since the state's evidence establishes all of the elements of an offense, and there is no evidence raising the lesser offense, there is no error in failing to give a charge on the lesser offense. *Davis v. State*, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

**Charging in rape case.** — In all cases where defendant is charged with rape, and where evidence under any view thereof would authorize conviction for lesser offense necessarily involved in graver charge, the jury should be instructed that defendant may be convicted of the lesser offense. Where all evidence shows either completed offense as charged, or no offense, such evidence will

not support a verdict for one of the lesser grades of the offense, and court should not charge on such lesser grades. *Hardy v. State*, 159 Ga. App. 854, 285 S.E.2d 547 (1981).

**Charging entire Code section.** — It is not reversible error to charge entire Code section to the jury even though a portion thereof was not specifically pertinent to the accusation. *Zager v. State*, 172 Ga. App. 207, 322 S.E.2d 530 (1984); *Jackson v. State*, 205 Ga. App. 452, 422 S.E.2d 304 (1992).

Defendant was indicted for simple battery only by causing the victim physical harm, but the court instructed the jury that it was "charging the definition of simple battery as it is contained in the Official Code of Georgia Annotated 16-5-23"; the instruction was not improper, as although the court recited the entire statutory definition of simple battery, it charged the jury that it should find the defendant guilty if it believed that the defendant had committed simple battery "as alleged in the indictment," the court instructed the jury that the defendant had been indicted for simple battery by "unlawfully and intentionally causing physical harm to the victim, by hitting the victim in the arms, back and face," and the indictment went out with the jury to aid it in deliberations. *Hammonds v. State*, 263 Ga. App. 5, 587 S.E.2d 161 (2003).

**Battery charge not proper given use of deadly weapon.** — Since the indictment alleged assault with a deadly weapon, and the evidence showed that an assault was committed with a knife, aggravated assault was proved beyond a reasonable doubt, and the evidence did not support a finding that the defendant committed a battery. Therefore, the trial court was not required to charge the jury on battery as a lesser included offense. *Scott v. State*, 208 Ga. App. 561, 430 S.E.2d 879 (1993).

**Whether striking person with weapon likely to kill is felony is jury question.** — Whether an assault and battery committed by striking one over the head with a weapon likely to produce death would amount to a felony, in that it was done with intent to kill even though death did not in fact result, would be a

**Jury Instructions (Cont'd)**

question for the jury. *Mullis v. State*, 196 Ga. 569, 27 S.E.2d 91 (1943).

**Assault and battery committed with automobile.** — Assault and battery may be committed by striking another with an automobile intentionally, or by driving the automobile recklessly as to justify a jury in finding that there was a reckless disregard of human life and safety. *Henry v. State*, 49 Ga. App. 80, 174 S.E. 183 (1934); *Maloney v. State*, 57 Ga. App. 265, 195 S.E. 209 (1938); *Martin v. State*, 98 Ga. App. 136, 105 S.E.2d 250 (1958); *Bailey v. State*, 101 Ga. App. 81, 113 S.E.2d 172 (1960).

It is assault and battery if, under like circumstances, an automobile is driven against another vehicle in which persons are riding, and the collision occasions physical injuries to persons in the vehicle so struck. *Henry v. State*, 49 Ga. App. 80, 174 S.E. 183 (1934); *Maloney v. State*, 57 Ga. App. 265, 195 S.E. 209 (1938); *Martin v. State*, 98 Ga. App. 136, 105 S.E.2d 250 (1958).

**Assault and battery on victim.** — When there was no indication that twisting the victim's hand and jerking the victim around were done for any lawful purpose, the jury was amply authorized to find that such acts were offensive and harmful, at least to the feelings and peace of mind of the victim, and that, as such, the actions constituted an assault and battery. *Brown v. State*, 57 Ga. App. 864, 197 S.E. 82 (1938).

**Charging jury as to lesser included offenses.** — When a graver charge, such as rape, necessarily includes an offense of lesser grade, such as assault and battery, particularly if the minor offense is expressly alleged in the indictment, it is the duty of the judge, without request, to instruct the jury as to the principles of law applicable to the minor offense, if, under any view of the evidence, independently of the defendant's statement, a finding that the defendant was guilty of the minor but not the major offense would be authorized. It is, however, not error to fail to instruct the jury as to the minor offense when all the evidence connecting the defendant with the transaction shows that the minor

offense was necessarily but an incidental part of the major offense perpetrated. *Whitley v. State*, 188 Ga. 177, 3 S.E.2d 588 (1939).

Trial court gave the jury the option to find the defendant guilty of the lesser included offense of misdemeanor battery or of felony aggravated battery as indicted, but since the jury rejected the misdemeanor battery offense and found the additional aggravating elements to warrant a felony conviction, the idea that the jury might have reached a different result had they also been charged on the even less culpable misdemeanor of simple battery is not reasonable. *Christensen v. State*, 245 Ga. App. 165, 537 S.E.2d 446 (2000).

It was unnecessary for the trial court to charge on the lesser offenses of battery and simple battery because the indictment charged defendant and others with malice murder by stabbing the victim to death, and there was no evidence whatsoever that defendant's beating of the victim was a separate act. *Lamb v. State*, 273 Ga. 729, 546 S.E.2d 465 (2001).

Sexual battery was not a lesser included offense of statutory rape as a matter of law, and because the indictment charging defendant with statutory rape was narrowly drawn and the evidence did not support instructions allowing the jury to find defendant guilty of sexual battery or simple battery, the trial court did not err when it denied defendant's request to instruct the jury that sexual battery and simple battery were lesser included offenses of statutory rape. *Neal v. State*, 264 Ga. App. 311, 590 S.E.2d 168 (2003).

When the defendant was charged with sexual battery under O.C.G.A. § 16-6-22.1, the trial court properly refused to instruct on simple battery under O.C.G.A. § 16-5-23(a) as a lesser included offense. The defendant claimed that the victim had placed his hand on the outside of her clothing over her vagina, and simple battery required intentional contact. *Engle v. State*, 290 Ga. App. 396, 659 S.E.2d 795 (2008).

**Jury questions regarding ejectment of persons from property.** — Upon the defendant's refusal to leave, the prosecutor had a right to eject defendant

from the prosecutor's property, but with force not disproportionate to that required to eject the defendant. Whether or not the prosecutor was using force in excess of that necessary, giving in turn the right to the defendant to defend self against an unwarranted assault as to defendant or defendant's property, but not to an extent within itself to constitute an assault and battery on the prosecutor, or whether the defendant was arbitrarily refusing to leave and was committing an unwarranted battery upon prosecutor, were all questions for the jury under the proper instructions of the court. *Slaughter v. State*, 64 Ga. App. 423, 13 S.E.2d 391 (1941).

**When reversible error for judge to fail to charge law regarding assault and battery.** — Under an indictment for assault with intent to rape, which so describes the manner of the commission of the offense as to contain allegations essential to constitute the lesser offense of assault and battery, where the evidence will consistently support a verdict for either offense, it is reversible error for the trial judge to fail to charge, without request, the law with reference to the offense of assault and battery. *Barton v. State*, 58 Ga. App. 554, 199 S.E. 357 (1938).

On the trial of one charged with the offense of assault with intent to rape, where the indictment is sufficiently broad to include therein the offense of assault and battery, and where the evidence is inconclusive as to whether the assault by the accused was with the intention to gain the woman's consent to sexual intercourse, or whether it was with the intention to overpower her and commit rape, it is error for the court to fail to submit to the jury the law of assault and battery. *Reeves v. State*, 78 Ga. App. 126, 50 S.E.2d 640 (1948).

When on an indictment for assault with intent to murder, it is alleged that the defendant beat the prosecutrix, and when on the trial of the case the evidence does not demand a finding that there is an intent to kill, but a verdict for the lesser offense of assault and battery would be warranted, it is error, even in the absence of request, to fail to charge the lesser offense of assault and battery. *Jackson v.*

*State*, 99 Ga. App. 740, 109 S.E.2d 886 (1959).

**Failure to charge law of assault and battery not error.** — If a graver charge, such as rape, necessarily includes an offense of lesser grade, such as assault and battery, particularly if the minor offense is expressly alleged in the indictment, it is the duty of the judge, without request, to instruct the jury as to the principles of law applicable to the minor offense, if under any view of the evidence, independently of the defendant's statement, a finding that the defendant was guilty of the minor but not the major offense would be authorized. It is, however, not error to fail to instruct the jury as to the minor offense, when all the evidence connecting the defendant with the transaction shows that the minor offense was necessarily but an incidental part of the major offense perpetrated. In this case, if the defendant was guilty of an assault and battery as charged in the indictment, the defendant was also necessarily guilty of the major offense of rape, as charged, by being a principal in the second degree present and aiding and abetting by the defendant's assault the perpetration of the major offense by the codefendant; thus, there was no error in failing to close on assault and battery. *Whitley v. State*, 188 Ga. 177, 3 S.E.2d 588 (1939).

When the accused was convicted of assaulting a female, under the age of 14 years, with the intent to rape her, and in the defendant's statement to the jury the defendant denied committing any assault, or any assault and battery, upon the female, while the evidence of the female, if true, proved the felonious assault as alleged in the indictment, omission of the court to charge the jury on the law of assault, or assault and battery, was not error. *Finney v. State*, 51 Ga. App. 545, 181 S.E. 144 (1935).

**When jury should be given discretion to convict of lower offense.** — To constitute the offense of assault with intent to murder, there must be a specific intent to kill. This intent is not necessarily or conclusively shown by the use of a weapon likely to produce death, in a manner likely to produce death. Under the proof in this case, the jury should have

**Jury Instructions (Cont'd)**

been given the discretion to convict of a lower offense included in the higher felony charged, if they believed the evidence did not show a specific intent to kill. *Jackson v. State*, 99 Ga. App. 740, 109 S.E.2d 886 (1959).

**Error in instruction waived.** — Error was deemed waived because the defendant's silence, after the trial court ruled that it would not instruct the jury on simple battery under O.C.G.A. § 16-5-23(b) as a lesser included offense of battery under O.C.G.A. § 16-5-23.1(c), essentially amounted to acquiescence and induced the error. *McPetrie v. State*, 263 Ga. App. 85, 587 S.E.2d 233 (2003).

**Charging entire section when not supported by indictment.** — When defendant was specifically charged with violation of O.C.G.A. § 16-5-23(a)(2), prohibiting the intentional causing of physical harm to another, it was reversible error for the trial court to instruct the jury that the jury could convict the defendant of simple battery even if it only found that defendant violated O.C.G.A. § 16-5-23(a)(1), prohibiting intentional physical contact aimed at insulting or provoking another. *Dinnan v. State*, 173 Ga. App. 191, 325 S.E.2d 851 (1984).

Charging the entire section when the indictment alleged only that defendant intentionally caused physical harm was reversible error where no remedial instructions were given to limit the jury's consideration to the acts alleged. *Owens v.*

*State*, 173 Ga. App. 309, 326 S.E.2d 509 (1985).

When defendant was charged with a violation of O.C.G.A. § 16-5-23(a)(2), an instruction which permitted the jury to convict defendant if the jury found that defendant either caused the victim physical harm or made an offensive contact with the victim was reversible error. *Lyman v. State*, 188 Ga. App. 790, 374 S.E.2d 563 (1988).

**Justification defense.** — In a prosecution for simple battery, failure to charge the jury that the state had the burden to prove the absence of the elements of defendant's justification defense was not harmless error. *Austin v. State*, 218 Ga. App. 90, 460 S.E.2d 310 (1995).

In a prosecution for simple battery, as the defendant denied grabbing or striking the victim, the evidence did not support the defendant's requested justification charge. *Burrowes v. State*, 296 Ga. App. 629, 675 S.E.2d 518 (2009).

**Charge on right to resist unlawful arrest.** — On appeal from convictions entered against the defendant for misdemeanor battery on a police officer, and misdemeanor obstruction of that officer entered against the defendant's mother, a charge that one could resist an unlawful arrest with reasonably necessary force was not required in either case as such was covered by the charge on the elements of the offense; moreover, as to the battery charge, because the defendant testified to never touching the officer, there was no requirement to charge on this affirmative defense. *Curtis v. State*, 285 Ga. App. 298, 645 S.E.2d 705 (2007).

## OPINIONS OF THE ATTORNEY GENERAL

**Authority of Georgia Crime Information Center to maintain records.** — Georgia Crime Information Center is authorized to maintain records of reported crime and, in some instances, to record information identifying persons charged with the commission of crime; however,

the center is not authorized to maintain records identifying persons charged with disorderly conduct except when the charge is directly connected with or directly related to certain statutory offenses, including simple battery. 1976 Op. Att'y Gen. No. 76-33.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Assault and Battery, § 1 et seq.

**C.J.S.** — 6A C.J.S., Assault and Battery, §§ 84, 85.

**ALR.** — Civil liability growing out of mutual combat, 47 ALR 1092.

Mayhem as dependent on part of body injured and extent of injury, 58 ALR 1320.

Mayhem by use of poison or acid, 58 ALR 1328.

Civil liability of one instigating or inciting an assault or assault and battery notwithstanding primary or active participant therein has been absolved of liability, 72 ALR2d 1229.

Liability of physician or hospital in the performance of cosmetic surgery upon the face, 54 ALR3d 1255.

Consent as defense to charge of criminal assault and battery, 58 ALR3d 662.

What constitutes offense of "sexual battery," 87 ALR3d 1250.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient, 99 ALR3d 854.

### 16-5-23.1. Battery.

(a) A person commits the offense of battery when he or she intentionally causes substantial physical harm or visible bodily harm to another.

(b) As used in this Code section, the term "visible bodily harm" means bodily harm capable of being perceived by a person other than the victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, or substantial bruises to body parts.

(c) Except as provided in subsections (d) through (l) of this Code section, a person who commits the offense of battery is guilty of a misdemeanor.

(d) Upon the second conviction for battery against the same victim, the defendant shall be punished by imprisonment for not less than ten days nor more than 12 months, by a fine not to exceed \$1,000.00, or both. The minimum sentence of ten days for a second offense shall not be suspended, probated, deferred, stayed, or withheld; provided, however, that it is within the authority and discretion of the sentencing judge to:

(1) Allow the sentence to be served on weekends by weekend confinement or during the nonworking hours of the defendant. A weekend shall commence and shall end in the discretion of the sentencing judge, and the nonworking hours of the defendant shall be determined in the discretion of the sentencing judge; or

(2) Suspend, probate, defer, stay, or withhold the minimum sentence where there exists clear and convincing evidence that imposition of the minimum sentence would either create an undue hardship upon the defendant or result in a failure of justice.

(e) Upon a third or subsequent conviction for battery against the same victim, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years. The minimum sentence provisions contained in subsection (d) of

this Code section shall apply to sentences imposed pursuant to this subsection.

(f) If the offense of battery is committed between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living or formerly living in the same household, then such offense shall constitute the offense of family violence battery and shall be punished as follows:

(1) Upon a first conviction of family violence battery, the defendant shall be guilty of and punished for a misdemeanor; and

(2) Upon a second or subsequent conviction of family violence battery against the same or another victim, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years. In no event shall this subsection be applicable to reasonable corporal punishment administered by parent to child.

(g) Any person who commits the offense of battery in a public transit vehicle or station shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature. For purposes of this Code section, "public transit vehicle" has the same meaning as in subsection (c) of Code Section 16-5-20.

(h) Any person who commits the offense of battery against a female who is pregnant at the time of the offense shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature.

(i) Any person who commits the offense of battery against a teacher or other school personnel engaged in the performance of official duties or while on school property shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years or a fine of not more than \$10,000.00, or both. For purposes of this Code section, "school property" shall include public school buses and public school bus stops as designated by local school boards of education.

(j) Except as otherwise provided in subsection (e) and paragraph (2) of subsection (f) of this Code section, any person who commits the offense of battery against a person who is 65 years of age or older shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature.

(k) A person who is an employee, agent, or volunteer at any facility licensed or required to be licensed under Code Section 31-7-3, relating to long-term care facilities, or Code Section 31-7-12.2, relating to assisted living communities, or Code Section 31-7-12, relating to personal care homes, or who is required to be licensed pursuant to Code Section 31-7-151 or 31-7-173, relating to home health care and hospices,

who commits the offense of battery against a person who is admitted to or receiving services from such facility, person, or entity shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years, or a fine of not more than \$2,000.00, or both.

(l) Any person who commits the offense of battery against a sports official while such sports official is officiating an amateur contest or while such sports official is on or exiting the property where he or she will officiate or has completed officiating an amateur contest shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature. For purposes of this Code section, the term "sports official" means any person who officiates, umpires, or referees an amateur contest at the collegiate, elementary or secondary school, or recreational level. (Code 1981, § 16-5-23.1, enacted by Ga. L. 1987, p. 1010, § 1; Ga. L. 1991, p. 971, §§ 7, 8; Ga. L. 1996, p. 449, § 1; Ga. L. 1997, p. 907, § 2; Ga. L. 1997, p. 1064, § 9; Ga. L. 1998, p. 128, § 16; Ga. L. 1999, p. 562, § 4; Ga. L. 2000, p. 16, § 1; Ga. L. 2004, p. 621, § 3; Ga. L. 2011, p. 227, § 4/SB 178.)

**The 2011 amendment**, effective July 1, 2011, inserted "or Code Section 31-7-12.2, relating to assisted living communities," in the middle of subsection (k).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1987, a comma was inserted following "stay" in paragraph (d)(2).

Pursuant to Code Section 28-9-5, in 1997, subsection (h), which was added by Ga. L. 1997, p. 1064, was redesignated as subsection (i).

**Editor's notes.** — Ga. L. 1997, p. 1064, § 12, not codified by the General Assembly, provides that the provisions of that Act "shall not affect or abate the status of a crime or delinquent act or of any such act or omission which occurred prior to the effective date of this Act, nor shall the prosecution of such crime or delinquent act be abated as a result of the provisions of this Act."

Ga. L. 1997, p. 1064, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Juvenile Justice Act of 1997.'"

Ga. L. 1999, p. 562, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crimes Against Elderly Act of 1999'."

Ga. L. 2000, p. 16, § 2, not codified by the General Assembly, provides that the 2000 amendment to this Code section is applicable to offenses committed on or after July 1, 2000.

Ga. L. 2004, p. 621, § 9(b), not codified by the General Assembly, provides that the amendment by that Act shall apply to offenses committed on or after July 1, 2004.

**Law reviews.** — For article commenting on the 1997 amendment of this Code section, see 14 Georgia St. U.L. Rev. 69 (1997). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. (2001).

For note on 2000 amendment of O.C.G.A. § 16-5-23.1, see 17 Georgia St. U.L. Rev. 89 (2000).

## JUDICIAL DECISIONS

**Statute not an ex post facto law.** — Even though a statute, passed after a conviction, uses the conviction as an element of a future offense, this is not an ex

post facto law, because the defendant's punishment for the earlier conviction is not increased, since the statute punishes only for a future offense, and that punish-

ment is rationally enhanced by the prior conviction. *State v. Dean*, 235 Ga. App. 847, 510 S.E.2d 605 (1998).

**Enhanced penalty for battery of family members.** — Passage of this 1996 Code section, O.C.G.A. § 16-5-23.1, did not create a new offense but rather a separate category of an existing offense, enhancing the penalty for the already prohibited act of battery when such involved family members. *State v. Dean*, 235 Ga. App. 847, 510 S.E.2d 605 (1998).

In increasing to a felony the punishment of repeat convictions for battery against family members, the legislature recognized that repetition itself increased the severity and reprehensibility of the act. *State v. Dean*, 235 Ga. App. 847, 510 S.E.2d 605 (1998).

**Living in same household.** — Evidence was sufficient to support defendant's two separate convictions for family violence battery, one for striking and kicking a woman with whom defendant was living in the same apartment and one for striking the woman on a different occasion, as it showed defendant committed a battery upon a person living in the same household that defendant was living in. *Alvarado v. State*, 257 Ga. App. 746, 572 S.E.2d 18 (2002).

**Battery as lesser included offense of cruelty to children.** — When the evidence was sufficient to establish that the defendant repeatedly struck the defendant's nine-year-old child on the back, buttocks, and legs with defendant's hand, leaving several visible, handprint-shaped bruises, battery was a lesser included offense of cruelty to children. *Bennett v. State*, 244 Ga. App. 149, 534 S.E.2d 881 (2000).

Trial court did not err by refusing to give an instruction on battery since, based on the evidence, defendant was either guilty of cruelty to children or no crime. *Allen v. State*, 247 Ga. App. 10, 543 S.E.2d 45 (2000).

**Battery merged into kidnapping with bodily injury count.** — Battery count against a defendant required merger with a kidnapping with bodily injury count since the only allegation of bodily injury in connection with the kidnapping count was the evidence that the

defendant held the victim against the victim's will resulting in bruising to the victim's head; since that same evidence was the only evidence used to show a bodily injury described in the kidnapping charge, the battery charge required merger with the kidnapping with bodily injury count. *Jones v. State*, 285 Ga. App. 114, 645 S.E.2d 602 (2007).

**Whether simple battery is lesser included offense of aggravated assault.**

— After defendant was indicted for aggravated assault upon the person of another "with a bottle, an object which when used offensively against a person is likely to or actually does result in serious bodily injury," simple battery was a lesser included offense of aggravated assault, and the jury was properly instructed as to the lesser included offense. *Haun v. State*, 189 Ga. App. 884, 377 S.E.2d 878, cert. denied, 189 Ga. App. 912, 377 S.E.2d 878 (1989).

Although the element of physical or bodily harm is a requisite for battery, where the physical or bodily harm is committed with a deadly weapon, such as a knife, simple battery is not a lesser included offense. *Scott v. State*, 208 Ga. App. 561, 430 S.E.2d 879 (1993).

Aggravated assault under O.C.G.A. § 16-5-21 with fists only and family violence battery under O.C.G.A. § 16-5-23.1(f) with fists and a bottle upon the defendant's then live-in love interest were not required to be merged under O.C.G.A. § 16-1-7(a) because there were two separate incidents separated by the love interest's visit to a store and because the aggravated assault did not require the use of a bottle. *Collins v. State*, 277 Ga. App. 381, 626 S.E.2d 513 (2006).

**Simple battery could be a lesser included offense of battery,** when the defendant is charged with intentionally causing visible bodily harm and the state does not prove that the harm was visible. *Ross v. State*, 214 Ga. App. 385, 448 S.E.2d 52 (1994).

**Convictions for aggravated battery and family violence battery, arising out of the same conduct, violated double jeopardy.** — Convictions under both O.C.G.A. § 16-5-24(a) and (h) (aggravated battery, family violence) and O.C.G.A. § 16-5-23.1(a), (b), and (f) (fam-

ily violence battery, substantial physical and visible bodily harm), which were not based on actions at different times or places or different injuries, violated a defendant's double jeopardy rights under O.C.G.A. § 16-1-7. *Pierce v. State*, 301 Ga. App. 167, 687 S.E.2d 185 (2009), cert. denied, No. S10C0549, 2010 Ga. LEXIS 244 (Ga. 2010).

**Attitude of victim not an element of offense.** — It is the act, intent and results of the defendant's act which constitute the crimes as charged; the attitude of the victim is not called into issue by these elements. *Ramey v. State*, 203 Ga. App. 650, 417 S.E.2d 699 (1992).

**Substantial bodily harm.** — Whether or not a victim of intentional injury by another heals from the injury is not the test of whether the victim suffered substantial bodily harm. *Richards v. State*, 222 Ga. App. 853, 476 S.E.2d 598 (1996).

**Defense of property not sole defense.** — Trial court did not err in failing sua sponte to instruct the jury on the defense of property defense as the defendant's sole defense as the defendant claimed that the defendant did not cause the victim's injuries, defense counsel attempted to establish that the victim's recollection of the events was impaired by the victim's fading in and out of consciousness and by the victim's consumption of alcohol, and the jury was adequately instructed on witness credibility, the burden of proof, reasonable doubt, and the presumption of innocence. *Strickland v. State*, 267 Ga. App. 610, 600 S.E.2d 693 (2004).

County's practice of strip searching all detainees placed in the general jail population was unlawful, but as the plaintiff was charged with family violence battery, O.C.G.A. § 16-5-23.1, a dispatcher had reasonable suspicion for a strip search; the dispatcher and the dispatcher's superiors were thus entitled to qualified immunity in the plaintiff's 42 U.S.C. § 1983 action alleging violation of the plaintiff's U.S. Const., amend. 4 rights. *Hicks v. Moore*, 422 F.3d 1246 (11th Cir. 2005).

**Charge dismissed on basis of immunity.** — Trial court properly held that the defendant, who was charged with family violence battery and simple battery under

O.C.G.A. §§ 16-5-23.1(f) and 16-5-23, was immune from prosecution under O.C.G.A. § 16-3-24.2. The testimony of the defendant's friend that the defendant restrained the friend after the friend broke the defendant's windshield and kicked a car seat, knocking the defendant into the steering wheel, provided some evidence that the defendant's actions were justified under O.C.G.A. § 16-3-21(a). *State v. Apo*, 296 Ga. App. 158, 674 S.E.2d 44 (2009).

**Indictment sufficient.** — Three counts of an indictment charging defendant with "family violence battery (felony)" in violation of O.C.G.A. §§ 16-5-21(f), 16-5-23(f), and 16-5-23.1(f)(2), respectively, were sufficient as the indictment informed defendant of the charges and protected against double jeopardy; mere surplusage did not vitiate an otherwise sufficient indictment, and since the indictment did not reference the sentencing for the offense charged, it did not inject the issue of punishment and was not subject to demurrer. *State v. Barnett*, 268 Ga. App. 900, 602 S.E.2d 899 (2004).

Discrepancy between an averment in the indictment that the defendant "intentionally caused visible bodily harm to (the victim)" and the jury charge that "a person commit(ed) the offense of battery when (the defendant) intentionally cause(d) substantial physical harm or visible bodily harm to another" had nothing to do with the manner in which the crime was committed and did not present the jury with an alternative basis for finding the defendant guilty of family violence battery not charged in the indictment since the evidence presented at trial supported two alternative theories: (1) that the defendant committed no offense at all, or (2) that the defendant committed family violence battery as alleged in the indictment; this was not a case where there was evidence that the crime itself was committed by two different, alternative methods, only one of which was charged in the indictment. *Buice v. State*, 281 Ga. App. 595, 636 S.E.2d 676 (2006), cert. denied, 2007 Ga. LEXIS 93 (Ga. 2007).

**Indictment for misdemeanor battery sufficient to withstand demur-**

**rer.** — Trial court correctly denied defendant's motion to quash a count alleging misdemeanor battery because the allegations of the count were not too vague, uncertain, or unclear, as contended by defendant where they met the language of the statute and were sufficiently technical and correct; further, the specific bodily harm did not have to be alleged. *State v. Tate*, 262 Ga. App. 311, 585 S.E.2d 224 (2003).

**Trial court did not commit reversible error** in failing to charge the jury on simple battery, where defendant denied committing sodomy. *Thompson v. State*, 203 Ga. App. 339, 416 S.E.2d 755, cert. denied, 203 Ga. App. 908, 416 S.E.2d 755 (1992).

**Family violence battery.** — Victim of defendant's battery was the defendant's parent, and there was testimony as to the victim's statements that the defendant beat the victim and photographs of the victim's wounds; this was sufficient evidence to convict defendant of family violence battery in violation of O.C.G.A. § 16-5-23.1(f). *Meeks v. State*, 281 Ga. App. 334, 636 S.E.2d 77 (2006).

Defendant's convictions for family violence battery and simple battery were supported by evidence from the victim that the defendant had slapped the victim and choked the victim, an officer's observation of red marks around the victim's neck, and evidence of the defendant's two prior guilty pleas to batteries against the defendant's spouse. Evidence of the victim's fear of retrieving the victim's children from the house and the defendant's threats to spread the victim's brains on the wall supported the simple assault conviction. *Cuzzort v. State*, 307 Ga. App. 52, 703 S.E.2d 713 (2010).

**Error in admitting similar transaction evidence required reversal.** — While state presented sufficient evidence of the victim's age to support assault charge under O.C.G.A. § 16-5-21(a)(1), because the trial court clearly erred in admitting evidence of two burglaries defendant committed in 1998 as similar transactions to help prove the issue of identity, defendant's aggravated assault, burglary, robbery, theft, and battery convictions were reversed. *Usher v. State*, 290 Ga. App. 710, 659 S.E.2d 920 (2008).

**Similar transaction evidence properly admitted.** — In a prosecution on two counts of second-degree cruelty to children and family violence battery, the trial court properly admitted similar transaction evidence against the defendant for the limited purpose of showing the defendant's course of conduct and bent of mind, as identity was not an issue and the similar transaction and the charged offense were the same, except for the fact that the offenses were committed against different family members. *Breazeale v. State*, 290 Ga. App. 632, 660 S.E.2d 376 (2008).

**Evidence authorized finding of serious disfigurement to support aggravated battery conviction.** — There was sufficient evidence of disfigurement to support a defendant's conviction for aggravated battery with regard to the abuse inflicted upon the defendant's two year old child based on the numerous visible injuries inflicted on the child, and a CT scan that showed a skull fracture, which required a long period of hospitalization. *Yearwood v. State*, 297 Ga. App. 633, 678 S.E.2d 114 (2009).

**Battery of police officer not justified.** — Officer's second-tier Terry frisk of the defendant did not constitute an illegal detention considering all of the circumstances including the defendant's repeated refusal to keep the defendant's hands away from the pockets of the defendant's baggy clothes at the officer's request, the defendant's nervous demeanor, the presence of two companions, and the officer's knowledge of violent crime in the area. Therefore, the defendant was not justified in elbowing the officer and resisting arrest. *Santos v. State*, 306 Ga. App. 772, 703 S.E.2d 140 (2010).

**Evidence was sufficient** to enable the jury to find defendant guilty of the offense of battery, where an investigating officer observed red scuff marks on the victim's head, arms, and legs, and the scuff marks turned into substantial bruises — as evidenced by photographs of the victim taken ten days after the victim was beaten and kicked. *Danzis v. State*, 198 Ga. App. 136, 400 S.E.2d 671 (1990), cert. denied, 198 Ga. App. 897, 400 S.E.2d 671 (1991).

Evidence was sufficient to enable a ra-

tional trier of fact to find appellant guilty of battery beyond a reasonable doubt, although the appellant and the victim's testimony was contradictory, in part because the appellant was nine inches taller and 70 pounds heavier than the victim. *Hussey v. State*, 206 Ga. App. 122, 424 S.E.2d 374 (1992).

Convictions of cruelty to children and battery were supported by evidence that defendant caused eight-year-old son to suffer severe burns by forcing the son to sit in a bathtub filled with hot water and caustic chemicals. *Mitchell v. State*, 233 Ga. App. 92, 503 S.E.2d 293 (1998).

Conviction of defendant for family violence battery was authorized by the testimony of eye-witnesses who refuted testimony of the victim that the victim provoked defendant's violence and that defendant did not strike the victim. *Holland v. State*, 239 Ga. App. 436, 521 S.E.2d 255 (1999).

Defendant's admission to striking son in the face and photographic evidence revealing visible bodily harm were sufficient to support defendant's conviction for family violence battery. *Bowers v. State*, 241 Ga. App. 122, 526 S.E.2d 163 (1999).

Defendant's admission that during an argument defendant hit the victim in the face with defendant's fist, coupled with proof that the victim's face and eye were swollen and bruised was sufficient to authorize the jury's verdict that defendant was guilty of battery by intentionally causing visible bodily harm. *Etheridge v. State*, 249 Ga. App. 111, 547 S.E.2d 744 (2001).

Evidence that defendant beat the victim, who had a child with defendant, so badly that the victim had to go to the hospital was sufficient to sustain defendant's conviction for family violence battery as such evidence consisted of eyewitness testimony and statements of the victim, later murdered by defendant, that were admissible under the necessity exception to the hearsay rule. *Hayes v. State*, 275 Ga. 173, 562 S.E.2d 498 (2002).

After the defendant threw a set of keys at a parent, which hit the parent in the face and shoulder, spat in the parent's face, violently grabbed and pulled out the parent's hair, which left the parent's head

bloody, the evidence was sufficient to show lack of justification and to sustain the defendant's conviction for family battery. *Cobble v. State*, 259 Ga. App. 236, 576 S.E.2d 623 (2003).

There was ample evidence that the defendant committed battery against the victim, the defendant's spouse by intentionally causing substantial physical harm; the victim had scrapes and bruises on the neck consistent with being choked, and the defendant had thrown the victim against a wall. *Johnson v. State*, 260 Ga. App. 413, 579 S.E.2d 809 (2003).

When the evidence revealed that defendant and others returned to a parking lot with the specific intent of ambushing a group of people who had earlier told defendant not to speed and had thrown a beer bottle at defendant's car, and when defendant was found to be an accomplice of one who possessed a gun and fatally shot someone, there was sufficient evidence pursuant to the "party to a crime" law under O.C.G.A. § 16-2-20 to convict defendant of felony murder in violation of O.C.G.A. § 16-5-1 and simple battery in violation of O.C.G.A. § 16-5-23.1. *Smith v. State*, 277 Ga. 95, 586 S.E.2d 629 (2003).

When an accomplice testified that the accomplice drove defendant to the robberies, and the victims testified that the victims were robbed at gunpoint and hit with a gun or that the robbers banged one victim's head on the dashboard of that victim's vehicle and was then locked in the truck of the victim's vehicle, and defendant admitted that defendant was one of the persons videotaped while using the victims' automatic teller cards shortly after the robberies and was wearing sunglasses in the videotape, and even though the victims could not identify defendant, both victims recalled that one of the robbers had something metallic on the robber's face, identified by one victim as glasses, the accomplice testimony was sufficiently corroborated, and the evidence was sufficient to support the verdict of guilty of kidnapping, battery, and two counts of armed robbery. *Ross v. State*, 264 Ga. App. 830, 592 S.E.2d 479 (2003).

Conviction for family violence battery was supported by sufficient evidence where, during an argument with a love

interest, the defendant shoved the love interest into kitchen cabinets and then head-butted the love interest in the face, causing the love interest to drop to the floor with a nose bleed, facial, knee, and arm bruises, a lip cut, and loosened teeth; the battery was seen by the love interest's child, and although the defendant claimed that the defendant collided with the love interest's nose only in an effort to avoid the love interest's blows, the jury was authorized to disregard the claims of accident and self-defense in light of the evidence, including the defendant's demeanor after the incident, and the defendant's flight. *Kuykendoll v. State*, 278 Ga. App. 369, 629 S.E.2d 32 (2006).

Evidence was sufficient to support a conviction of family violence battery, O.C.G.A. § 16-5-23.1, where the victim's sibling saw defendant strike the victim, the defendant admitted striking the victim, and the trial court found the victim's reddened face to have been harm capable of being perceived by a person, a police officer, other than the victim. *Gilbert v. State*, 278 Ga. App. 765, 629 S.E.2d 587 (2006).

Defendant's convictions for robbery, battery, false imprisonment, and obstruction of an emergency telephone call were all upheld on appeal, as no error flowed from: (1) the trial court's admission of an audio recording of the attack on the victim and order granting the state two hearings regarding the admissibility of said recording; (2) the trial court's failure to give a curative instruction after the prosecutor injected a personal experience with domestic violence into the closing argument; (3) the trial court's failure to strike the testimony of similar transaction witnesses and issue a curative instruction; and (4) the trial court's order restricting the counsel's closing argument. *Ellis v. State*, 279 Ga. App. 902, 633 S.E.2d 64 (2006).

Evidence supported a defendant's conviction for family violence battery as: (1) although the victim recanted the earlier allegations and denied that the victim had been living with the defendant, an officer testified as to the victim's statements that the defendant had pushed, hit, kicked, and spat on the victim, and that in an

effort to force the defendant away, the victim struck the defendant in the head with a chair; (2) the officer testified that, at the scene, the victim had visible injuries and was distraught; (3) the officer testified that the defendant told the officer that the defendant lived with the victim; and (4) the state presented evidence of two previous incidents in which the defendant had physically injured the victim. *Buice v. State*, 281 Ga. App. 595, 636 S.E.2d 676 (2006), cert. denied, 2007 Ga. LEXIS 93 (Ga. 2007).

Defendant's family violence battery conviction was affirmed on appeal as testimony from the victim, standing alone, describing the defendant's attack, when coupled with testimony regarding two prior incidents, sufficiently supported the convictions; moreover, the jury was authorized to: (1) rely upon the victim's prior statement to the responding officer as substantive evidence supporting the conviction; and (2) consider the prior difficulties evidence presented by the state, which most certainly demonstrated the status of the relationship between the defendant and the victim, and was highly relevant to show the defendant's abusive bent of mind towards the victim. *Simmons v. State*, 285 Ga. App. 129, 645 S.E.2d 622 (2007).

Legally sufficient evidence existed to support the defendant's conviction for battery under O.C.G.A. § 16-5-23.1 because the victim suffered a bruised lip and the victim's wrists were red when the victim was found; photographic evidence of the injuries was presented by the state. *Austin v. State*, 286 Ga. App. 149, 648 S.E.2d 414 (2007), cert. denied, 2007 Ga. LEXIS 687 (Ga. 2007).

Evidence was sufficient to support battery conviction for intentionally causing defendant's spouse visible bodily harm after defendant admitted that defendant had punched the defendant's spouse in the face, the spouse and one of the parties' children testified that defendant struck the spouse in the face, another child saw the spouse covered with blood, an officer testified about the spouse's injuries and photographs of which were admitted into evidence, and a doctor testified to performing surgery on the spouse's nose.

*Holmes v. State*, 291 Ga. App. 196, 661 S.E.2d 603 (2008).

Sufficient evidence supported defendant's convictions on one count of simple assault and two counts of battery, which arose from a fight with a romantic friend, as it was within the jury's province to consider defendant's self-defense theory and reject that defense; the jury heard witnesses and observed testimony and was more capable of determining the reasonableness of the hypothesis produced by the evidence or the lack of evidence than the appellate court. *Thompson v. State*, 291 Ga. App. 355, 662 S.E.2d 135 (2008).

Evidence was sufficient to support the defendant's conviction of misdemeanor battery when the victim testified that on the day after the victim told the defendant that the victim no longer wanted to be in a relationship with the defendant, the defendant punched the victim in the eye, after which they fought, and when the victim identified photographs depicting the victim's injuries. Although the defendant claimed that the victim started the altercation, the jury was authorized to believe the victim instead of the defendant. *Watkins v. State*, 291 Ga. App. 343, 662 S.E.2d 544 (2008).

Evidence authorized a battery conviction after the victim testified that the defendant hit the victim and dragged the victim through the victim's house, leaving various marks on the victim's body, including bruises on the victim's arms and neck; furthermore, the state presented photographs of the bruises and other marks suffered by the victim. *Mack v. State*, 294 Ga. App. 518, 669 S.E.2d 487 (2008).

In a prosecution for battery, eyewitness testimony that the defendant struck the victim in the face and photographs of the victim's injuries provided sufficient evidence to overcome a motion for a directed verdict. Therefore, defense counsel was not ineffective for failing to make such a motion. *Crawford v. State*, 294 Ga. App. 711, 670 S.E.2d 185 (2008).

Testimony of the victim that the victim was beaten and kicked by a former romantic companion and another person, and that the defendant later joined these two in battering the victim, and the compan-

ion's testimony corroborating the defendant's role in the attack, was sufficient to convict the defendant of battery in violation of O.C.G.A. § 16-5-23.1. *Frasier v. State*, 295 Ga. App. 596, 672 S.E.2d 668 (2009).

Evidence that the defendant smashed the victim's head into the trunk of a car, and choked and kicked the victim was sufficient to convict the defendant of battery in violation of O.C.G.A. § 16-5-23.1(a). *Bradley v. State*, 298 Ga. App. 384, 680 S.E.2d 489 (2009).

Evidence plainly was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of aggravated assault with a deadly weapon in violation of O.C.G.A. § 16-5-21(a)(2) and battery in violation of O.C.G.A. § 16-5-23.1(a) because the state presented more than ample evidence that the defendant's use of force was not justified under O.C.G.A. § 16-3-21(a); based upon the victim's testimony and the victim's prior statement to the responding officer, the jury clearly was authorized to find that the defendant's acts of grabbing the victim by the hair, throwing the victim to the ground, and choking the victim to the point of unconsciousness constituted excessive force, and the prior and subsequent difficulties evidence and the similar transaction evidence the state presented supported the jury's decision to give little credence to the defendant's self-defense claim. *Whitley v. State*, 307 Ga. App. 553, 707 S.E.2d 375 (2011).

**Juvenile delinquency based on school bus assault.** — In a juvenile proceeding wherein a juvenile was adjudicated delinquent as a result of an assault of a schoolmate on a school bus, sufficient evidence existed to support the juvenile's delinquency adjudication because the conflicting evidence, which the trial court as the trier of fact chose to resolve against the juvenile, established that the juvenile hit the schoolmate several times as a result of an insult made, causing the victim to have a nose bleed, a bruise over the eye, and a raised bruise on the forehead. *In the Interest of E.J.*, 283 Ga. App. 648, 642 S.E.2d 179 (2007).

**Evidence was insufficient** to convict defendant of the offense of family violence

battery when the evidence showed only that some beer was splashed on the defendant's wife's clothes. *Cox v. State*, 243 Ga. App. 582, 532 S.E.2d 697 (2000).

**Municipal court lacks jurisdiction.** — Since the municipal court lacked jurisdiction to try defendant pursuant to a Uniform Traffic Citation charging defendant with "simple battery" in violation of O.C.G.A. § 16-5-23, prosecution of the offense before such court was void; accordingly, trial of defendant for simple battery in the state court was not barred on the ground of double jeopardy or prior prosecution. *Rangel v. State*, 217 Ga. App. 152, 456 S.E.2d 739 (1995).

**Denial of motion for directed verdict of acquittal was proper.** — Where defendant was tried on two counts of battery in violation of O.C.G.A. § 16-5-23.1(a) in relation to an altercation in a movie theater, the trial court properly denied defendant's motion for a directed verdict of acquittal, which was based on defendant's claim of justification under O.C.G.A. § 16-3-21(a), even though defendant presented the testimony of two witnesses who said that defendant only struck the victim after the victim grabbed defendant's throat, as the victim denied choking defendant and defendant had earlier entered into a written restitution agreement with the victim in which defendant had admitted that defendant approached and struck the seated victim, inflicting a forehead laceration; the conflicting testimony on the justification defense presented credibility issues for the jury to resolve and there was ample evidence from which a rational trier of fact could have found defendant guilty beyond a reasonable doubt. *Tahantan v. State*, 260 Ga. App. 861, 581 S.E.2d 373 (2003).

**Error waived.** — Error was deemed waived as defendant's silence, after the trial court ruled that it would not instruct the jury on simple battery under O.C.G.A. § 16-5-23(b) as a lesser included offense of battery under O.C.G.A. § 16-5-23.1(c), essentially amounted to acquiescence and induced the error. *McPetrie v. State*, 263 Ga. App. 85, 587 S.E.2d 233 (2003).

**Additional jury charge not error.** — After the jury requested written copies of the definitions of certain offenses in defen-

dant's criminal trial, and the trial court recharged the jury on those offenses, and the court sua sponte charged the jury on the issue of voluntary intoxication, such was not error because defendant had not requested the opportunity to reargue to the jury and hence, the trial court did not absolutely deny that right. *Cochran v. State*, 276 Ga. App. 840, 625 S.E.2d 92 (2005).

**Charging jury as to lesser included offenses.** — Trial court gave the jury the option to find defendant guilty of the lesser included offense of misdemeanor battery or of felony aggravated battery as indicted, but since the jury rejected the misdemeanor battery offense and found the additional aggravating elements to warrant felony conviction, the idea that the jury might have reached a different result had the jury also been charged on the even less culpable misdemeanor of simple battery is not reasonable. *Christensen v. State*, 245 Ga. App. 165, 537 S.E.2d 446 (2000).

It was unnecessary for the trial court to charge on the lesser offenses of battery and simple battery because the indictment charged defendant and others with malice murder by stabbing the victim to death, and there was no evidence whatsoever that defendant's beating of the victim was a separate act. *Lamb v. State*, 273 Ga. 729, 546 S.E.2d 465 (2001).

Trial court did not err in failing to give an instruction on the lesser-included offense of simple battery because the defendant failed to request such an instruction. *Griggs v. State*, 303 Ga. App. 442, 693 S.E.2d 615 (2010).

Although the trial court should have given the defendant's requested charge on battery, O.C.G.A. § 16-5-23.1, since the evidence authorized a finding that the defendant intentionally caused substantial physical harm and visible bodily harm to the victims by beating the victims with a bat and a belt, the failure to give the battery charge was harmless error in light of the overwhelming evidence of the commission of the greater offense, cruelty to children, O.C.G.A. § 16-5-70; the indictment alleged that the defendant unlawfully and maliciously caused the victims cruel and excessive physical and mental

pain by striking the victims about the body with a belt and wooden bat. Dinkler v. State, 305 Ga. App. 444, 699 S.E.2d 541 (2010).

**Jury charge on living in same household.** — There was not reversible error as a jury charge that “if the offense of battery (was) committed between persons living or formerly living in the same household then that offense constitute(d) the offense of family violence battery” did not permit the state to prove that the crime was committed in a wholly different manner than that specifically alleged in the indictment, which alleged that the defendant “did live in the same household as the victim,” since “did” was a phraseology that did not distinguish between whether a defendant currently or formerly lived with the victim at the time of the battery and could reasonably be construed as encompassing both factual scenarios; the indictment was sufficient to put the defendant on notice that the defendant could be convicted for family violence battery if the defendant lived with the victim at some point in time. Buice v. State, 281 Ga. App. 595, 636 S.E.2d 676 (2006), cert. denied, 2007 Ga. LEXIS 93 (Ga. 2007).

**Prior transaction jury instruction.** — Trial court properly admitted evidence of defendant’s prior domestic offenses in defendant’s trial for simple battery and battery of defendant’s children as the prior offenses were sufficiently similar to the crimes charged in that they all involved family members and grabbing the necks of or hitting the faces of defendant’s children or former spouse; the prior transaction jury instruction was not erroneous merely because course of conduct was not one of the purposes set forth by the trial court when it decided to admit the evidence, as defendant’s course of conduct in repeatedly abusing members of defendant’s family was a legitimate purpose for the similar transaction evidence. Morrell v. State, 262 Ga. App. 288, 585 S.E.2d 204 (2003).

**Justification charge properly refused.** — Trial court properly refused to charge the jury on justification as either: (1) as a police officer testified, the victim stated that the defendant had pushed, hit, kicked, and spat on the victim and that

the victim had reacted by hitting the defendant in the head with a chair, which did not support a justification defense since the evidence presented the defendant as the aggressor, or (2) as the victim testified, the victim hit the defendant in the head with a chair during the course of their argument, and the defendant never pushed, hit, or kicked the victim in response, which did not support a justification defense since there was no evidence that the defendant tried to defend the defendant or otherwise acted in any manner to protect the defendant’s person. Buice v. State, 281 Ga. App. 595, 636 S.E.2d 676 (2006), cert. denied, 2007 Ga. LEXIS 93 (Ga. 2007).

With regard to defendant’s conviction for aggravated battery of a taxi driver, defendant was not entitled to a jury instruction on the lesser included offense of battery based on defendant’s argument that the jury could have found under the facts of the case that the gun was not used as a deadly weapon as the evidence showed without conflict that defendant’s physical assault upon the taxi driver with the handgun caused the taxi driver to bleed from the head and the entire right side of the face, and the taxi driver testified that, during the attack, the taxi driver was very afraid of being killed. Thus, the pistol in the case, if used in the manner testified to by the taxi driver, was per se a deadly weapon, and the offense was either aggravated assault or no offense at all. Ortiz v. State, 292 Ga. App. 378, 665 S.E.2d 333 (2008), cert. denied, No. S08C1851, 2008 Ga. LEXIS 928 (Ga. 2008).

**Enhanced sentence for second offense.** — Defendant could not challenge a sentence for family violence battery on appeal, claiming that the sentence was erroneously enhanced from a misdemeanor to a felony under O.C.G.A. § 16-5-23.1(f)(2) based on a previous conviction arising from a guilty plea to the same offense that was based on a defective indictment, because since the defendant failed to challenge the indictment at the time the defendant pled guilty, the proper remedy was a motion in arrest of judgment under O.C.G.A. § 17-9-61(b) or habeas corpus. Grogan v. State, 297 Ga. App. 251, 676 S.E.2d 764 (2009).

**Trial court did not err in failing to charge the jury that malice was an essential element of either second-degree cruelty to children or family violence battery,** as malice, prior to a 2004 amendment, was not an element of cruelty to children, and was not an element to the offense of family violence battery. *Breazeale v. State*, 290 Ga. App. 632, 660 S.E.2d 376 (2008).

**Omitting statutory definition of “visible bodily harm” from instruction error.** — By omitting the statutory definition of “visible bodily harm” contained in O.C.G.A. § 16-5-23.1(b), the trial court failed to give the jury the proper framework for evaluating whether a laceration to the victim’s nose was severe enough to merit a finding of aggravated battery under O.C.G.A. § 16-5-24 or whether only a finding of battery was merited. Thus, the charge was fatally insufficient. *Carroll v. State*, 293 Ga. App. 721, 667 S.E.2d 708 (2008).

**Verdict not inconsistent.** — Verdicts were not necessarily inconsistent where the defendant was acquitted of family violence battery but convicted of third-degree cruelty to children because: (1) the appellate court could not know, and should not speculate, why a jury acquitted a defendant on a predicate offense, but convicted on the compound offense; (2) the jury was authorized to believe an officer’s testimony about a red mark under the victim’s right eye that was caused by an altercation between the victim and the defendant which occurred in the presence of the victim’s children; and (3) the victim’s prior inconsistent statement was admissible as substantive evidence of the defendant’s guilt. *Amis v. State*, 277 Ga. App. 223, 626 S.E.2d 192 (2006).

In a shaken baby death, an involuntary manslaughter verdict was not mutually exclusive of a guilty verdict for felony murder/cruelty to children because, consistent with the jury’s guilty verdict on the felony murder charge, an offense requiring criminal intent, the jury predicated the jury’s involuntary manslaughter verdict on a misdemeanor involving criminal intent, battery, or simple battery under O.C.G.A. §§ 16-5-23(a) and 16-5-23.1(a),

although the jury was also instructed on reckless conduct, a misdemeanor committed by criminal negligence, O.C.G.A. § 16-5-60(b). *Drake v. State*, 288 Ga. 131, 702 S.E.2d 161 (2010).

**Withdrawal of guilty pleas properly denied.** — Because: (1) the facts of the case as narrated by the prosecutor presented a sufficient factual basis for the defendant’s pleas to both aggravated assault and two battery counts; (2) the trial court informed the defendant of the consequences of the guilty pleas, waiver of certain constitutional and statutory rights, and the minimum and maximum possible sentences for the crimes charged; and (3) the defendant admitted guilt and to entering the guilty plea freely and voluntarily, the trial court did not abuse its discretion in denying withdrawal of said pleas. *Foster v. State*, 281 Ga. App. 584, 636 S.E.2d 759 (2006).

**Cited in** *Givens v. State*, 199 Ga. App. 845, 406 S.E.2d 272 (1991); *United States v. Myers*, 972 F.2d 1566 (11th Cir. 1992); *Ogletree v. State*, 211 Ga. App. 845, 440 S.E.2d 732 (1994); *Allen v. State*, 213 Ga. App. 290, 444 S.E.2d 385 (1994); *McCracken v. State*, 224 Ga. App. 356, 480 S.E.2d 361 (1997); *Vaughn v. State*, 226 Ga. App. 318, 486 S.E.2d 607 (1997); *Meja v. State*, 232 Ga. App. 548, 502 S.E.2d 484 (1998); *Dunn v. State*, 234 Ga. App. 623, 507 S.E.2d 170 (1998); *Seritt v. State*, 237 Ga. App. 665, 516 S.E.2d 366 (1999); *Cook v. State*, 255 Ga. App. 578, 565 S.E.2d 896 (2002); *Grant v. State*, 257 Ga. App. 678, 572 S.E.2d 38 (2002); *Spinner v. State*, 263 Ga. App. 802, 589 S.E.2d 344 (2003); *Martin v. State*, 278 Ga. App. 465, 629 S.E.2d 134 (2006); *Glanton v. State*, 283 Ga. App. 232, 641 S.E.2d 234 (2007); *Northington v. State*, 287 Ga. App. 96, 650 S.E.2d 760 (2007); *Griffin v. State*, 291 Ga. App. 618, 662 S.E.2d 171 (2008); *Armstrong v. State*, 292 Ga. App. 145, 664 S.E.2d 242 (2008); *Mazza v. State*, 292 Ga. App. 168, 664 S.E.2d 548 (2008); *Moran v. State*, 293 Ga. App. 279, 666 S.E.2d 726 (2008); *Hight v. State*, 293 Ga. App. 254, 666 S.E.2d 678 (2008); *Gonzales v. State*, 298 Ga. App. 821, 681 S.E.2d 248 (2009); *In the Interest of D.M., No. A10A2353*, 2011 Ga. App. LEXIS 239 (Mar. 21, 2011).

**OPINIONS OF THE ATTORNEY GENERAL**

**Fingerprintable offense.** — Violation of O.C.G.A. § 16-5-23.1 is an offense for which those charged with a violation are to be fingerprinted. 1987 Op. Att'y Gen. No. 87-21.

**16-5-24. Aggravated battery.**

(a) A person commits the offense of aggravated battery when he or she maliciously causes bodily harm to another by depriving him or her of a member of his or her body, by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member thereof.

(b) Except as provided in subsections (c) through (h) of this Code section, a person convicted of the offense of aggravated battery shall be punished by imprisonment for not less than one nor more than 20 years.

(c) A person who knowingly commits the offense of aggravated battery upon a peace officer while the officer is engaged in, or on account of the performance of, his or her official duties shall, upon conviction thereof, be punished by imprisonment for not less than ten nor more than 20 years.

(d) Any person who commits the offense of aggravated battery against a person who is 65 years of age or older shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years.

(e)(1) As used in this subsection, the term "correctional officer" shall include superintendents, wardens, deputy wardens, guards, and correctional officers of state, county, and municipal penal institutions who are certified by the Georgia Peace Officer Standards and Training Council pursuant to Chapter 8 of Title 35 and employees of the Department of Juvenile Justice who are known to be employees of the department or who have given reasonable identification of their employment. The term "correctional officer" shall also include county jail officers who are certified or registered by the Georgia Peace Officer Standards and Training Council pursuant to Chapter 8 of Title 35.

(2) A person who knowingly commits the offense of aggravated battery upon a correctional officer while the correctional officer is engaged in, or on account of the performance of, his or her official duties shall, upon conviction thereof, be punished by imprisonment for not less than ten nor more than 20 years.

(f) Any person who commits the offense of aggravated battery in a public transit vehicle or station shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20

years. For purposes of this Code section, "public transit vehicle" has the same meaning as in subsection (c) of Code Section 16-5-20.

(g) Any person who commits the offense of aggravated battery upon a student or teacher or other school personnel within a school safety zone as defined in paragraph (1) of subsection (a) of Code Section 16-11-127.1 shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years.

(h) If the offense of aggravated battery is committed between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons excluding siblings living or formerly living in the same household, the defendant shall be punished by imprisonment for not less than three nor more than 20 years. (Laws 1833, Cobb's 1851 Digest, pp. 786, 787; Code 1863, § 4238; Code 1868, § 4273; Code 1873, § 4339; Code 1882, § 4339; Penal Code 1895, § 83; Penal Code 1910, § 83; Code 1933, § 26-1201; Code 1933, § 26-1305, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 543, § 2; Ga. L. 1982, p. 3, § 16; Ga. L. 1984, p. 900, § 2; Ga. L. 1985, p. 628, § 2; Ga. L. 1991, p. 971, §§ 9, 10; Ga. L. 1994, p. 1012, § 9; Ga. L. 1996, p. 988, § 2; Ga. L. 1997, p. 1453, § 1; Ga. L. 1999, p. 381, § 5; Ga. L. 2000, p. 1626, § 2; Ga. L. 2003, p. 140, § 16.)

**Cross references.** — Indemnification program for law enforcement officers, firefighters, and prison guards killed or injured on duty, § 45-9-80 et seq.

**Editor's notes.** — Ga. L. 1994, p. 1012, § 1, not codified by the General Assembly, provides that the Act shall be known and may be cited as the "School Safety and Juvenile Justice Reform Act of 1994."

Ga. L. 1994, p. 1012, § 2, not codified by the General Assembly, sets forth legislative findings and determinations for the "School Safety and Juvenile Justice Reform Act of 1994."

Ga. L. 1994, p. 1012, § 29, not codified by the General Assembly, provides for severability.

Ga. L. 1999, p. 381, § 1, not codified by

the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crimes Against Family Members Act of 1999'."

Ga. L. 1999, p. 381, § 7, not codified by the General Assembly, provides that: "Nothing herein shall be construed to validate a relationship between people of the same sex as a 'marriage' under the laws of this State."

**Law reviews.** — For article surveying developments in Georgia constitutional law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 51 (1981).

For review of 1996 children and youth services legislation, see 13 Georgia St. U.L. Rev. 314 (1996).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION  
APPLICATION  
JURY INSTRUCTIONS

### General Consideration

**Former offense of mayhem is replaced by aggravated battery** under former Code 1933, § 26-1305. *Wells v. State*, 125 Ga. App. 579, 188 S.E.2d 407 (1972) (see O.C.G.A. § 16-5-24).

Inasmuch as putting out an eye indisputably constituted an offense of mayhem, it follows that an established offense of mayhem likewise constitutes an aggravated battery, the present offense standing in place of mayhem. *Watts v. State*, 141 Ga. App. 127, 232 S.E.2d 590, cert. denied, 434 U.S. 925, 98 S. Ct. 405, 54 L. Ed. 2d 283 (1977), overruled on other grounds, *Graham v. State*, 153 Ga. App. 658, 266 S.E.2d 316 (1980).

**Aggravated battery is a felony.** *Ruff v. State*, 150 Ga. App. 238, 257 S.E.2d 203 (1979).

**Causation.** — Defendant's assertion that the victim had fallen against a grill after being hit did not demonstrate that defendant's admitted initial contact with the victim had not "caused" a subsequent cut to the victim's eye and the resulting loss of the victim's eyesight. If by maliciously striking the victim, defendant set in motion a force which ultimately resulted in the victim's loss of eyesight, it was not determinative that defendant's hand was not a more immediate factor in that result. *McKissic v. State*, 201 Ga. App. 525, 411 S.E.2d 516, cert. denied, 201 Ga. App. 904, 411 S.E.2d 516 (1991).

**Knowledge that victim peace officer or other official.** — The O.C.G.A. § 17-10-30(b)(8) statutory aggravating circumstance does not require knowledge on the part of the defendant that the victim was a peace officer or other designated official engaged in the performance of official duties. *Fair v. State*, 284 Ga. 165, 664 S.E.2d 227 (2008).

**Victim who dies instantaneously from first blow** cannot be subjected to aggravated battery. *Patrick v. State*, 247 Ga. 168, 274 S.E.2d 570 (1981), cert. denied, 459 U.S. 1089, 103 S. Ct. 575, 74 L. Ed. 2d 936 (1982).

Evidence did not show beyond a reasonable doubt that the victim suffered an aggravated battery before death when, according to the medical examiner's testimony, the victim sustained three blows to

the scalp area of the head, any one of which would have been fatal, three other blows to the head would have rendered the victim unconscious and it was impossible to determine the sequence of the blows. Thus, the victim may have been dead or only unconscious after the first blow. *Patrick v. State*, 247 Ga. 168, 274 S.E.2d 570 (1981), cert. denied, 459 U.S. 1089, 103 S. Ct. 575, 74 L. Ed. 2d 936 (1982).

**It is not incumbent upon the state to prove that defendant intended to maim.** *White v. State*, 210 Ga. App. 563, 436 S.E.2d 584 (1993).

**Indictment laid in exact terms of former Code 1933, § 26-1305 was sufficient.** See *Miller v. State*, 155 Ga. App. 54, 270 S.E.2d 466 (1980) (see O.C.G.A. § 16-5-24).

Use of the word "struggle" in an indictment charging aggravated battery merely adjusted the charge to the specific facts of the case, did not leave open the possibility that defendant acted in self-defense, and did not make the indictment deficient. *Stokes v. State*, 258 Ga. App. 840, 575 S.E.2d 651 (2002).

**Indictment not required to allege party status.** — Indictment's failure to allege that a defendant was a party to aggravated assault, aggravated battery, and first-degree child cruelty under O.C.G.A. §§ 16-5-21(a), 16-5-24(a), and 16-5-70(b) did not require a showing that the defendant was the principal perpetrator under O.C.G.A. § 16-2-21; the defendant's status as a party to the crimes was not an essential element used to increase the sentences for the crimes, and the trial court did not err in instructing the jury that the defendant could be convicted either as the principal perpetrator of the crimes or as a party thereto. *Hill v. State*, 282 Ga. App. 743, 639 S.E.2d 637 (2006).

**No fatal variance between indictment and proof.** — Fact that an indictment charged the defendant with aggravated assault and battery by slicing the victim's neck with a knife, but the evidence showed the defendant used a box cutter, did not constitute a fatal variance between the indictment and the proof, because the defendant was sufficiently informed of the charges and faced no danger

**General Consideration (Cont'd)**

of further prosecution arising out of the incident. *Lawson v. State*, 278 Ga. App. 852, 630 S.E.2d 131 (2006).

**Aggravated battery conviction merged into the malice murder conviction** where the medical examiner's testimony established that the same act caused the aggravated battery and the victim's death; thus, the same evidence was used to prove both crimes. *Fulton v. State*, 278 Ga. 58, 597 S.E.2d 396 (2004).

**Offenses of aggravated battery and armed robbery merged** as a matter of fact, where the aggravated battery indictment was drawn to charge the same serious bodily harm inflicted by a knife in the course of an armed robbery, and thus the same facts necessary to prove the aggravated battery charge were used up on proving the armed robbery charge. *Whitner v. State*, 198 Ga. App. 300, 401 S.E.2d 318 (1991).

**Aggravated battery did not merge with offense of attempted armed robbery.** *Miller v. State*, 155 Ga. App. 54, 270 S.E.2d 466 (1980).

**Aggravated battery and robbery offenses did not merge.** — Trial court did not err in refusing to merge a defendant's robbery and aggravated battery offenses. The robbery offense required that the defendant, with intent to commit theft, took the property of the victim from the victim by use of force, O.C.G.A. § 16-8-40(a)(1), and the aggravated battery charge required proof that the defendant maliciously caused bodily harm to the victim by seriously disfiguring the victim's body or a member thereof, O.C.G.A. § 16-5-24(a). Taking property of the victim was not a fact required to establish aggravated battery, and causing serious disfigurement was not a fact required to establish robbery. *Blanch v. State*, 306 Ga. App. 631, 703 S.E.2d 48 (2010).

**Merger with reckless conduct.** — Defendant's reckless conduct conviction merged as a matter of fact into the aggravated battery conviction as the state conceded at the beginning of sentencing, and the trial court erred in failing to so find. *Collins v. State*, 283 Ga. App. 188, 641 S.E.2d 208 (2007).

**No merger of nonhomicide counts.** — Defendant's convictions of involuntary manslaughter while in the commission of a simple battery, aggravated assault, aggravated battery, cruelty to children, and reckless conduct were not mutually exclusive, and the trial court did not err in not merging the nonhomicide counts upon sentencing. *Waits v. State*, 282 Ga. 1, 644 S.E.2d 127 (2007).

**Aggravated assault merged into aggravated battery.** — Because the indictment alleged only one act, the shooting of the victim, and because the evidence showed only that defendant's actions were the result of a single act of firing a series of shots in quick succession at the victim, the convictions for aggravated assault merged into the aggravated battery. *Brown v. State*, 246 Ga. App. 60, 539 S.E.2d 545 (2000).

Trial court erred in failing to merge a defendant's offenses of aggravated battery under O.C.G.A. § 16-5-24(a) and aggravated assault under O.C.G.A. § 16-5-21(a), for sentencing purposes, because the assault was a lesser included offense of the battery offense under O.C.G.A. § 16-1-6(1), given the defendant's single attack on the victim with a golf club. *Allen v. State*, 302 Ga. App. 190, 690 S.E.2d 492 (2010).

**Aggravated assault did not merge with aggravated battery.** — Defendant's convictions of aggravated assault and aggravated battery against the same victim did not merge for sentencing purposes, as the two offenses were proven with different facts: the assault occurred when defendant threatened the victim with a gun, and the battery occurred when defendant later shot the victim in the arm. *Pennymon v. State*, 261 Ga. App. 450, 582 S.E.2d 582 (2003).

Trial court did not err in failing to merge an aggravated assault count into a kidnapping with bodily injury count, the aggravated assault count into an aggravated battery count, and the aggravated battery count into the kidnapping count, as each count referred to a separate cut of the victims with a decorative sword that defendant pulled off the wall during a domestic dispute with defendant's spouse and child. *Brown v. State*, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

Because a conviction on a charge of aggravated assault could be based on the defendant's act of cutting of the victim's throat, while a conviction on a charge of aggravated battery could be based on the serious disfigurement of the victim's arms, a conviction could be entered on each count. Hence, merger did not apply. *Goss v. State*, 289 Ga. App. 734, 658 S.E.2d 168 (2008).

Defendant's aggravated assault and aggravated battery convictions under O.C.G.A. §§ 16-5-21(a) and 16-5-24(a) did not merge under O.C.G.A. § 16-1-7(a), although both stemmed from the same act. The aggravated assault charge required proof that the defendant attempted to commit a violent injury with the intent to murder using a deadly weapon, while the aggravated battery charge required proof that the defendant maliciously caused bodily harm to the victim by rendering a member of the victim's body useless; thus, the offenses were distinct, with each requiring proof of a fact which the other did not. *Robbins v. State*, 293 Ga. App. 584, 667 S.E.2d 684 (2008).

Trial court did not err in refusing to merge the defendant's convictions for aggravated assault and aggravated battery, O.C.G.A. §§ 16-5-21 and 16-5-24, because the offenses were established by proving different facts; the defendant was found guilty of aggravated assault because there was evidence that the defendant assaulted the victim with a screwdriver, and the defendant was found guilty of aggravated battery because the victim's left lung was nonfunctional for a period of time due to the stab wound. *Works v. State*, 301 Ga. App. 108, 686 S.E.2d 863 (2009), cert. denied, No. S10C0458, 2010 Ga. LEXIS 251 (Ga. 2010).

**No merger of aggravated battery, aggravated assault, and kidnapping.** — Trial court did not err under O.C.G.A. § 16-1-7 in failing to merge convictions for aggravated assault and aggravated battery with a conviction for kidnapping with bodily injury as each crime required proof of at least one different element, and the state presented independent evidence to prove each individual crime as set out in the indictment. Evidence that the defendant pointed a gun at the victim and fired

the gun at the floor near the victim, that the defendant used a wooden stick resembling a baseball bat to repeatedly hit the victim, and that the defendant hit and kicked the victim while the victim was tied up supported the three aggravated assault counts; aggravated battery was established by evidence that the defendant broke the victim's nose, wrist, and shoulder and knocked out two teeth and by evidence that the defendant burned the victim's hand and caused the victim to be bitten by fire ants; and kidnapping with bodily injury was proven by evidence of injuries to the victim due to being bound by rope. *Rouse v. State*, 295 Ga. App. 61, 670 S.E.2d 869 (2008).

**Convictions for aggravated battery and cruelty to children did not merge** since the evidence established that the victim was subjected to multiple injuries in addition to a broken arm, and that none of the injuries were relevant to defendant's aggravated battery conviction, which was predicated upon the victim's broken arm. *Mashburn v. State*, 244 Ga. App. 524, 536 S.E.2d 208 (2000).

Trial court did not err by refusing to give an instruction on battery since the state presented evidence that defendant maliciously struck the victim in the abdomen and caused severe and permanent damage to her liver and spleen, and defendant could not point to any evidence that would suggest the offense of battery. *Allen v. State*, 247 Ga. App. 10, 543 S.E.2d 45 (2000).

Aggravated battery and cruelty to children each requires proof of at least one additional element which the other does not, and the two crimes are not so closely related that multiple convictions are prohibited under O.C.G.A. §§ 16-1-6 and 16-1-7; accordingly, even if the same conduct establishes the commission of both aggravated battery and cruelty to children, the two crimes do not merge, and thus a defendant was properly convicted of both crimes (overruling *Jones v. State*, 276 Ga. App. 762 (624 SE2d 291) (2005); *Etchinson v. State*, 245 Ga. App. 449 (538 SE2d 87) (2000); and *Harmon v. State*, 208 Ga. App. 271 (430 SE2d 399) (1993)). *Waits v. State*, 282 Ga. 1, 644 S.E.2d 127 (2007).

**General Consideration (Cont'd)**

**Aggravated battery did not merge with kidnapping with bodily injury** because the battery was concluded when defendant delivered the initial blow to the victim's head before moving the victim to another place. *Deal v. State*, 233 Ga. App. 79, 503 S.E.2d 288 (1998).

Trial court did not err in failing to merge aggravated battery and kidnapping with bodily injury counts; the kidnapping with bodily injury count included an injury, a broken leg, that was not included in the aggravated battery count, and the evidence that authorized the defendant's conviction of aggravated battery was separate and distinct from the evidence that authorized the conviction of kidnapping with bodily injury. *Davis v. State*, 281 Ga. 871, 644 S.E.2d 113 (2007).

Because there was independent evidence to support each of the offenses as indicted, a defendant's aggravated assault conviction did not merge as a matter of fact with either the aggravated battery or kidnapping with bodily injury convictions. *Pitts v. State*, 287 Ga. App. 540, 652 S.E.2d 181 (2007).

**Aggravated battery, family violence, merged with family violence battery if charges not based on different acts or injuries** — Convictions under both O.C.G.A. § 16-5-24(a) and (h) (aggravated battery, family violence) and O.C.G.A. § 16-5-23.1(a), (b), and (f) (family violence battery, substantial physical and visible bodily harm), which were not based on actions at different times or places or different injuries, violated a defendant's double jeopardy rights under O.C.G.A. § 16-1-7. *Pierce v. State*, 301 Ga. App. 167, 687 S.E.2d 185 (2009), cert. denied, No. S10C0549, 2010 Ga. LEXIS 244 (Ga. 2010).

**Criminal attempt to commit aggravated battery.** — Attempted destruction of another's eyesight constitutes a criminal attempt to commit an aggravated battery. *Greene v. State*, 155 Ga. App. 222, 270 S.E.2d 386 (1980).

**Mitigating factors.** — Focus of O.C.G.A. § 16-5-24(a) is upon whether the defendant has maliciously caused the victim to suffer an enumerated physical

injury, and the means employed so as maliciously to cause such an injury is not a mitigating factor. *McKissic v. State*, 201 Ga. App. 525, 411 S.E.2d 516, cert. denied, 201 Ga. App. 904, 411 S.E.2d 516 (1991).

**Cited in** *Teal v. State*, 122 Ga. App. 532, 177 S.E.2d 840 (1970); *Lowe v. State*, 133 Ga. App. 420, 210 S.E.2d 869 (1974); *Jackson v. State*, 234 Ga. 549, 216 S.E.2d 834 (1975); *Braxton v. State*, 240 Ga. 10, 239 S.E.2d 339 (1977); *Tuggle v. State*, 145 Ga. App. 603, 244 S.E.2d 131 (1978); *Webster v. State*, 147 Ga. App. 322, 248 S.E.2d 697 (1978); *Jarrard v. State*, 152 Ga. App. 553, 263 S.E.2d 444 (1979); *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980); *Dean v. State*, 245 Ga. 503, 265 S.E.2d 805 (1980); *Baker v. State*, 245 Ga. 657, 266 S.E.2d 477 (1980); *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316 (1980); *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980); *Rollins v. State*, 154 Ga. App. 585, 269 S.E.2d 81 (1980); *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650 (1981); *Cunningham v. State*, 248 Ga. 558, 284 S.E.2d 390 (1981); *Collins v. State*, 164 Ga. App. 482, 297 S.E.2d 503 (1982); *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983); *Ewing v. State*, 169 Ga. App. 680, 314 S.E.2d 695 (1984); *Morgan v. Zant*, 582 F. Supp. 1026 (S.D. Ga. 1984); *Howard v. State*, 173 Ga. App. 585, 327 S.E.2d 554 (1985); *Davis v. State*, 255 Ga. 588, 340 S.E.2d 862 (1986); *Parrish v. State*, 182 Ga. App. 247, 355 S.E.2d 682 (1987); *Cohn v. State*, 186 Ga. App. 816, 368 S.E.2d 572 (1988); *Williams v. State*, 187 Ga. App. 355, 370 S.E.2d 210 (1988); *Terry v. State*, 188 Ga. App. 748, 374 S.E.2d 235 (1988); *Harris v. State*, 188 Ga. App. 795, 374 S.E.2d 565 (1988); *Nichols v. State*, 198 Ga. App. 323, 401 S.E.2d 338 (1991); *Lynd v. State*, 262 Ga. 58, 414 S.E.2d 5 (1992); *Grace v. State*, 262 Ga. 746, 425 S.E.2d 865 (1993); *Mullen v. Nezhat*, 223 Ga. App. 278, 477 S.E.2d 417 (1996); *Grant v. State*, 239 Ga. App. 608, 521 S.E.2d 654 (1999); *Shepherd v. State*, 245 Ga. App. 386, 537 S.E.2d 777 (2000); *Henderson v. State*, 252 Ga. App. 295, 556 S.E.2d 204 (2001); *D.W. Adcock, M.D., P.C. v. Adcock*, 257 Ga. App. 700, 572 S.E.2d 45 (2002); *Grant v. State*, 257 Ga. App. 678, 572 S.E.2d 38 (2002); *Miller v. Martin*, No. 1:04-cv-1120-WSD-JFK, 2007 U.S. Dist.

LEXIS 61192 (N.D. Ga. Aug. 20, 2007); *Glover v. State*, 292 Ga. App. 22, 663 S.E.2d 772 (2008); *Armstrong v. State*, 292 Ga. App. 145, 664 S.E.2d 242 (2008); *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008); *Hayes v. State*, 298 Ga. App. 338, 680 S.E.2d 182 (2009); *Hargrove v. State*, 299 Ga. App. 27, 681 S.E.2d 707 (2009).

### **Application**

**It is not necessary that the victim suffer the total loss of a member** in order to be the victim of an aggravated battery. *Taylor v. State*, 178 Ga. App. 817, 344 S.E.2d 748 (1986).

**Finger** is a bodily part that accordingly qualifies as a “member” under O.C.G.A. § 16-5-24. *Ganas v. State*, 245 Ga. App. 645, 537 S.E.2d 758 (2000).

Evidence was sufficient to sustain conviction of aggravated battery on defendant’s former wife when the testimony was that defendant’s former wife’s index finger had been rendered useless as the result of defendant’s beating. *Ahmadi v. State*, 251 Ga. App. 1895, 554 S.E.2d 215 (2001).

**Loss of tooth.** — Defendant deprived his ex-girlfriend of a member of her body or rendered such member of her body useless, when he repeatedly struck her in the face, dislodging a large portion of one of her teeth; thus, defendant’s aggravated battery conviction was upheld. *Rivers v. State*, 255 Ga. App. 422, 565 S.E.2d 596 (2002).

**Nose is a bodily member.** — A nose, which is a part of the body and was considered a bodily member under the law of mayhem, also qualifies as a bodily member for the purpose of O.C.G.A. § 16-5-24(a). *Jones v. State*, 283 Ga. App. 631, 642 S.E.2d 331 (2007).

**Ear rendered useless.** — When an ear is capable of hearing no more than a slight beep, the ear has been rendered useless for purposes of former Code 1933, § 26-1305. *Jackson v. State*, 153 Ga. App. 584, 266 S.E.2d 273 (1980) (see O.C.G.A. § 16-5-24).

Because the evidence was sufficient for a trier of fact to find beyond a reasonable doubt that defendant’s attack on the victim rendered the victim’s ear useless, the

trial court did not err in denying defendant’s motion for directed verdict of acquittal as to an aggravated battery charge under O.C.G.A. § 16-5-24(a). *Biggins v. State*, 299 Ga. App. 554, 683 S.E.2d 96 (2009).

**Loss of use of eye is member rendered useless.** — Loss of use of an eye constitutes the rendering of “a member of his body useless” within the meaning of former Code 1933, § 26-1305. *Mitchell v. State*, 238 Ga. 167, 231 S.E.2d 773 (1977); *Blackman v. State*, 178 Ga. App. 88, 342 S.E.2d 24 (1986); *Taylor v. State*, 178 Ga. App. 817, 344 S.E.2d 748 (1986) (see O.C.G.A. § 16-5-24).

Evidence that established that a victim’s eye was removed immediately after defendant struck the victim and caused the eye to bleed was sufficient to show harm and to support a conviction under O.C.G.A. § 16-5-24(a) even though the eye was not functional before the battery because loss of the eye deprived the victim of a member of the victim’s body. *Williams v. State*, 262 Ga. App. 698, 588 S.E.2d 755 (2003).

**Expert testimony is not required** in an aggravated battery case to prove the loss of use of an eye. The victim’s testimony as to loss of eyesight will support the verdict. *Mitchell v. State*, 238 Ga. 167, 231 S.E.2d 773 (1977).

**Blurred vision** is evidence that an eye has been rendered useless. *Taylor v. State*, 178 Ga. App. 817, 344 S.E.2d 748 (1986).

**Eye injury sufficient for conviction.** — Evidence that defendant put fist through a window causing broken glass to strike the victim’s eye was sufficient for conviction. *Blackwood v. State*, 224 Ga. App. 486, 480 S.E.2d 914 (1997).

**Victim’s testimony that vision was improving** was not sufficient to overcome the evidence that the victim’s eye was rendered useless, especially in the absence of a prognosis of complete recovery. *Taylor v. State*, 178 Ga. App. 817, 344 S.E.2d 748 (1986).

**Photographs depicting condition of victim’s injured eye immediately following attack** were admissible over defendant’s objection that they were designed to inflame and prejudice the jury. *Few v. State*, 182 Ga. App. 667, 356 S.E.2d 729 (1987).

**Application (Cont'd)**

**Admission of color photographs.** — Court did not err in admitting color photographs showing the victim's injuries. These photographs depicted the victim's injuries shortly after the injuries were inflicted and shortly before trial to show the permanence of the victim's injuries. Since the appellant was indicted for aggravated battery, the state was required to prove that the appellant severely disfigured the victim. Maxwell v. State, 250 Ga. App. 628, 552 S.E.2d 870 (2001).

**Legs rendered useless.** — That the victim can walk for short distances with the aid of braces and a walker does not take away from the fact that for the purposes of O.C.G.A. § 16-5-24 the victim's legs have been rendered useless. Magsby v. State, 169 Ga. App. 637, 314 S.E.2d 473 (1984).

Victim's testimony that defendant picked the victim up and threw the victim on the floor on the victim's neck, causing the victim to lose the use of both legs, was sufficient to sustain defendant's conviction for aggravated battery pursuant to O.C.G.A. § 16-5-24(a), despite defendant's contrary testimony that the victim simply tripped over a cord. King v. State, 255 Ga. App. 191, 564 S.E.2d 815 (2002).

When a defendant was charged with aggravated battery under O.C.G.A. § 16-5-24(a), for rendering a victim's legs useless by shooting the victim, the evidence supporting defendant's conviction was insufficient because no evidence showed that a gunshot wound caused the victim to lose the use of the victim's legs or any other part of the victim's body. Doomes v. State, 261 Ga. App. 442, 583 S.E.2d 151 (2003).

**Pouring boiling water over spouse's leg and foot.** — Sufficient evidence supported aggravated battery conviction, pursuant to O.C.G.A. § 16-5-24(a), after testimony was received that defendant maliciously injured defendant's spouse and seriously disfigured that spouse by pouring boiling water on the spouse's leg and foot. Jones v. State, 259 Ga. App. 698, 577 S.E.2d 878 (2003).

**Evidence sufficient for aggravated battery because hot bleach thrown on**

**victim.** — Evidence supported defendant's conviction for aggravated battery as defendant threw a cup of hot bleach on the victim and then repeatedly punched the victim in the face; the bleach burned and discolored the victim's face and severely damaged the victim's left eye. Payne v. State, 273 Ga. App. 483, 615 S.E.2d 564 (2005).

**Harm to spouse's sexual organ.** — Defendant's actions in biting and severing part of the defendant's spouse's genitals while the defendant was performing oral sex on the spouse, done as revenge for the spouse's infidelity, constituted serious disfigurement sufficient to support the defendant's conviction of aggravated assault. Byrd v. State, 251 Ga. App. 83, 553 S.E.2d 380 (2001).

**Brain injury to infant.** — Testimony that the defendant's baby spent 15 days in intensive care and, over a year later, was still being treated for head injuries was sufficient for the jury to find that the baby had suffered a loss of normal brain functioning (i.e., was deprived of a member of the body) to convict the defendant of aggravated battery under O.C.G.A. § 16-5-24(a). Nichols v. State, 278 Ga. App. 46, 628 S.E.2d 131 (2006).

**Disfigurement need not be permanent.** — To constitute the crime of aggravated battery, there is no requirement that, in addition to being "serious," the disfigurement of a victim be permanent. In re H.S., 199 Ga. App. 481, 405 S.E.2d 323 (1991).

**Factual issue of serious disfigurement for jury.** — Whether six scars from gunshot wounds, plus a large scar from operation to remove a bullet, constitute serious disfigurement is a factual issue for the jury. Miller v. State, 155 Ga. App. 54, 270 S.E.2d 466 (1980).

Whether a scar constituted serious disfigurement was a jury question and the trial court did not err in refusing to direct a verdict of acquittal on the charge of aggravated battery. Grace v. State, 210 Ga. App. 718, 437 S.E.2d 485 (1993).

**Evidence authorized finding of serious disfigurement.** — Evidence authorized a finding that the victim had incurred a serious disfigurement to the victim's head as the result of being inten-

tionally struck by defendant, where the victim suffered a broken nose and a laceration to the scalp requiring several stitches. *In re H.S.*, 199 Ga. App. 481, 405 S.E.2d 323 (1991).

When the defendant broke the victim's nose with a metal pipe, and a surgeon testified as to how the victim's nose was rebroken and replaced in its proper position, the jury could find that the victim suffered serious disfigurement under O.C.G.A. § 16-5-24. *Underwood v. State*, 283 Ga. App. 638, 642 S.E.2d 324 (2007).

With regard to a defendant's conviction for aggravated battery, and other related crimes, sufficient evidence existed authorizing the jury to find that the victim's facial injuries were seriously disfiguring after the victim testified that the victim's eye socket was broken in three places, causing the eyeball to recede into the victim's head after the defendant beat the victim; the victim also testified that the victim's cheekbone and nose were broken, four ribs were broken, the victim's adenoids and eardrums burst, and the injuries required the victim to undergo multiple surgeries, including having wires placed in the victim's cheekbone and eye socket, one eye pulled back into place, and a plastic implant placed behind the eye. *Ferrell v. State*, 283 Ga. App. 471, 641 S.E.2d 658 (2007).

There was sufficient evidence of disfigurement to support a defendant's conviction for aggravated battery with regard to the abuse inflicted upon the defendant's two year old child based on the numerous visible injuries inflicted on the child, and a CT scan that showed a skull fracture, which required a long period of hospitalization. *Yearwood v. State*, 297 Ga. App. 633, 678 S.E.2d 114 (2009).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty of aggravated battery in violation of O.C.G.A. § 16-5-24(a) beyond a reasonable doubt because the jury could reasonably find that the victim's broken nose constituted serious disfigurement. *Seymore v. State*, 300 Ga. App. 523, 685 S.E.2d 772 (2009).

Evidence that a belt used by a defendant to hit the victim created knots deep under the victim's skin and discoloration

still visible during defendant's trial a year later, and that the severity and depth of those knots put the victim at risk for blood clots and deep vein thrombosis, was sufficient for the jury to determine that the victim was seriously disfigured and to sustain the defendant's conviction for aggravated battery. *Pierce v. State*, 301 Ga. App. 167, 687 S.E.2d 185 (2009), cert. denied, No. S10C0549, 2010 Ga. LEXIS 244 (Ga. 2010).

**Sufficient injury to warrant conviction for aggravated battery.** — Evidence that nine-week-old infant had numerous abrasions, lacerations, and bruises, as well as nine fractured ribs, showed sufficient injury to warrant conviction for aggravated battery. *Thompson v. State*, 156 Ga. App. 1, 273 S.E.2d 894 (1980).

Based on the victim's testimony that not only was the victim's arm broken, but that it jerked out of place, a rational trier of fact could conclude beyond a reasonable doubt that the arm was seriously disfigured and that defendant was guilty of aggravated battery under O.C.G.A. § 16-5-24. *Hopkins v. State*, 255 Ga. App. 202, 564 S.E.2d 805 (2002).

Evidence was sufficient to support defendant's conviction for aggravated battery as it showed that defendant was upset with the victim and wanted to confront the victim, defendant did in fact confront the victim while the victim was sitting in the victim's car, defendant had an angry and hostile demeanor during the confrontation, defendant started the verbal and physical confrontation, and defendant seriously disfigured the victim who sustained multiple cut wounds, including cuts to the head that took 30 staples to close. *Campbell v. State*, 258 Ga. App. 863, 575 S.E.2d 748 (2002).

Trial court properly rejected the defendant's contention that an aggravated battery conviction had to be reversed, as the stabbing left no part of the victim's body seriously disfigured, given the victim's testimony that: (1) the victim was hospitalized for three days; (2) the stabbing had violated the victim's skin and fatty tissue and exposed the sternum; (3) the tip of the knife used penetrated the sternum or had slipped to the side of the sternum and

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then punctured the tissues immediately underneath the sternum; and (4) for a month after the incident, the victim suffered intermittent shortness of breath and heavy chest pain; and that for about eight months, the victim was unable to work a job as a machine operator cutting metal. Parnell v. State, 280 Ga. App. 665, 634 S.E.2d 763 (2006).

Testimony indicating that the defendant struck the victim in the head and on the arm with a pry bar, breaking the victim's arm and pulling the flesh away from the victim's head, was sufficient to convict the defendant of aggravated battery under O.C.G.A. § 16-5-24 and aggravated assault under O.C.G.A. § 16-5-21. Mattis v. State, 282 Ga. App. 49, 637 S.E.2d 787 (2006).

Evidence was sufficient to support a conviction of aggravated battery under O.C.G.A. § 16-5-24(a) because the record showed that defendant cut a deep gash across the victim's abdomen using a knife with a 3.5 inch blade, stabbed the victim two more times, and then chased the victim as the victim fled. Brinkley v. State, 301 Ga. App. 827, 689 S.E.2d 116 (2009).

**Introduction of civil lawsuit in criminal proceeding.** — Defendant's malice murder and aggravated battery convictions were upheld on appeal as the trial court did not err in introducing into evidence the pleadings filed in a civil lawsuit brought by defendant against the victim and others as the evidence was introduced to show the defendant's motive or state of mind. Taylor v. State, 282 Ga. 44, 644 S.E.2d 850 (2007), cert. denied, 552 U.S. 950, 128 S. Ct. 384, 169 L. Ed. 2d 263 (2007).

**Statute sufficient to give due notice of prohibited acts causing serious disfigurement.** — When there was evidence that the defendant hit the defendant's mother-in-law, breaking her nose; that the defendant hit her repeatedly; that the results of the defendant's beating were severe, extensive bruises throughout the face and eyes, and forehead with deep lacerations at the bridge of her nose, her right brow, and her left temple, with arterial bleeding flowing from the final lacer-

ation; and, that the totality of the injuries required approximately 25 stitches, the prohibition in former Code 1933, § 26-1305 against maliciously causing bodily harm to another by seriously disfiguring the person's body gave the defendant due notice that the statute prohibited the acts for which defendant was convicted. Baker v. State, 246 Ga. 317, 271 S.E.2d 360 (1980) (see O.C.G.A. § 16-5-24).

**Evidence sufficient for aggravated battery of officer.** — Because sufficient evidence was presented showing that the defendant cut a correctional officer's face with either a razor blade or other sharp object, requiring more than 150 stitches and cosmetic surgery to repair, the defendant's convictions of aggravated assault and aggravated battery upon a correctional officer were upheld on appeal. White v. State, 289 Ga. App. 224, 656 S.E.2d 567 (2008).

**Knowledge that victim was officer is essential element.** — Charge was inadequate, and the convictions of the indictment were vacated when the court defined the elements of the charges of aggravated assault and aggravated battery without any reference to the element of defendant's knowledge that the victim was a police officer. Chandler v. State, 204 Ga. App. 816, 421 S.E.2d 288 (1992).

**Exclusion of evidence relevant to exculpatory theories as reversible error.** — When defendant was convicted of seriously disfiguring the body of the victim, evidence that the victim had previously attacked defendant's spouse during a custody hearing in court and evidence that a major part of the harm done to the victim was the result, not of defendant's fist, but of the foot of defendant's spouse, was relevant to the issues raised by exculpatory theories, and exclusion of such evidence constituted reversible error. Baker v. State, 246 Ga. 317, 271 S.E.2d 360 (1980).

**Evidence of victim's alcoholism.** — Defendant's convictions of aggravated battery and simple battery were affirmed as the trial court properly refused to admit evidence of the victim's alcoholism prior to the victim's involvement with the defendant when the defendant failed to

show any nexus between the victim's alcoholism and the conclusion that the victim had falsely accused the defendant of battery. *Harris v. State*, 263 Ga. App. 329, 587 S.E.2d 819 (2003).

**Evidence of victim's conduct not admitted.** — In a defendant's trial for aggravated battery against a victim more than 65 years of age in violation of O.C.G.A. § 16-5-24(a) and (d), evidence that the victim had fondled the defendant's genitals when the defendant was 15 was not admissible under O.C.G.A. § 24-2-2 to support the defendant's claim of justification under O.C.G.A. § 16-3-21. *Strozier v. State*, 300 Ga. App. 199, 685 S.E.2d 743 (2009).

**Conduct outside scope of involuntary manslaughter.** — Whether the conduct of an accused is lawful at the outset, e.g., in self-defense or unlawful, where what takes place thereafter discloses felonious conduct in committing either an aggravated assault with an instrument likely to produce death or an aggravated battery which causes the death of another, such conduct is not within the scope of involuntary manslaughter. *Trask v. State*, 132 Ga. App. 645, 208 S.E.2d 591 (1974).

**Aggravated assault occurring after aggravated battery.** — When defendant was convicted of aggravated assault and aggravated battery under an indictment as to aggravated assault alleging that defendant aided, abetted, advised, and encouraged defendant's son to shoot the victim, this occurred prior to the aggravated battery, and there is no evidence that after the victim was shot, defendant advised and encouraged the son to kill the victim, but in fact, prevented the son from doing so, it was error to sentence defendant for both offenses, and the sentence as to aggravated assault with intent to murder must be set aside. *Overstreet v. State*, 182 Ga. App. 809, 357 S.E.2d 103 (1987).

**No merger of related offenses.** — Trial court did not err in failing to merge aggravated battery and armed robbery convictions. The evidence needed to prove each charge was entirely different, as one charge demanded evidence that the defendant shot and seriously disfigured the victim, while the other required proof that the defendant took money from the victim

at gunpoint. *Smashum v. State*, 293 Ga. App. 41, 666 S.E.2d 549 (2008), cert. denied, 2008 Ga. LEXIS 952 (Ga. 2008).

**Sufficient evidence of requisite criminal intent.** — Appellate court rejected the defendant's claim that insufficient evidence with respect to the requisite criminal intent failed to support an aggravated battery conviction, as the jury could infer intent by: (1) the defendant's act of twisting the victim's head all the way around to the left and slamming it towards the car floorboard; (2) the fact that the incident occurred during a heated argument that extended over several hours and had previously resulted in physical violence towards the victim; (3) the defendant's refusal to take the victim to a hospital or call the victim's mother after the incident; (4) the defendant's subsequent flight from law enforcement; and (5) evidence of two prior similar transactions admitted against the defendant involving assaults on a previous girlfriend. *Collins v. State*, 283 Ga. App. 188, 641 S.E.2d 208 (2007).

**Evidence sufficient to support conviction.** — Evidence sufficient to sustain convictions of arson in the first degree and two counts of aggravated battery. *Rhodes v. State*, 187 Ga. App. 218, 370 S.E.2d 219 (1988); *Williams v. State*, 187 Ga. App. 355, 370 S.E.2d 210 (1988).

Testimony by the victim, in which the victim positively identified defendant as the man who entered the victim's home, and committed the crimes of robbery by intimidation, kidnapping, aggravated assault, aggravated assault with a knife, aggravated battery and possession of a knife during the commission of a crime, charged in the indictment and eyewitness testimony that defendant entered the victim's premises minutes before the attack of the victim was sufficient to authorize the jury's finding that defendant was guilty, beyond a reasonable doubt, of committing the crimes charged in the indictment. *Mobley v. State*, 211 Ga. App. 709, 441 S.E.2d 73 (1994).

Evidence was sufficient to support defendants' convictions for aggravated assault with intent to rob and aggravated battery. *Autry v. State*, 230 Ga. App. 773, 498 S.E.2d 304 (1998).

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Proof that defendant's unjustified and malicious blows to the victim's head caused memory lapses and permanent nerve damage is sufficient to authorize the jury's verdict that defendant committed aggravated battery by depriving the victim of a member of the victim's body. *Scott v. State*, 243 Ga. App. 383, 532 S.E.2d 141 (2000).

Evidence showing that the victim, defendant's son, was subjected to unspeakable abuse at defendant's hands, and that the victim suffered a broken arm, amply supported defendant's aggravated battery conviction. *Mashburn v. State*, 244 Ga. App. 524, 536 S.E.2d 208 (2000).

Evidence that defendant struck the victim in the face with such force that defendant suffered a broken jaw was sufficient to support conviction. *Ellis v. State*, 245 Ga. App. 807, 539 S.E.2d 184 (2000).

Appellate court found that when a victim positively identified defendant as the person who came to the residence where the victim was visiting, assaulted and coerced the victim into showing defendant where certain drugs and money were stashed in the residence, and then dragged the victim to the backyard where defendant slit the victim's throat twice and left the victim for dead, the evidence sufficed to sustain an aggravated battery conviction. *Kelly v. State*, 255 Ga. App. 813, 567 S.E.2d 36 (2002).

Evidence that defendant intentionally stabbed a man with a knife, causing a wound that required 100 stitches and that left a scar on the victim's side, was sufficient to support defendant's conviction of aggravated battery under O.C.G.A. § 16-5-24(a). *Townsend v. State*, 256 Ga. App. 837, 570 S.E.2d 47 (2002).

Since the state proved that defendant committed aggravated battery, pursuant to O.C.G.A. § 16-5-24(a), by rendering the victim's brain useless and by depriving the victim of a brain through defendant's punches and kicks, the conviction was upheld. *Miller v. State*, 275 Ga. 730, 571 S.E.2d 788 (2002), cert. denied, 538 U.S. 1004, 123 S. Ct. 1911, 155 L. Ed. 2d 835 (2003).

Evidence was sufficient to convict the

defendant of aggravated stalking and aggravated battery as the defendant's spouse had just parked at a supermarket when the defendant ran a vehicle into the spouse's vehicle, the defendant then approached the spouse, threatened to kill the spouse, opened the door, grabbed and twisted the spouse's wrist, and punched the spouse's nose, breaking the nose; on the date of the incident, a permanent protective order was in effect prohibiting the defendant from contacting the spouse or the spouse's family, or touching or damaging their property. *Johnson v. State*, 260 Ga. App. 413, 579 S.E.2d 809 (2003).

Evidence that the defendant, a convicted felon, accompanied the victim to a store with the codefendant; shot the victim in the head with a handgun that the defendant had in defendant's possession thereby, causing a wound in which the victim lost one eye; and along with the codefendant took all the victim's money was sufficient to support the defendant's conviction for aggravated battery. *Drummer v. State*, 264 Ga. App. 617, 591 S.E.2d 481 (2003); *Griggs v. State*, 264 Ga. App. 636, 592 S.E.2d 168 (2003).

Reviewing the evidence in the light most favorable to the verdict, the evidence was sufficient to support the verdicts against defendant for false imprisonment, aggravated battery, and simple assault in regard to acts of domestic violence against the victim, defendant's spouse, as the evidence showed that defendant dragged the spouse down a hallway by the spouse's hair and held the spouse in a bedroom against the spouse's will, that defendant broke the spouse's nose and arm, and that defendant beat the spouse with a car-washing brush. *Mize v. State*, 262 Ga. App. 486, 585 S.E.2d 913 (2003).

Evidence was sufficient to support convictions against defendant for aggravated assault in violation of O.C.G.A. § 16-5-21 and aggravated battery in violation of O.C.G.A. § 16-5-24, when the victim identified defendant from a pre-trial photograph and from in-court identification, a codefendant and a witness testified against defendant, and the gun used to shoot the victim was found near the car with shell casings in the car. *Dunn v. State*, 262 Ga. App. 643, 586 S.E.2d 352 (2003).

Evidence that defendant, the estranged spouse of the victim, shot the victim twice and caused the spouse to be paralyzed from the neck down was sufficient to support defendant's conviction for aggravated battery. *Colbert v. State*, 263 Ga. App. 193, 587 S.E.2d 300 (2003).

Evidence in the form of testimony from defendant's accomplices that defendant repeatedly struck the victim in the face while asking the victim "where the money was" and choked the victim when the victim could not immediately find the money in the victim's truck after defendant took the victim to the truck because the victim told defendant that the money was there, coupled with defendant's possession of the victim's beeper, was sufficient to sustain defendant's convictions for robbery, kidnapping with bodily injury, and aggravated battery. *Rutledge v. State*, 263 Ga. App. 308, 587 S.E.2d 808 (2003).

Evidence was sufficient to convict defendant of causing the victim's death while committing an aggravated battery against the victim, in violation of O.C.G.A. §§ 16-5-1(c) and 16-5-24, because defendant was seen walking toward the residence defendant shared with the victim, after a neighbor had called the police to report a disturbance there, carrying a gas can that appeared to be heavy, and, therefore, not empty, after which the victim was seen on the porch of the residence, in flames, and defendant, who was sitting on the porch, refused the requests of passersby attempting to give the victim assistance by providing a blanket to smother the flames, which caused the victim's death shortly thereafter. *Lowe v. State*, 276 Ga. 538, 579 S.E.2d 728 (2003).

Defendant's attempt to invoke the circumstantial evidence rule of O.C.G.A. § 24-4-6 was rejected, and the evidence was sufficient to support defendant's conviction of aggravated battery, as the evidence was not entirely circumstantial where there was direct evidence that: (1) defendant said that defendant was going to set the victim on fire; (2) defendant was present and poured the gasoline on the victim; (3) defendant reached in defendant's pocket for something just before the fire started; and (4) the victim questioned why defendant had done it. *Miller v. State*, 265 Ga. App. 402, 593 S.E.2d 943 (2004).

Evidence was sufficient to show that defendant was guilty of two counts of aggravated assault, one count of aggravated battery, and one count of possession of a firearm during the commission of a crime, as the evidence showed that defendant shot the victim in the abdomen and the arm with a gun and that defendant intended to cause serious physical harm and disfigurement to the victim. *King v. State*, 269 Ga. App. 658, 605 S.E.2d 63 (2004).

Because defendant shot the victim in the buttocks, rendering the victim's rectum and a portion of the victim's colon useless for a period of time, the evidence sufficed to sustain an aggravated battery conviction under O.C.G.A. § 16-5-24(a); consequently, the trial court properly denied defendant's motion for a directed verdict. *Parham v. State*, 270 Ga. App. 54, 606 S.E.2d 79 (2004).

Victim was shot while running away from the victim's home following an armed robbery, and although the codefendant testified that the codefendant accidentally shot the victim, the victim's testimony showed that both perpetrators fought with the victim inside the victim's home and that after the victim was shot, both perpetrators struggled over the gun, and one of the defendant's said, "Kill him"; sufficient evidence supported the defendant's aggravated battery conviction. *Daniel v. State*, 271 Ga. App. 539, 610 S.E.2d 90 (2005).

Defendant's convictions for aggravated assault, aggravated battery, kidnapping with bodily injury, and possession of a knife during the commission of a felony, in violation of O.C.G.A. §§ 16-5-21(a)(2), 16-5-24, 16-5-40, and 16-11-106, respectively, were supported by the evidence, as the defendant was engaged in a domestic dispute with the defendant's spouse and child, wherein the defendant argued, threatened to kill them, and locked them in a bathroom, punched and hit the spouse, and stabbed them each multiple times with a decorative sword that the defendant removed from the wall; there was sufficient evidence to show that the defendant did not stab them in the midst of a struggle over possession of the sword, but instead, that the defendant intended

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to stab or cut them. *Brown v. State*, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

Evidence supported defendant's conviction for armed robbery, possession of a weapon during the commission of a crime, aggravated assault, burglary, aggravated battery, and impersonating an officer because defendant kicked in the door of a home while shouting that defendant was a "federal agent," fired a shotgun through a door, shooting off a victim's thumb, inserted the barrel of the shotgun in the same person's mouth, and demanded money, which the victims turned over, two codefendants identified defendant as the user of the shotgun, and defendant's DNA was found on a ski mask recovered from the getaway car and defendant's fingerprints were found on the car. *Garrison v. State*, 276 Ga. App. 243, 622 S.E.2d 910 (2005).

Defendant's conviction as a party for aggravated assault and aggravated battery was affirmed as: (1) the defendant drove a car knowing a gun was inside; (2) the defendant extinguished the headlights and drove slowly past a crowded corner as a passenger opened fire; (3) the defendant stopped the car next to a prone victim while the passenger continued shooting; and (4) the defendant told the police that the defendant did not care who had been shot. *Ford v. State*, 280 Ga. App. 580, 634 S.E.2d 522 (2006).

Defendant's convictions for aggravated assault with a deadly weapon, aggravated battery, and possessing a firearm during the commission of a felony were supported by evidence that: (1) the victim and the defendant had an acrimonious relationship; (2) the defendant threatened to hit the victim with a jug; and (3) the defendant's statement that the victim was not "dead yet" after the victim was shot in the back; the jury could reject the defendant's claim that the defendant fired a warning shot away from the victim and could convict the defendant, even though the victim did not see the defendant point the gun at the victim. *Rowe v. State*, 280 Ga. App. 881, 635 S.E.2d 251 (2006).

Victim's prior statements to a responding police officer and to an investigator

that the defendant beat the victim, photographs of the victim's injuries, and evidence of prior difficulties between the defendant and the victim constituted sufficient evidence to convict the defendant of aggravated battery under O.C.G.A. § 16-5-24(a). *Meeks v. State*, 281 Ga. App. 334, 636 S.E.2d 77 (2006).

Evidence supported a defendant's conviction for aggravated battery as there was evidence supporting an inference that the victim's first wound was non-fatal, as the victim managed to flee a short distance into a neighbor's yard before succumbing to the gunfire; the trial court was not required to grant the defendant's motion for a directed verdict on the aggravated battery charge, and the trial court did not err by allowing the jury to consider the crime of aggravated battery as an aggravating circumstance of the murder. *Thomason v. State*, 281 Ga. 429, 637 S.E.2d 639 (2006).

Aggravated battery and obstruction or hindering an emergency telephone call convictions were upheld on appeal, despite a change in the victim's story, as the injuries sustained were consistent with the victim's original statements, foundational requirements supported the admission of hearsay statements regarding the injuries, the victim's actual written inconsistent statement was properly withheld from the jury, and a mistrial was unwarranted. *Buchanan v. State*, 282 Ga. App. 298, 638 S.E.2d 436 (2006).

Defendant's convictions for aggravated assault, aggravated battery, and first-degree child cruelty pursuant to O.C.G.A. §§ 16-5-21(a), 16-5-24(a), and 16-5-70(b) for participating in a drive-by shooting were supported by sufficient evidence because the testimony of a single witness was generally sufficient to establish a fact pursuant to O.C.G.A. § 24-4-8 and it was the function of the jury to evaluate the credibility of witnesses; based on the testimony of the witnesses to the shooting, a reasonable jury could have rejected the defendant's claims and determined that the defendant was a party to each of the crimes. *Hill v. State*, 282 Ga. App. 743, 639 S.E.2d 637 (2006).

Defendant's aggravated battery conviction was upheld on appeal based on: (1)

sufficient evidence showing that the victim lost the use of an elbow when the elbow was broken during the beating with the defendant; (2) the trial court's proper jury instructions as to the offense; and (3) counsel's representation at trial, which was not made ineffective due to a failure to object to certain testimony. *Walls v. State*, 283 Ga. App. 560, 642 S.E.2d 195 (2007).

There was sufficient evidence that a victim had been deprived of the use of the victim's extremities under O.C.G.A. § 16-5-24(a) when the victim's doctor testified that the victim would not regain full mobility of the victim's arm or hand and would likely suffer from arthritis for the rest of the victim's life, the bones in the victim's arm had been broken into several pieces, the victim had been immobilized by a fixation device, a cast, and a splint, and the victim had spent a month in the hospital with the victim's extremities in restrictive devices. *McClain v. State*, 284 Ga. App. 187, 643 S.E.2d 273 (2007).

Defendant's convictions for malice murder, aggravated battery, burglary, and violation of the Georgia Controlled Substances Act by unlawfully possessing cocaine and marijuana were supported by sufficient evidence; the defendant walked into a neighbor's house with a butcher knife in each hand and stabbed two people, knives found in the woods behind the defendant's apartment matched the descriptions of those used in the stabbings and had deoxyribonucleic acid matching the defendant's, two knives were missing from a knife block in the defendant's apartment, marijuana and cocaine were found in the apartment, the defendant told a friend that the defendant had "hurt some people really bad," and three eyewitnesses identified the defendant as the assailant. *Swanson v. State*, 282 Ga. 39, 644 S.E.2d 845 (2007).

Evidence supported the defendant's convictions of malice murder, two counts of felony murder, kidnapping with bodily injury, two counts of armed robbery, and aggravated battery as: the defendant had been seen fleeing the victim's home in a car registered to the defendant; the defendant told the defendant's spouse to discard the defendant's bloody clothing; the

defendant sought treatment at a hospital after being shot during the crimes; and the defendant had initiated conversations in which the defendant described the actions of the defendant's companions in discarding guns used in the crimes and offered to reveal the names of the companions in exchange for not being charged with murder. *Davis v. State*, 281 Ga. 871, 644 S.E.2d 113 (2007).

Since the evidence presented at the defendant's trial showed, and the defendant admitted, that the defendant was holding a gun that shot the defendant's boyfriend in the neck and paralyzed him, and there was no evidence presented indicating that the act of shooting the boyfriend was in self-defense, sufficient evidence existed to support the defendant's conviction for aggravated assault. *Worthy v. State*, 286 Ga. App. 77, 648 S.E.2d 682 (2007).

Aggravated assault and aggravated battery convictions were upheld on appeal as: (1) sufficient evidence was presented for the jury to reject the defendant's self-defense claim; (2) two photographs were properly admitted as innocuous demonstrative aids to show the scene of the crime and the defendant's location; and (3) the trial court did not improperly give the court's opinion about the evidence, but merely attempted to clarify the state's position. *Whitaker v. State*, 287 Ga. App. 465, 652 S.E.2d 568 (2007).

Sufficient evidence supported the defendant's convictions of aggravated assault, two counts of aggravated battery, and possessing a firearm during the commission of a felony; the defendant told the victim, who had walked into a common hallway in the defendant's apartment building, to leave, went inside, retrieved a gun, and shot the victim twice after the victim refused to leave, and then shot at the victim while the victim was fleeing. *Johnson v. State*, 289 Ga. App. 435, 657 S.E.2d 333 (2008).

Because sufficient evidence of the defendant's attack on the victim, repeatedly stabbing the victim and rendering the victim's wrist useless, supported an aggravated battery charge, and the defendant was adequately put on notice of the charge by the indictment, a conviction on that charge was supported by the evi-

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dence. Thus, a conviction based on this evidence did not violate due process. *Goss v. State*, 289 Ga. App. 734, 658 S.E.2d 168 (2008).

There was sufficient evidence to support convictions for aggravated assault, aggravated battery, and burglary when the victim unhesitatingly identified the defendant as one of the people who attacked the victim with a bat or a pipe; the victim's roommate was about "70 percent sure" that the defendant was one of the attackers; the defendant came to the victim's door earlier in the evening and told someone in the street, "Oh no, not now"; one of the attackers threatened the victim because the victim befriended the attacker's paramour; the paramour, who was a friend of the defendant and who had called the victim to the victim's door before the attack, knew that the victim had come into some cash; and the parent of the defendant's child testified that the defendant and others left the house saying that they were going to get into a fight. Furthermore, the victim sustained a stab wound in the liver, a shattered jaw, a broken foot, a stab to the elbow, damage to the facial nerves, and a double hernia and was in constant pain and could not work. *Drew v. State*, 291 Ga. App. 306, 661 S.E.2d 675 (2008).

Victim's testimony that after being shot by the defendant, the victim was left with nerve damage to the shoulder from which the victim had not fully recovered, was sufficient to convict the defendant of aggravated battery in violation of O.C.G.A. § 16-5-24(a). *Serchion v. State*, 293 Ga. App. 629, 667 S.E.2d 624 (2008).

Victim testified that as the victim walked in front of the defendant's car, the defendant hit the gas pedal, throwing the victim onto the hood; accelerated when the victim asked the defendant to stop; and slammed on the brakes, causing the victim to slide down the hood, and the victim's legs and foot to be broken as they went underneath the car. As the victim's testimony alone was sufficient to establish these facts under O.C.G.A. § 24-4-8, the defendant was properly convicted of aggravated battery. *Cash v. State*, 293 Ga. App. 702, 667 S.E.2d 691 (2008).

Jury was authorized to find that the defendant committed aggravated battery by seriously disfiguring the victim's face and rendering the victim's hand useless. The victim testified that the defendant beat the victim repeatedly, causing many injuries, including a scar above the victim's eye and trauma to the victim's hand that left the hand useless for several weeks; furthermore, there was photographic evidence of the injuries. *Mack v. State*, 294 Ga. App. 518, 669 S.E.2d 487 (2008).

Evidence that the defendant shot the victim at close range; that the victim, who knew the defendant well, identified the defendant from a photo line-up and at trial; and that a witness told police of driving the defendant to find the victim and of witnessing the shooting was sufficient to convict the defendant of aggravated battery, aggravated assault, and possession of a firearm during the commission of those crimes. *Spencer v. State*, 296 Ga. App. 828, 676 S.E.2d 274 (2009).

Evidence was sufficient to support the defendant's convictions of aggravated assault and aggravated battery. The evidence showed that the defendant and other gang members opened fire on a crowd of rival gang members and that the bullets also wounded two people inside a duplex; the jury chose to disbelieve the defendant's alibi witnesses and to believe that of the eyewitnesses. *Lopez v. State*, 297 Ga. App. 618, 677 S.E.2d 776 (2009), overruled on other grounds, *State v. Gardner*, 286 Ga. 633, 690 S.E.2d 164 (2010).

Convictions of aggravated battery, O.C.G.A. § 16-5-24, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106, were not supported by sufficient evidence because, although the defendant's conduct before the crime was suspicious, the circumstantial evidence against the defendant was insufficient under O.C.G.A. § 24-4-6; the state did not show that the defendant was anywhere near the scene at the time of the shooting, did not present evidence connecting a weapon used in the shooting to the defendant, and, although a witness testified that three days before the shoot-

ing, the witness saw the defendant's brother hand the defendant a gun, the witness could not identify the type of gun involved, and this testimony did not connect the defendant with the shooting. The state also failed to adduce evidence that the defendant intentionally aided, abetted, or encouraged the commission of the crimes of which the defendant was convicted. *Gresham v. State*, 298 Ga. App. 136, 679 S.E.2d 344 (2009).

Defendant's aggravated battery conviction under O.C.G.A. § 16-5-24(a) was supported by evidence that the defendant and the codefendant burned the victim's hand and that the codefendant placed a red ant nest on the victim's body, resulting in numerous bites. *Wilkinson v. State*, 298 Ga. App. 190, 679 S.E.2d 766 (2009).

Evidence was sufficient to support convictions for aggravated assault, aggravated battery, armed robbery, and kidnapping. The victims' in-court identifications of the defendant and the codefendant were buttressed by the evidence that a cell phone in the defendants' possession matched that taken from the victims, that a car of the type used by the robbers contained guns similar to those used in the robbery, and the fact that the codefendant had a key to that car. *Wright v. State*, 300 Ga. App. 32, 684 S.E.2d 102 (2009).

Evidence supported the jury's determination that the defendant was guilty beyond a reasonable doubt of aggravated assault and aggravated battery, O.C.G.A. §§ 16-5-21 and 16-5-24, because although the victim was under the influence of alcohol and in severe pain when making statements to the police and the emergency room physician, it was within the jury's province to find the victim's statements more credible than the victim's trial testimony; the victim's statements in a request to dismiss the charges, which acknowledged that the defendant was the individual who attacked the victim, did not occur while the victim was under any physical impairment. *Works v. State*, 301 Ga. App. 108, 686 S.E.2d 863 (2009), cert. denied, No. S10C0458, 2010 Ga. LEXIS 251 (Ga. 2010).

Trial court did not err in convicting the defendant of rape, O.C.G.A. § 16-6-1(a)(1), sexual battery, O.C.G.A.

§ 16-6-22.1(b), aggravated battery, O.C.G.A. § 16-5-24(a), and assault, O.C.G.A. § 16-5-20(a)(1), because the victim's testimony that the defendant raped, sodomized, punched, burned, and threatened to kill the victim was sufficient to authorize the defendant's convictions. *Harris v. State*, 308 Ga. App. 523, 707 S.E.2d 908 (2011).

Evidence was sufficient to support the defendant's convictions of armed robbery under O.C.G.A. § 16-8-41(a), aggravated battery under O.C.G.A. § 16-5-24(a), aggravated assault under O.C.G.A. § 16-5-21(a), burglary under O.C.G.A. § 16-7-1(a)(2), possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b), and conspiracy to possess cocaine under O.C.G.A. §§ 16-4-8 and 16-13-30(a) as a conspirator because, while the uncorroborated testimony of one accomplice was insufficient under O.C.G.A. § 24-4-8, the evidence sufficed to sustain the defendant's conviction when an additional accomplice provided testimony to corroborate that of the first accomplice. Both codefendants testified that the defendant was present from the robbery's inception through the robbery's execution, that the defendant was aware of the conspiracy to obtain the victim's money and cocaine by armed robbery, and that the defendant willingly participated in the crimes and shared the criminal intent of those who committed the crimes inside the victim's residence by supplying the defendant's car and acting as a get-away driver. *Watson v. State*, No. A11A0090, 2011 Ga. App. LEXIS 295 (Mar. 28, 2011).

**Attack with a bottle sufficient for conviction.** — Evidence that the defendant attacked the victim with a bottle and bit off one of the victim's ears is sufficient to support a conviction. *Drayton v. State*, 167 Ga. App. 477, 306 S.E.2d 731 (1983).

**Injury to nose sufficient for conviction.** — Evidence that defendant struck the victim in the face with such force that the blow fractured the victim's nose was sufficient to support conviction. *Pollard v. State*, 230 Ga. App. 159, 495 S.E.2d 629 (1998).

Evidence showing that the defendant shattered the victim's nasal bone and

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caused permanent injury to the victim's sinuses was sufficient to support a conviction for aggravated battery. Silvers v. State, 245 Ga. App. 486, 538 S.E.2d 135 (2000).

When the indictment alleged that the defendant deprived the victim of a bodily member, the victim's nose, the evidence was sufficient to sustain the conviction, and there was not a fatal variance between the indictment and the proof; a nose is a bodily member under O.C.G.A. § 16-5-24(a), and the victim's nasal drainage and blood leakage prior to surgery, as well as the victim's testimony that the victim's nose was still not "all the way" at the time of trial, could constitute evidence of loss of use. Jones v. State, 283 Ga. App. 631, 642 S.E.2d 331 (2007).

**Evidence sufficient for aggravated battery against child.** — Evidence was sufficient to support defendants' convictions of cruelty to children and aggravated battery when the medical testimony concerning the extent and possible cause of the victim's injuries, evidence of defendants' complacent demeanor, and testimony concerning their access to the victim were but some of the factors from which the jury could find the defendants guilty. Thomas v. State, 262 Ga. App. 492, 589 S.E.2d 243 (2003).

Evidence supported defendant's conviction for cruelty to children and aggravated battery because there were a multitude of factors from which the jury could determine defendant's guilt. Hood v. State, 273 Ga. App. 430, 615 S.E.2d 244 (2005).

Evidence was sufficient to support defendant's convictions on four counts of aggravated battery and one count of cruelty to children in the first degree after the 17-month-old child of a love interest was found with hot-water immersion burns incurred while the defendant was watching the child for the love interest; the jury was free to reject the explanation that defendant had no criminal intent at the time the burns were incurred and find that the only reasonable hypothesis was that defendant maliciously and intentionally immersed the baby in hot water after the baby soiled a diaper, especially since

the explanations were not consistent with the evidence. Lee v. State, 275 Ga. App. 93, 619 S.E.2d 767 (2005).

Evidence that the defendant kicked and slammed the infant child of the defendant's love interest, breaking an arm and legs, and that, although the defendant knew the severity of the child's injuries, failed to procure medical treatment for the child on the day of the incident and for the following three days was sufficient to enable a jury to conclude that the defendant was guilty of the offense of aggravated battery, pursuant to O.C.G.A. § 16-5-24(a). McKee v. State, 275 Ga. App. 646, 621 S.E.2d 611 (2005).

Evidence supported defendants' convictions for aggravated battery and cruelty to children because the jury was free not only to reject defendants' explanations of the child's injuries as unreasonable, but to find that the state's case, including testimony as to the extent and cause of the child's injuries and as to defendants' access to the child, excluded every reasonable possibility save defendants' guilt. Hunnicutt v. State, 276 Ga. App. 547, 623 S.E.2d 714 (2005).

Trial court properly denied a motion for a directed verdict of acquittal pursuant to O.C.G.A. § 17-9-1(a) since there was ample circumstantial evidence under O.C.G.A. § 24-4-6 for the jury to have found that the defendant was guilty of aggravated battery, in violation of O.C.G.A. § 16-5-24(a); the defendant's claim that the defendant tripped and fell while carrying the infant child was contradicted by expert testimony that the injury to the infant's brain was caused by shaken baby syndrome. Lindo v. State, 278 Ga. App. 228, 628 S.E.2d 665 (2006).

Evidence, including the defendant's admission to squeezing and shaking the child and the testimony of the forensic pediatrician that the child's injuries were consistent with being squeezed, was sufficient to convict the defendant of child cruelty in the first degree under O.C.G.A. § 16-5-70(b) and aggravated battery under O.C.G.A. § 16-5-24(a). Bass v. State, 282 Ga. App. 159, 637 S.E.2d 863 (2006).

Evidence supported the defendant's convictions of aggravated assault, aggravated battery, cruelty to children, and

reckless conduct in connection with the death of the 16-month-old victim after: the defendant repeatedly fed the victim tomatoes despite the victim's allergic reactions to the tomatoes; two days before the victim's fatal injuries, the victim had numerous bruises, a black eye, and a split bottom lip; while the victim was in the hospital for the fatal injuries, the defendant repeatedly asked a babysitter to persuade the defendant's five-year-old child to say that the child had taken the victim out of the bathtub; the defendant asked medical personnel whether it could be proven that the victim was shaken; and medical evidence showed that the victim's death was consistent with violent shaking by a person of adult strength. *Waits v. State*, 282 Ga. 1, 644 S.E.2d 127 (2007).

There was sufficient evidence to support the defendant's convictions for the felony murder and aggravated battery of the defendant's two-month-old child: (1) the child, who had been in good health at a pediatric checkup earlier in the day, was limp and cold when the defendant brought the child to an office where the child's other parent had an appointment; (2) the child was diagnosed as a "shaken baby"; and (3) the defendant was the only person with the child during and immediately prior to the onset of the child's symptoms. *Smith v. State*, 283 Ga. 237, 657 S.E.2d 523 (2008).

**Jury resolves issue of self defense.** — Evidence was sufficient to affirm defendant's aggravated battery conviction; whether defendant engaged in unprovoked attacks or acted in self-defense or in defense of defendant's love interest was for the jury to resolve, and the jury obviously resolved the question in defendant's disfavor. *Chalvatzis v. State*, 265 Ga. App. 699, 595 S.E.2d 558 (2004).

**Aggravated battery by juvenile against parent.** — Delinquency judgment upon a determination that a juvenile committed acts which, if committed by an adult, would have constituted the felony of aggravated battery, O.C.G.A. § 16-5-24(a), was proper. The juvenile's acts of grabbing, shoving, and pinning the juvenile's parent down and with such force so as to cause a knee injury exceeded the bounds of justification. In the Interest

of A.D., 295 Ga. App. 750, 673 S.E.2d 116 (2009).

**Compelled medical examination.** — Victim could not be compelled to undergo an independent medical examination of victim's eye based on defendant's claim that the injuries were preexisting or did not deprive the victim of eye nor render it useless. *Park v. State*, 230 Ga. App. 274, 495 S.E.2d 886 (1998).

Evidence was sufficient to support a conviction for aggravated battery when defendant maliciously and seriously disfigured a detective's face, ear, and arm, where the defendant cut the detective several times with a boxcutter inflicting a wound requiring 65 stitches and reattachment of the detective's ear. *Ramsey v. State*, 233 Ga. App. 810, 505 S.E.2d 779 (1998).

There was sufficient evidence to conclude that defendant was the person who attacked the victim with a machete, and that by doing so the defendant was guilty of aggravated assault with a deadly weapon resulting in serious bodily injury, pursuant to O.C.G.A. § 16-5-21(a)(2), and aggravated battery by maliciously causing bodily harm and serious disfigurement, pursuant to O.C.G.A. § 16-5-24(a); the victim and two other people identified the defendant, and a witness testified that the defendant confided in the witness that the defendant had hit a person with a machete after someone threw an object at the defendant's car. *Emerson v. State*, 271 Ga. App. 773, 611 S.E.2d 83 (2005).

**Factor for death sentence.** — Evidence supported the jury's finding of an aggravated battery for purposes of the death penalty under O.C.G.A. § 17-10-30(b)(7), after finding petitioner inmate guilty of felony murder, because the evidence showed that the inmate severely beat the victim in the face with a heavy stick, and then finished the victim off by crushing the victim's skull with a log after the victim fell to the ground. *Jefferson v. Terry*, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), aff'd in part and rev'd in part, 570 F.3d 1283 (11th Cir. Ga. 2009).

**Sentencing.** — Trial court did not err in sentencing defendant because the sentence it imposed on defendant was 10 years in prison and 10 years probation for

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aggravated assault, 10 years in prison to run concurrently for aggravated battery, and five years confinement to run consecutively for possession of a firearm during the commission of a crime, as each part of defendant's sentence was well within the statutory limits for the respective crime involved; accordingly, defendant's sentence would not be modified on appeal. King v. State, 269 Ga. App. 658, 605 S.E.2d 63 (2004).

Trial court erred by failing to merge a defendant's two aggravated battery count convictions for sentencing purposes as the two counts were based on a disfigurement of the victim's back and buttocks and rendering of the victim's legs useless by the single act of the defendant pushing the victim out of a moving car; thus, that act did not violate two distinct statutory provisions. Rather, the state prosecuted the same act for two alleged violations of the same statutory provision, which was not appropriate; therefore, the defendant was entitled to have the two aggravated battery counts merged for sentencing purposes. Gonzales v. State, 298 Ga. App. 821, 681 S.E.2d 248 (2009).

Trial court did not err in sentencing the defendant on two counts of aggravated battery because the indictment alleged that the defendant committed two separate acts against the victim that caused the victim bodily harm; evidence was presented to show that the defendant's act of fracturing the victim's skull was separate from the defendant's act of violently shaking the victim. Eskew v. State, No. A10A2224, 2011 Ga. App. LEXIS 312 (Mar. 30, 2011).

**Consecutive sentences.** — When the trial court sentenced the defendant to consecutive 20-year sentences on two aggravated battery convictions, after the defendant was convicted of breaking the victim's ribs and both orbital bones of the victim's eyes, the sentences were not cruel and unusual under the Eighth Amendment; the sentences were within the statutory limits under O.C.G.A. § 16-5-24(a), (b), and (h) and did not shock the conscience. Ware v. State, 259 Ga. App. 267, 576 S.E.2d 649 (2003).

**Jury Instructions**

**Charging on lesser included offense.** — When the same facts were used to support aggravated assault and aggravated battery charges, the trial court erred in sentencing defendant on the aggravated assault count, the lesser included offense. Riden v. State, 226 Ga. App. 245, 486 S.E.2d 198 (1997).

Trial court did not err in refusing to give defendant's requested charge on reckless conduct, where defendant's own testimony showed that defendant committed a culpable act with criminal intent when defendant threw gasoline on the victim and tossed a lighted match toward the victim. McClain v. State, 232 Ga. App. 282, 502 S.E.2d 266 (1998).

Trial court gave the jury the option to find the defendant guilty of the lesser included offense of misdemeanor battery or of felony aggravated battery as indicted, but since the jury rejected the misdemeanor battery charge and found the additional aggravating elements to warrant a felony conviction, the idea that the jury might have reached a different result had the jury also been charged on the even less culpable misdemeanor of simple battery is not reasonable. Christensen v. State, 245 Ga. App. 165, 537 S.E.2d 446 (2000).

**Curative instructions prevented prejudice and obviated mistrial.** — In the prosecution of the defendant for aggravated assault with a deadly weapon and resisting arrest, because the trial court's curative instructions to the jury obviated the need for a mistrial with respect to statements from a potential juror and cured any prejudice which might have resulted from the prosecutor's closing argument, convictions of those crimes were upheld on appeal. Mitchell v. State, 284 Ga. App. 209, 644 S.E.2d 147 (2007).

**Charge on lesser included crimes not required.** — When there is uncontradicted evidence that the victim died, it is not necessary to charge on the lesser included crimes of aggravated assault and aggravated battery. Sanders v. State, 251 Ga. 70, 303 S.E.2d 13 (1983).

During the defendant's trial for aggravated battery, the trial court did not err in refusing to give a jury charge on the lesser

included offense of reckless conduct because the defendant did not submit a written request for a reckless conduct charge but orally requested such charge at the close of the evidence. *Eskew v. State*, No. A10A2224, 2011 Ga. App. LEXIS 312 (Mar. 30, 2011).

**Trial court did not sua sponte err in failing to charge jury on identity** as: (1) there was Georgia law requiring a trial judge to warn the jury against the possible dangers of mistaken identification of an accused as the person committing a crime; and (2) such was not required after the jury had already been charged as to the presumption of innocence, reasonable doubt, burden of proof, credibility of witnesses, and impeachment of witnesses. *Lee v. State*, 281 Ga. 776, 642 S.E.2d 835 (2007).

**Omitting statutory definition of "visible bodily harm" from instruction error.** — By omitting the statutory definition of "visible bodily harm" contained in O.C.G.A. § 16-5-23.1(b), the trial court failed to give the jury the proper framework for evaluating whether a laceration to the victim's nose was severe enough to merit a finding of aggravated battery under O.C.G.A. § 16-5-24 or whether only a finding of battery was merited. Thus, the charge was fatally insufficient. *Carroll v. State*, 293 Ga. App. 721, 667 S.E.2d 708 (2008).

**Instructions to jury.** — Trial court is not required to define the meaning of "seriously" with regard to the phrase "seriously disfiguring the person's body or a body part" and may properly instruct the jury that the "disfigurement may be temporary." *Perkins v. State*, 269 Ga. 791, 505 S.E.2d 16 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999).

There was no conflict between the trial court's charge that the victim's loss of the use of an eye need not be permanent and the allegation in the indictment that defendant rendered the victim's eye "useless." *Christensen v. State*, 245 Ga. App. 165, 537 S.E.2d 446 (2000).

Trial court's jury instructions in defendant's criminal trial on multiple charges arising out of a domestic dispute were proper, as: (1) there was no requirement

that the jury be instructed on the element of assault (O.C.G.A. § 16-5-20) in order to be properly instructed on the crime of aggravated assault (O.C.G.A. § 16-5-21); (2) the methods of committing an aggravated battery, pursuant to O.C.G.A. § 16-5-24(a), were properly defined based on the methods asserted in the indictment; (3) there was no support for a requested charge on the lesser included offense of reckless conduct, pursuant to O.C.G.A. § 16-5-60(b); and (4) there was no possibility of a lesser included conviction for false imprisonment (O.C.G.A. § 16-5-41), such that instruction only on the indicted offense of kidnapping (O.C.G.A. § 16-5-40) was proper. *Brown v. State*, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

At a trial in which defendant was on trial for aggravated battery, in violation of O.C.G.A. § 16-5-24, and an instruction was provided to the jury on the lesser included offenses of battery and simple battery as they related to the charged offense, the trial court judge did not commit reversible error in responding to the jury's questions, during deliberations, as to which offenses were felonies, as there was no discussion as to the possible sentences associated with each offense. *Quintana-Camporredondo v. State*, 275 Ga. App. 859, 622 S.E.2d 66 (2005).

In a prosecution for aggravated battery, false imprisonment, and kidnapping, a written Allen charge issued by the court was not coercive, despite the court's use of the phrase "must be decided", given that said language was only a small portion of an otherwise fair and balanced charge, the trial court urged the jury to take their time, and the defendant was acquitted of the kidnapping charge. *Benson v. State*, 280 Ga. App. 643, 634 S.E.2d 821 (2006).

Reversal of the defendant's aggravated battery conviction was not warranted based on a challenged jury instruction on that offense, as the charge as a whole limited the jury's consideration to the specific manner of committing the crime alleged in the indictment. *Walls v. State*, 283 Ga. App. 560, 642 S.E.2d 195 (2007).

On appeal from a conviction for voluntary manslaughter as a lesser-included offense of malice murder, the appeals

**Jury Instructions (Cont'd)**

court found that no error or prejudice resulted from the trial court's denial of the defendant's request for an aggravated battery charge as a forcible felony in support of the defendant's justification claim, and affirmed the trial court's choice to charge on aggravated assault and rape, as the defendant failed to present evidence of any reasonable belief that the use of force was necessary to prevent the commission of an aggravated battery. *Wicker v. State*, 285 Ga. App. 294, 645 S.E.2d 712 (2007).

Because the trial court properly instructed the jury on the law regarding the use of prior consistent statements and on the defense of accident, the appeals court lacked any reason to reverse the defendant's aggravated battery and cruelty to children convictions. *Watkins v. State*, 290 Ga. App. 41, 658 S.E.2d 812 (2008).

With regard to a defendant's conviction for aggravated assault and battery, since the trial court's jury charge tracked the language of O.C.G.A. § 16-5-24, the charge was a correct statement of law and the charge was properly tailored to the allegation in the indictment that the victim was deprived of the use of the victim's lower body. As a result, there was no impermissible amendment to the indict-

ment with regard to that charge. *Binns v. State*, 296 Ga. App. 537, 675 S.E.2d 265 (2009).

Trial court correctly instructed the jury that, under Georgia law, a person committed the offense of aggravated battery when he or she maliciously caused bodily harm to another by seriously disfiguring the person's body or a member thereof because the instruction, which was taken from the pattern jury instructions, was adequately tailored to the indictment and adjusted to the evidence admitted in court; the trial court was not required to instruct the jury on the meaning of "serious disfigurement," and the jury's verdict was supported by ample evidence that the victim's injuries were "seriously disfiguring." *Seymore v. State*, 300 Ga. App. 523, 685 S.E.2d 772 (2009).

In an aggravated assault case in which the defense was justification under O.C.G.A. § 16-3-21(a), trial counsel was not ineffective for failing to request a charge defining aggravated battery under O.C.G.A. § 16-5-24(a) as a forcible felony for which the use of force was justified. Also, there was no showing that the outcome of the trial would have been different if such a charge had been given. *Lewis v. State*, 302 Ga. App. 506, 691 S.E.2d 336 (2010).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Assault and Battery, §§ 2, 7, 32, 33, 35, 152. 53 Am. Jur. 2d, Mayhem and Related Offenses, § 1 et seq.

**C.J.S.** — 56 C.J.S., Mayhem, § 1 et seq.

**ALR.** — Mayhem as dependent on part of body injured and extent of injury, 58 ALR 1320.

Mayhem by use of poison or acid, 58 ALR 1328.

Use of set gun, trap, or similar device on defendant's own property, 47 ALR3d 646.

Consent as defense to charge of criminal assault and battery, 58 ALR3d 662.

Criminal responsibility for physical

measures undertaken in connection with treatment of mentally disordered patient, 99 ALR3d 854.

Criminal assault or battery statutes making attack on elderly person a special or aggravated offense, 73 ALR4th 1123.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 ALR4th 660.

Stationary object or attached fixture as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 8 ALR5th 775.

**16-5-25. Opprobrious or abusive language as justification for simple assault or simple battery.**

A person charged with the offense of simple assault or simple battery may introduce in evidence any opprobrious or abusive language used by the person against whom force was threatened or used; and the trier of facts may, in its discretion, find that the words used were justification for simple assault or simple battery. (Laws 1833, Cobb's 1851 Digest, p. 786; Code 1863, § 4576; Code 1868, § 4597; Code 1873, § 4694; Code 1882, § 4694; Penal Code 1895, § 103; Penal Code 1910, § 103; Code 1933, § 26-1409; Code 1933, § 26-1306, enacted by Ga. L. 1968, p. 1249, § 1.)

#### JUDICIAL DECISIONS

**Opprobrious words are not absolute defense to charge of assault and battery;** much less would they be an absolute defense to a charge of contempt of court by acts occurring in the presence of the trial judge in the courtroom during the progress of a trial. *Cohran v. Sosebee*, 120 Ga. App. 115, 169 S.E.2d 624 (1969).

**Past opprobrious words** may never serve as a justification for assault and battery. *Cawley v. State*, 74 Ga. App. 214, 39 S.E.2d 427 (1946); *Ailstock v. State*, 159 Ga. App. 482, 283 S.E.2d 698 (1981).

**Opprobrious words must by nature arouse passions** and be said in assaulting party's presence. Opprobrious words which justify an assault and battery must be such as are uttered in the presence of the assaulting party and which, in their nature, are supposed to arouse the passions, and justify, under certain circumstances to be adjudged by the jury, instant and appropriate resentment, not disproportional to the provocation. *Berry v. State*, 105 Ga. 683, 31 S.E. 592 (1898); *Cowart v. State*, 9 Ga. App. 169, 70 S.E. 891 (1911); *Haygood v. State*, 137 Ga. 168, 73 S.E. 81 (1911); *Robinson v. De Vaughn*, 59 Ga. App. 37, 200 S.E. 213 (1938).

**Grimaces or facial expressions do not constitute such words.** *Behling v. State*, 110 Ga. 754, 36 S.E. 85 (1900).

**Threats are not necessarily opprobrious.** *Kimberly v. State*, 4 Ga. App. 852, 62 S.E. 571 (1908).

**Insulting language used by child of nine years** does not furnish adult justifi-

cation for assault and battery. *McKinley v. State*, 121 Ga. 193, 48 S.E. 917 (1904).

**Exchange of opprobrious words would not necessarily bar first speaker from pleading justification.** — Exchange of opprobrious words between two parties immediately leading to an assault would not under all circumstances bar the party who first used such words from pleading justification. *Bagley v. State*, 85 Ga. App. 570, 69 S.E.2d 799 (1952).

**Speaker of opprobrious words entitled to resist provoked assault.** — If the assault upon the accused is made with a weapon likely to produce death, and a manner apparently dangerous to life, the fact that the accused provoked the assault by opprobrious words would not put the accused in the wrong for resisting it, so far as is necessary to the accused's defense; and a seeming necessity, if acted on in good faith, is equivalent to a real necessity. *Mitchell v. State*, 54 Ga. App. 254, 187 S.E. 675 (1936).

**Battery cannot be disproportionate to opprobrious words used**, and never to the extent of taking life, intentionally or unintentionally where the battery is excessive. Any step beyond proportionate resentment carries one into the mire of unlawfulness, whether there be one or many blows. *Collum v. State*, 65 Ga. App. 740, 16 S.E.2d 483 (1941).

**Opprobrious words do not justify homicide.** *Robinson v. State*, 118 Ga. 198, 44 S.E. 985 (1903).

**Publication in newspaper is no excuse for assault and battery.** Haygood v. State, 10 Ga. App. 394, 73 S.E. 423 (1912).

**Conduct not amounting to justification may be pleaded and proved in extenuation and mitigation of damages.** Robinson v. De Vaughn, 59 Ga. App. 37, 200 S.E. 213 (1938).

**When proof of deceased's violent and turbulent character is admissible.** — Proof of violent and turbulent character of deceased is admissible only when it is shown *prima facie* that deceased was assailant, that accused had been assailed, and that defendant was honestly seeking to defend self. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698 (1981).

Testimony concerning victim's general reputation for violence is admissible to corroborate testimony of accused that deceased was violent on occasion in question on theory that one with general reputation for violence is more likely to have been violent toward accused than one with a gentle reputation. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698 (1981).

**Justification for battery is jury question.** — Justification for a battery based on former Code 1933, § 26-1409 is always a question for the jury in each case under all the facts and circumstances adduced on the trial. Collum v. State, 65 Ga. App. 740, 16 S.E.2d 483 (1941).

**Use of opprobrious words justifying battery is jury issue.** — Use of opprobrious words may or may not justify a battery, according to the nature and extent of it, and abusive language will not justify a battery which is excessive and disproportionate to the language used — all of which the jury should determine. Reid v. State, 71 Ga. 865 (1883).

**Question for jury whether provocation was sufficient or not.** Nobles v. State, 12 Ga. App. 355, 77 S.E. 184 (1913).

**Jury may consider conduct of person assaulted and degree of force justified.** — Jury may consider the actions and conduct of the person assaulted at the time of the assault with other facts in determining if force, and what degree of force, on the part of the defendant was justified, and if not justified, what, if any,

effect should be given to such facts as in mitigation. Hutcheson v. Browning, 34 Ga. App. 276, 129 S.E. 125 (1925).

**Failing to charge that plaintiff's opprobrious words could justify or mitigate damages.** — The court erred in failing to charge the jury upon written request, in an action for damages on account of an assault and battery, that defendant could give in evidence any opprobrious words or abusive language used by the plaintiff to its servant or agent, in order to justify the servant or agent's conduct or mitigate the damages, and it was for the jury to determine whether such language amounted to a justification or only to a mitigation of damages recoverable. Exposition Cotton Mills v. Crawford, 67 Ga. App. 135, 19 S.E.2d 835 (1942).

**Duty of court to charge former Penal Code 1895, § 103 (see now O.C.G.A. § 16-5-25) when opprobrious words are relied on as defense;** it is obligatory for the court to charge that section. Buchanan v. State, 100 Ga. 75, 25 S.E. 843 (1896).

It was not error to refuse to charge on the "abusive language" defense since defendant was not charged with simple battery and simple battery was not a lesser included offense in the case. Christensen v. State, 245 Ga. App. 165, 537 S.E.2d 446 (2000).

**Court may determine, as matter of law, that words are not of opprobrious nature** where the words used are obviously not of an opprobrious nature, so as to justify an assault and battery. Robinson v. De Vaughn, 59 Ga. App. 37, 200 S.E. 213 (1938).

**Court's discretion to give general charge.** — It is not error to fail to give the exact language requested by the defendant when the same principles are fairly given to the jury in the court's general charge. Rider v. State, 207 Ga. App. 519, 428 S.E.2d 423 (1993).

**Cited** in Taylor v. State, 127 Ga. App. 692, 194 S.E.2d 627 (1972); Aguilar v. State, 240 Ga. 830, 242 S.E.2d 620 (1978); Davis v. State, 153 Ga. App. 528, 265 S.E.2d 857 (1980); Danzis v. State, 198 Ga. App. 136, 400 S.E.2d 671 (1990); Bryant v. State, 226 Ga. App. 135, 486

S.E.2d 374 (1997); In re A.C., 226 Ga. App. 369, 486 S.E.2d 646 (1997).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Assault and Battery, § 46.

**Am. Jur. Proof of Facts.** — Liability for Abusive Language, 16 POF2d 493.

**C.J.S.** — 6A C.J.S., Assault and Battery, §§ 104, 105.

**ALR.** — What is "infamous" offense within constitutional or statutory provi-

sion in relation to presentment or indictment by grand jury, 24 ALR 1002.

Liability of tort-feasor for consequences of act induced by fear aroused by tort, 35 ALR 1447.

Insulting words as provocation of homicide or as reducing the degree thereof, 2 ALR3d 1292.

### **16-5-26. Publication of second or subsequent conviction of simple assault, simple battery, or battery; cost of publication; good faith publications immune from liability.**

(a) The clerk of the court in which a person is convicted of a second or subsequent violation of Code Section 16-5-20 and is sentenced pursuant to subsection (d) of such Code section, Code Section 16-5-23 and is sentenced pursuant to subsection (f) of such Code section, or Code Section 16-5-23.1 shall cause to be published a notice of conviction for such person. Such notice of conviction shall be published in the manner of legal notices in the legal organ of the county in which such person resides or, in the case of nonresidents, in the legal organ of the county in which the person was convicted. Such notice of conviction shall be one column wide by two inches long and shall contain the photograph taken by the arresting law enforcement agency at the time of arrest; the name and address of the convicted person; the date, time, and place of arrest; and the disposition of the case and shall be published once in the legal organ of the appropriate county in the second week following such conviction or as soon thereafter as publication may be made.

(b) The convicted person for which a notice of conviction is published pursuant to this Code section shall be assessed \$25.00 for the cost of publication of such notice and such assessment shall be imposed at the time of conviction in addition to any other fine imposed.

(c) The clerk of the court, the publisher of any legal organ which publishes a notice of conviction, and any other person involved in the publication of an erroneous notice of conviction shall be immune from civil or criminal liability for such erroneous publication, provided that such publication was made in good faith. (Code 1981, § 16-5-26, enacted by Ga. L. 2004, p. 621, § 3A; Ga. L. 2005, p. 60, § 16/HB 95.)

**Editor's notes.** — Ga. L. 2004, p. 621, § 9(b), not codified by the General Assembly, provides that this Code section shall apply to offenses committed on or after July 1, 2004.

**16-5-27. (Effective until January 1, 2013. See note.) Female genital mutilation.**

(a) Any person:

- (1) Who knowingly circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of a female under 18 years of age;
- (2) Who is a parent, guardian, or has immediate custody or control of a female under 18 years of age and knowingly consents to or permits the circumcision, excision, or infibulation, in whole or in part, of the labia majora, labia minora, or clitoris of such female; or
- (3) Who knowingly removes or causes or permits the removal of a female under 18 years of age from this state for the purpose of circumcising, excising, or infibulating, in whole or in part, the labia majora, labia minora, or clitoris of such female

shall be guilty of female genital mutilation.

(b) A person convicted of female genital mutilation shall be punished by imprisonment for not less than five nor more than 20 years.

(c) This Code section shall not apply to procedures performed by or under the direction of a physician, a registered professional nurse, a certified nurse midwife, or a licensed practical nurse licensed pursuant to Chapter 34 or 26, respectively, of Title 43 when necessary to preserve the physical health of the female. This Code section shall also not apply to any autopsy or limited dissection as defined by Code Section 45-16-21 which is conducted in accordance with Article 2 of Chapter 16 of Title 45.

(d) Consent of the female under 18 years of age or the parent, guardian, or custodian of the female under 18 years of age shall not be a defense to the offense of female genital mutilation. Religion, ritual, custom, or standard practice shall not be a defense to the offense of female genital mutilation.

(e) The statutory privileges provided by Chapter 9 of Title 24 shall not apply to proceedings in which one of the parties to the privilege is charged with a crime against a female under 18 years of age, but such person shall be compellable to give evidence only on the specific act for which the defendant is charged. (Code 1981, § 16-5-27, enacted by Ga. L. 2005, p. 820, § 1/HB 10.)

**Editor's notes.** — Ga. L. 2005, p. 820, § 2, not codified by the General Assembly, provides that this Act shall apply to all offenses committed on or after July 1, 2005.

Code Section 16-5-27 is set out twice in this Code. The first version is effective until January 1, 2013, and the second version becomes effective on that date.

**16-5-27. (Effective January 1, 2013. See note.) Female genital mutilation.**

(a) Any person:

- (1) Who knowingly circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of a female under 18 years of age;
- (2) Who is a parent, guardian, or has immediate custody or control of a female under 18 years of age and knowingly consents to or permits the circumcision, excision, or infibulation, in whole or in part, of the labia majora, labia minora, or clitoris of such female; or
- (3) Who knowingly removes or causes or permits the removal of a female under 18 years of age from this state for the purpose of circumcising, excising, or infibulating, in whole or in part, the labia majora, labia minora, or clitoris of such female

shall be guilty of female genital mutilation.

(b) A person convicted of female genital mutilation shall be punished by imprisonment for not less than five nor more than 20 years.

(c) This Code section shall not apply to procedures performed by or under the direction of a physician, a registered professional nurse, a certified nurse midwife, or a licensed practical nurse licensed pursuant to Chapter 34 or 26, respectively, of Title 43 when necessary to preserve the physical health of the female. This Code section shall also not apply to any autopsy or limited dissection as defined by Code Section 45-16-21 which is conducted in accordance with Article 2 of Chapter 16 of Title 45.

(d) Consent of the female under 18 years of age or the parent, guardian, or custodian of the female under 18 years of age shall not be a defense to the offense of female genital mutilation. Religion, ritual, custom, or standard practice shall not be a defense to the offense of female genital mutilation.

(e) The statutory privileges provided by Chapter 5 of Title 24 shall not apply to proceedings in which one of the parties to the privilege is charged with a crime against a female under 18 years of age, but such person shall be compellable to give evidence only on the specific act for which the accused is charged. (Code 1981, § 16-5-27, enacted by Ga. L. 2005, p. 820, § 1/HB 10; Ga. L. 2011, p. 99, § 25/HB 24.)

**The 2011 amendment**, effective January 1, 2013, in subsection (e), substituted “Chapter 5” for “Chapter 9” near the beginning and substituted “accused is charged” for “defendant is charged” at the end. See editor’s note for applicability.

**Editor’s notes.** — Code Section 16-5-27 is set out twice in this Code. The

first version is effective until January 1, 2013, and the second version becomes effective on that date.

Ga. L. 2011, p. 99, § 101, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

### 16-5-28. Assault on an unborn child.

(a) For the purposes of this Code section, the term “unborn child” means a member of the species homo sapiens at any stage of development who is carried in the womb.

(b) A person commits the offense of assault of an unborn child when such person, without legal justification, attempts to inflict violent injury to an unborn child.

(c) Any person convicted of the offense of assault of an unborn child shall be guilty of a misdemeanor.

(d) Nothing in this Code section shall be construed to permit the prosecution of:

(1) Any person for conduct relating to an abortion for which the consent of the pregnant woman, or person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(2) Any person for any medical treatment of the pregnant woman or her unborn child; or

(3) Any woman with respect to her unborn child. (Code 1981, § 16-5-28, enacted by Ga. L. 2006, p. 643, § 1/SB 77.)

**Editor’s notes.** — Ga. L. 2006, p. 643, § 5, not codified by the General Assembly, provides that the amendment by that Act shall apply to all offenses committed on or after July 1, 2006.

**Law reviews.** — For article on 2006 enactment of this Code section, see 23 Georgia St. U.L. Rev. 27 (2006).

### OPINIONS OF THE ATTORNEY GENERAL

**Fingerprinting required for violators.** — Those charged with offenses un-

der O.C.G.A. § 16-5-28 are to be finger-printed. 2007 Op. Att’y Gen. No. 2007-1.

### 16-5-29. Battery of an unborn child.

(a) For the purposes of this Code section, the term “unborn child” means a member of the species homo sapiens at any stage of development who is carried in the womb.

(b) A person commits the offense of battery of an unborn child when such person, without legal justification, intentionally inflicts physical harm upon an unborn child.

(c) A person convicted of the offense of battery of an unborn child shall be guilty of a misdemeanor.

(d) Nothing in this Code section shall be construed to permit the prosecution of:

(1) Any person for conduct relating to an abortion for which the consent of the pregnant woman, or person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(2) Any person for any medical treatment of the pregnant woman or her unborn child; or

(3) Any woman with respect to her unborn child. (Code 1981, § 16-5-29, enacted by Ga. L. 2006, p. 643, § 1/SB 77.)

**Editor's notes.** — Ga. L. 2006, p. 643, § 5, not codified by the General Assembly, provides that the amendment by that Act shall apply to all offenses committed on or after July 1, 2006.

**Law reviews.** — For article on 2006 enactment of this Code section, see 23 Georgia St. U.L. Rev. 37 (2006).

### OPINIONS OF THE ATTORNEY GENERAL

**Fingerprinting required for violators.** — Those charged with offenses under O.C.G.A. § 16-5-29 are to be fingerprinted. 2007 Op. Att'y Gen. No. 2007-1.

## ARTICLE 3

### KIDNAPPING, FALSE IMPRISONMENT, AND RELATED OFFENSES

**Law reviews.** — For annual survey on criminal law, see 61 Mercer L. Rev. 79 (2009).

For comment, "International Child Ab-

ductions Involving Non-Hague Convention States: The Need for a Uniform Approach," see 21 Emory Int'l L. Rev. 277 (2007).

### 16-5-40. Kidnapping.

(a) A person commits the offense of kidnapping when such person abducts or steals away another person without lawful authority or warrant and holds such other person against his or her will.

(b)(1) For the offense of kidnapping to occur, slight movement shall be sufficient; provided, however, that any such slight movement of another person which occurs while in the commission of any other

offense shall not constitute the offense of kidnapping if such movement is merely incidental to such other offense.

(2) Movement shall not be considered merely incidental to another offense if it:

(A) Conceals or isolates the victim;

(B) Makes the commission of the other offense substantially easier;

(C) Lessens the risk of detection; or

(D) Is for the purpose of avoiding apprehension.

(c) The offense of kidnapping shall be considered a separate offense and shall not merge with any other offense.

(d) A person convicted of the offense of kidnapping shall be punished by:

(1) Imprisonment for not less than ten nor more than 20 years if the kidnapping involved a victim who was 14 years of age or older;

(2) Imprisonment for life or by a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by probation for life, if the kidnapping involved a victim who is less than 14 years of age;

(3) Life imprisonment or death if the kidnapping was for ransom; or

(4) Life imprisonment or death if the person kidnapped received bodily injury.

(e) Any person convicted under this Code section shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.

(f) The offense of kidnapping is declared to be a continuous offense, and venue may be in any county where the accused exercises dominion or control over the person of another. (Laws 1833, Cobb's 1851 Digest, p. 788; Code 1863, §§ 4266, 4267; Code 1868, §§ 4301, 4302; Code 1873, §§ 4367, 4368; Ga. L. 1876, p. 39, § 1; Ga. L. 1880-81, p. 74, § 1; Code 1882, §§ 4367, 4368; Penal Code 1895, §§ 109, 110; Penal Code 1910, §§ 109, 110; Code 1933, §§ 26-1601, 26-1602, 26-1603; Ga. L. 1937, p. 489, § 1; Ga. L. 1953, Nov.-Dec. Sess., p. 99, § 1; Code 1933, § 26-1311, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1982, p. 970, § 1; Ga. L. 1994, p. 1959, § 4; Ga. L. 2006, p. 379, § 5/HB 1059; Ga. L. 2009, p. 331, § 1/HB 575.)

The 2009 amendment, effective July 1, 2009, in subsection (a), substituted "such person" for "he", substituted "another" for "any", inserted "other", and in-

serted "or her" near the end; added subsections (b) and (c); redesignated former subsections (b) and (c) as present subsections (d) and (e), respectively; and added subsection (f).

**Cross references.** — Jurisdiction of the Court of Appeals over certain crimes, § 15-3-3. Statutory rape, § 16-6-3. Enticing a child for indecent purposes, § 16-6-5. Time limitation on prosecution for crimes punishable by death or life imprisonment, § 17-3-1. Law enforcement agencies' duties to collect information as to missing persons, §§ 35-1-8, 35-3-4. Immunity of broadcasters from liability for Levi's Call: Georgia's Amber Alert Program, § 51-1-50.

**Editor's notes.** — *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977), held that imposition of the death penalty for rape where the victim is not killed is in violation of the Eighth Amendment. *Eberheart v. Georgia*, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 (1977), citing *Coker*, held the death penalty for kidnapping where the victim is not killed to be in violation of the Eighth Amendment. The Supreme Court of Georgia, in *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977) held that the rationale of *Coker* must be applied also to kidnapping.

Ga. L. 1994, p. 1959, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Sentence Reform Act of 1994'."

Ga. L. 1994, p. 1959, § 2, not codified by the General Assembly, provides: "The General Assembly declares and finds:

"(1) That persons who are convicted of certain serious violent felonies shall serve minimum terms of imprisonment which shall not be suspended, probated, stayed, deferred, or otherwise withheld by the sentencing judge; and

"(2) That sentences ordered by courts in cases of certain serious violent felonies shall be served in their entirety and shall not be reduced by parole or by any earned time, early release, work release, or other such sentence-reducing measures administered by the Department of Corrections."

Ga. L. 1994, p. 1959, § 16, not codified by the General Assembly, provides: "The provisions of this Act shall apply only to

those offenses committed on or after the effective date of this Act; provided, however, that any conviction occurring prior to, on, or after the effective date of this Act shall be deemed a 'conviction' for the purposes of this Act and shall be counted in determining the appropriate sentence to be imposed for any offense committed on or after the effective date of this Act."

Ga. L. 1994, p. 1959, § 17, not codified by the General Assembly, provides for severability.

Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: "The General Assembly declares and finds: (1) That the 'Sentence Reform Act of 1994,' approved April 20, 1994 (Ga. L. 1994, p. 1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated, deferred, or withheld by the sentencing court; (2) That in *State v. Allmond*, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the 'Sentence Reform Act of 1994,' that the provisions of the First Offender Act would still be available to the sentencing court, which would mean that a person who committed a serious violent felony could be sentenced to less than the minimum mandatory ten-year sentence; and (3) That, contrary to the decision in *State v. Allmond*, it is the expressed intent of the General Assembly that persons who commit a serious violent felony specified in the 'Sentence Reform Act of 1994' shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment."

Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides that: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General

Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect

the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

**Law reviews.** — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For survey article on death penalty decisions from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 175 (2003). For article on 2006 amendment of this Code section, see 23 Georgia St. U.L. Rev. 11 (2006). For annual survey of law on criminal law, see 62 Mercer L. Rev. 87 (2010).

For note on the 1994 amendment of this Code section, see 11 Georgia St. U.L. Rev. 159 (1994).

For comment on Adams v. State, 218 Ga. 130, 126 S.E.2d 624 (1962), see 25 Ga. B.J. 327 (1963).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### RELATIONSHIP TO OTHER OFFENSES

#### JURY INSTRUCTIONS

#### PUNISHMENT

#### APPLICATION

### General Consideration

**Editor's notes.** — Many of the cases noted below were decided prior to the 1994 amendment to subsection (b).

**Constitutionality.** — See *Albert v. State*, 180 Ga. App. 779, 350 S.E.2d 490 (1986).

**Constitutionality of mandatory 25-year sentence.** — Trial court decision that the mandatory 25-year sentence set forth in O.C.G.A. § 16-5-40(b)(2) for kidnapping of a child under the age of 14 constituted cruel and unusual punishment as applied to a defendant was premature as the defendant's motion for a new trial on the two relevant kidnapping charges had to be remanded for reconsideration of other issues as an ineffective assistance of counsel issue had been waived. *State v. Jones*, 284 Ga. 302, 667 S.E.2d 76 (2008).

**Jurisdiction over juvenile defendant.** — When either the juvenile court or the superior court properly could have exercised jurisdiction, no petition alleging delinquency was ever filed in juvenile court, and the superior court first took jurisdiction through indictment, jurisdiction properly vested in the superior court and no transfer hearing pursuant to O.C.G.A. § 15-11-39 was required. *Taylor v. State*, 194 Ga. App. 871, 392 S.E.2d 57 (1990).

**Jurisdiction when offense in multiple states.** — Under O.C.G.A. § 17-2-1(b)(1), Georgia had subject matter jurisdiction over a kidnapping case even though the victim was killed in South Carolina. As the victim was abducted in Georgia, the kidnapping occurred there; when the victim was later injured in South Carolina, it was nevertheless a bodily injury for purposes of the Georgia kidnapping. *Hunsberger v. State*, 299 Ga. App. 593, 683 S.E.2d 150 (2009).

**Failure to define "bodily injury" in subsection (b).** — That O.C.G.A. § 16-5-40 does not define "bodily injury" does not render present subsection (b) (former subsection (c)), providing punishment for kidnapping with bodily injury, unconstitutionally vague. *Waters v. State*, 248 Ga. 355, 283 S.E.2d 238 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1983).

There was no merit in a defendant's challenge to the statute proscribing kidnapping with bodily injury, O.C.G.A. § 16-5-40, on the ground that the statute was unconstitutionally vague by not defining the term "bodily injury" because bodily injury was a term that was commonly understood. *Harper v. State*, 300 Ga. App. 757, 686 S.E.2d 375 (2009).

**Venue.** — Venue in cases of kidnapping is proper in the county where the victim was seized. *Harris v. State*, 165 Ga. App. 249, 299 S.E.2d 924 (1983).

By applying the provisions of O.C.G.A. § 17-2-2(e) and (h), the jury could conclude that venue was proper because there was evidence that the victim's presence in the car remained voluntary until it became clear that defendant was not mistakenly driving toward Alabama and that defendant would not accommodate the victim's wish that the victim not be taken there; the jury could determine that the crime of kidnapping was complete when defendant refused to turn the car around or to stop and let the victim exit. *Pruitt v. State*, 279 Ga. 140, 611 S.E.2d 47, cert. denied, 546 U.S. 866, 126 S. Ct. 165, 163 L. Ed. 2d 152 (2005).

Georgia trial court was an improper venue for trying the kidnapping offense, as the kidnapping offense, pursuant to O.C.G.A. § 16-5-40(a), was complete when the defendant allegedly forced the victim into the defendant's truck in Tennessee and drove away; the victim testified that the victim was forced into the defendant's truck in Tennessee. *Martin v. State*, 281 Ga. App. 64, 635 S.E.2d 358 (2006).

**Kidnapping is not a continuing offense, and the crime is consummated when the victim is seized;** thus, the prosecution failed to prove venue in a county in Georgia when the evidence showed that the victim was seized in another state. *Miller v. State*, 174 Ga. App. 42, 329 S.E.2d 252 (1985); *Jordan v. State*, 242 Ga. App. 408, 530 S.E.2d 42 (2000), overruled on other grounds, *Shields v. State*, 276 Ga. 669, 581 S.E.2d 536 (2003).

Kidnapping is not a continuing crime; it was completed when the victim moved from one room in the store to another and the armed robbery occurred subsequently.

**General Consideration (Cont'd)**

Sharp v. State, 255 Ga. App. 485, 565 S.E.2d 841 (2002).

**"Bodily injury" includes any physical injury.** — For purposes of construing O.C.G.A. § 16-5-40(b), "bodily injury" is a term of common usage requiring no legal definition. Thus, "bodily injury" is accomplished, within the meaning of the statute, by inflicting any physical injury upon the victim's body, however slight. Green v. State, 193 Ga. App. 894, 389 S.E.2d 358, cert. denied, 193 Ga. App. 909, 389 S.E.2d 358 (1989).

Bruises which the victim testified were on the victim's neck and the evidence that defendant kept a hand tightly around the victim's neck while defendant moved the victim from room to room was sufficient to support a conviction of kidnapping with bodily injury. Bluain v. State, 242 Ga. App. 125, 529 S.E.2d 155 (2000).

Under O.C.G.A. § 16-5-40(b), kidnapping with bodily injury only requires that an injury, no matter how slight, occur during the kidnapping; the evidence was sufficient to support a kidnapping conviction with bodily injury conviction after defendant forced the victim into defendant's truck, drove away, and the victim received cuts to the victim's throat, face, hand, and back as a result of the kidnapping. Bailey v. State, 269 Ga. App. 262, 603 S.E.2d 786 (2004).

**Timing of injury.** — An injury does not have to be inflicted at the same moment as the initial abduction. Whether the injury occurs at the beginning of the kidnapping incident or after the victim has been abducted is immaterial for purposes of proving the elements of the crime. Hewitt v. State, 277 Ga. 327, 588 S.E.2d 722 (2003).

**Supreme Court of Georgia adopts the Berry test,** which assesses four factors in determining whether the movement at issue constitutes asportation: (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. To

the extent prior case law and, specifically, the "slight movement" standard are inconsistent with this approach, those cases and that standard are hereby overruled. Garza v. State, 284 Ga. 696, 670 S.E.2d 73 (2008).

**Refusal to sever charges.** — Trial court did not abuse the court's discretion in failing to sever a charge against the defendant for possession of methamphetamine in violation of O.C.G.A. § 16-13-30(a) and a charge against the defendant for kidnapping with bodily injury in violation of O.C.G.A. § 16-5-40; when the defendant was arrested for possession, the kidnapping was ongoing, as the victim remained locked in the camper where the defendant had bound the victim, and it was not an abuse of discretion for a trial judge to deny a motion for severance since the crimes alleged were part of a continuous transaction and from the nature of the entire transaction it would have almost been impossible to present to a jury evidence of one of the crimes without also permitting evidence of the other. Johnson v. State, 281 Ga. App. 7, 635 S.E.2d 278 (2006).

Trial court did not abuse the court's discretion by denying defendant's motion to sever 12 counts of robbery and kidnapping because all 12 counts involved a distinctive modus operandi and took place over a period of less than a month in a single county and showed a common scheme, which justified the denial of the defendant's motion to sever. Fielding v. State, 299 Ga. App. 341, 682 S.E.2d 675 (2009).

**Distance victim is carried is not material.** Any carrying away is sufficient. Brown v. State, 132 Ga. App. 399, 208 S.E.2d 183 (1974); Lockett v. State, 217 Ga. App. 328, 457 S.E.2d 579 (1995); Lumsden v. State, 222 Ga. App. 635, 475 S.E.2d 681 (1996); Lloyd v. State, 226 Ga. App. 401, 487 S.E.2d 44 (1997).

Only the slightest movement of the victim is required to constitute the necessary element of asportation. Helton v. State, 166 Ga. App. 662, 305 S.E.2d 592 (1983).

Any asportation of victim, however slight, is sufficient. Haynes v. State, 159 Ga. App. 34, 283 S.E.2d 25 (1981), rev'd on other grounds, 249 Ga. 119, 288 S.E.2d

185 (1982), overruled on other grounds by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006).

There is no minimum requirement as to the distance of asportation. That asportation was of short duration is without legal significance. Giddens v. State, 190 Ga. App. 723, 380 S.E.2d 274 (1989).

Unlawful asportation, however slight, is sufficient to support a kidnapping conviction. Williams v. State, 178 Ga. App. 581, 344 S.E.2d 247 (1986).

Only the slightest movement of the victim is required to establish the element of asportation, and this element was satisfied by evidence that defendant grabbed victim by the forearm and pushed the victim to the rear of the premises. Robinson v. State, 210 Ga. App. 175, 435 S.E.2d 466 (1993).

Slightest movement of the victim is sufficient to establish asportation. Williams v. State, 236 Ga. App. 351, 511 S.E.2d 910 (1999).

Movement for a short distance satisfies the asportation element of kidnapping. Hardy v. State, 240 Ga. App. 115, 522 S.E.2d 704 (1999).

Despite the fact that the movement of a victim to the floor to bind that victim's arms and legs was slight, because it was clear that the movement materially facilitated the commission of an aggravated assault on that victim, that movement was sufficient to support the defendant's kidnapping conviction. Mercer v. State, 289 Ga. App. 606, 658 S.E.2d 173 (2008).

Aggravated assault, under O.C.G.A. § 16-5-21(a)(2), was completed when the defendant pointed a gun at the victim and grabbed the victim around the neck, while the asportation for the kidnapping occurred when the defendant then dragged the victim into another room. The movement of the victim from one room to another within the hotel room, even though of minimal duration, created an additional danger to the victim by enhancing the defendant's control over the victim, and the movement was not an inherent part of the aggravated assault. Williams v. State, 307 Ga. App. 675, 705 S.E.2d 906 (2011).

**Kidnapping by force.** — Offense of kidnapping was complete when defendant

forced the victim into the pecan grove and held the victim against the victim's will. Dawson v. State, 203 Ga. App. 146, 416 S.E.2d 125, cert. denied, 203 Ga. App. 905, 416 S.E.2d 125 (1992).

**Movement of person 15 feet against that person's will may constitute crime of kidnapping.** Brown v. State, 132 Ga. App. 399, 208 S.E.2d 183 (1974).

**Forcing women, at gunpoint, to move 100 yards constituted kidnapping.** — Kidnapping occurred where undisputed evidence showed that two women were forced, at gunpoint, to march 100 yards from their car to a woods. Waters v. State, 248 Ga. 355, 283 S.E.2d 238 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1983).

**"Asportation" of the victim, necessary for conviction of kidnapping,** was sufficiently shown by the evidence that the appellant, armed with a handgun, forced the victim to walk from the victim's desk about 25 feet to the office of the hotel manager, to whom defendant made a demand for \$20,000, and that defendant held the victim there against the victim's will for 20 hours. Haynes v. State, 249 Ga. 119, 288 S.E.2d 185 (1982), overruled on other grounds by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006).

Evidence showing that boys in house during robbery by defendant were forced to go into several rooms and the attic of the house against their will, but were never carried away from the house, was sufficient to support conviction for kidnapping. Chambley v. State, 163 Ga. App. 502, 295 S.E.2d 166 (1982).

Defendant forced a nurse into the office of an emergency room. Upon seeing that defendant was armed, the three women who were already in the office ran to a location where they felt they would be afforded a degree of relative safety. The women acted on their own volition and, accordingly, the asportation element was not established. Briard v. State, 188 Ga. App. 490, 373 S.E.2d 239, cert. denied, 188 Ga. App. 911, 373 S.E.2d 239 (1988).

Evidence showed the unlawful asportation of a security guard who was coerced into entering an office against the guard's will by defendant's threats to in-

**General Consideration (Cont'd)**

jure female captives, where, once the guard was in the office, defendant threatened the guard with a gun and directed the guard to sit down. *Briard v. State*, 188 Ga. App. 490, 373 S.E.2d 239, cert. denied, 188 Ga. App. 911, 373 S.E.2d 239 (1988).

Evidence that defendant dragged the victim at gunpoint down the hall to the victim's bedroom was sufficient to authorize the jury's verdict that defendant kidnapped the victim. *Humphrey v. State*, 218 Ga. App. 574, 462 S.E.2d 641 (1995).

When the defendant willingly drove the victims around the corner of the parking lot while the victims were being robbed at gunpoint, there was sufficient evidence to authorize the defendant's conviction as a party to the kidnapping. *Williams v. State*, 236 Ga. App. 351, 511 S.E.2d 910 (1999).

Asportation for purposes of kidnapping under O.C.G.A. § 16-5-40(a) supported defendant's conviction since defendant: (1) grabbed a victim as the victim was trying to run out of the store, forcing that victim back in the store, and moving the victim approximately six to eight feet during the struggle; (2) pushed another victim; and (3) then tried to pull both victims back to the bathrooms. *Phillips v. State*, 259 Ga. App. 331, 577 S.E.2d 25 (2003).

Victim's testimony that the defendant's accomplice ordered the victim to move from the victim's vehicle to the ground during the hijacking of the victim's vehicle was sufficient to support the asportation element of the kidnapping offense. *Boykin v. State*, 264 Ga. App. 836, 592 S.E.2d 426 (2003).

Defendant's conviction for kidnapping was affirmed as there was sufficient evidence of asportation since the defendant pulled a handgun on a car salesperson as the defendant slowed a car down, at which time the salesperson was seized against the salesperson's will, and defendant then forced the salesperson to the shoulder of the road. *Mullins v. State*, 280 Ga. App. 689, 634 S.E.2d 850 (2006).

Evidence that defendant forcibly moved the victim from the living room to the kitchen, and then from the kitchen to the bedroom, where defendant threw the victim on and off the bed, was more than

sufficient to support defendant's kidnapping conviction. *Gilbert v. State*, 291 Ga. App. 898, 663 S.E.2d 299 (2008), cert. denied, 2008 Ga. LEXIS 883 (Ga. 2008).

Under the four-factor test for assessing whether a victim's movement constituted asportation, neither of the two distinct movements of the victim during the victim's false imprisonment constituted the necessary asportation to support a kidnapping conviction. Both the act of falling to the floor and the act of rising to sit in the chair where the victim was bound were of minimal duration and were incidental to the false imprisonment of the victim and the victim's children; the blow that caused the victim's fall was an inherent part of an aggravated assault; and the victim's movements did not significantly increase the dangers to the victim over those the victim faced from the false imprisonment or the aggravated assault. *Garza v. State*, 284 Ga. 696, 670 S.E.2d 73 (2008).

There was sufficient evidence of asportation with regard to the kidnapping convictions. The movement of the victims from the street to inside a car was not an inherent part of the robbery offense, which had begun outside the car when the victims were ordered to "give it up" and one victim relinquished a wallet, and the movement created an additional danger to the victims by enhancing the control of the robbers over the victims. *Wright v. State*, 300 Ga. App. 32, 684 S.E.2d 102 (2009).

With regard to a kidnapping with bodily injury charge, the defendant's movement of the victim from the defendant's yard to the defendant's carport and later from the carport to the defendant's television cabinet constituted asportation. Although the duration of both movements was minimal, not all of the Berry factors had to favor the state in order to prove asportation; the movements were not an inherent part of the defendant's other crimes; both movements created an additional danger to the victim independent of any of the other offenses; and both movements served to conceal the victim from the potential view of neighbors and diminished the victim's opportunity for rescue or escape. *Abernathy v. State*, 299 Ga. App. 897, 685 S.E.2d 734 (2009).

Asportation of the victim, necessary for kidnapping, was sufficiently shown, even though defendant only moved the victim two times because the moving occurred after the other crimes were completed and the moving was intended to prevent the victim's escape. *Hammond v. State*, 303 Ga. App. 176, 692 S.E.2d 760 (2010).

**Release as asportation.** — Although releasing an individual from confinement necessitates movement of that individual, it is movement away from the control of the defendant and is not the type of movement that constitutes asportation. *Gibson v. State*, 233 Ga. App. 838, 505 S.E.2d 63 (1998).

**Shoving was not asportation.** — Shoving a victim without moving the victim from one location to another, or merely pushing a victim to the ground, is not sufficient to satisfy the element of asportation for purposes of kidnapping under O.C.G.A. § 16-5-40(a). *Phillips v. State*, 259 Ga. App. 331, 577 S.E.2d 25 (2003).

**Consent of child victim.** — Insofar as a five year old child can be said to have gone with the defendant "willingly" or "voluntarily" because of enticement, when the victim was hit on the head and lost consciousness, the victim was deprived of the capacity to choose to remain with the defendant voluntarily, and thus was held against the victim's will. *Taylor v. State*, 194 Ga. App. 871, 392 S.E.2d 57 (1990).

**Common-law marriage as defense.** — When the existence of a common-law marriage was raised as a defense to kidnapping, there was no presumption in defendant's favor, and it was defendant's burden to prove that such marriage existed which gave defendant lawful authority to take the child from the child's mother. *Dixon v. State*, 217 Ga. App. 267, 456 S.E.2d 758 (1995).

When the existence of a common-law marriage was raised as a defense to kidnapping, even though the trial court erred in failing to charge that defendant's burden to prove the marriage was only a preponderance of the evidence, the error was harmless since no evidence was cited to prove two of the elements as required by O.C.G.A. § 19-3-2. *Dixon v. State*, 217 Ga. App. 267, 456 S.E.2d 758 (1995).

**Victim voluntarily getting into defendant's car.** — Although the victim got in defendant's car voluntarily, once the defendant refused to let the victim out of the car and held the victim against the victim's will, a kidnapping occurred. *Helton v. State*, 166 Ga. App. 662, 305 S.E.2d 592 (1983).

There was no merit to the defendant's claim that the victim's getting into a car willingly precluded a finding that a kidnapping thereafter occurred; this is simply not the law, as an abduction and holding against one's will could certainly take place thereafter. *Winfrey v. State*, 286 Ga. App. 450, 649 S.E.2d 561 (2007).

**Being forced into a car can substantially isolate the victim from protection or rescue**, see *Wright v. State*, 300 Ga. App. 32, 684 S.E.2d 102 (2009).

**Testimony by victim concerning whether consent was given or withheld** was not essential under former Code 1933, § 26-1311 since other evidence can be utilized to establish the victim was abducted and held against the victim's will. *Strozier v. State*, 156 Ga. App. 241, 274 S.E.2d 633 (1980) (see O.C.G.A. § 16-5-40).

**Victim's testimony was sufficient to convict and physical evidence not required.** — Because the victim's statement of sexual abuse was sufficient under O.C.G.A. § 24-4-8 to convict defendant of kidnapping with bodily injury, aggravated child molestation, rape, aggravated sodomy, aggravated assault, and possession of a knife during the commission of a crime, the victim's testimony did not have to be corroborated by physical evidence. *Gartrell v. State*, 272 Ga. App. 726, 613 S.E.2d 226 (2005).

**Noncooperation of victim as not rendering kidnapping a mere attempt.** — Fact that victim did not obey all of assailant's commands did not transpose offense from that of kidnapping to that of mere criminal attempt. *Padgett v. State*, 170 Ga. App. 98, 316 S.E.2d 523 (1984).

**Defendant's repeated shooting of victim** rendered the victim abducted against the victim's will because: (1) the victim would not have willingly remained with defendant to be further harmed or (2) the victim was so badly wounded that the

**General Consideration (Cont'd)**

victim had lost the capacity to make a voluntary choice to remain with the defendant. Wright v. State, 209 Ga. App. 128, 433 S.E.2d 99 (1993).

**Forcible abduction not required.** — There was sufficient evidence for the jury to find that victim was abducted when the victim was induced by persuasion, enticement, or fraud to get back in the car so defendant could supposedly take the victim to get medical assistance. Wright v. State, 209 Ga. App. 128, 433 S.E.2d 99 (1993).

**Whether abduction was forcible or by enticement is immaterial**, so long as the victim is unlawfully held "against his will." Fredrick v. State, 181 Ga. App. 600, 353 S.E.2d 41 (1987).

**Movement of victim need not be clandestine.** — Offense of kidnapping does not require proof that the movement of the victim was made in a clandestine or surreptitious manner. Cosby v. State, 234 Ga. App. 723, 507 S.E.2d 551 (1998).

**Kidnapping for ransom.** — Legislature clearly intended that kidnapping for ransom be higher grade of offense of kidnapping. Krist v. State, 227 Ga. 85, 179 S.E.2d 56 (1970).

Showing that ransom was actually paid is not necessary to constitute offense, but is one method of demonstrating the intent of the defendant at the time the victim's person is seized. Krist v. State, 227 Ga. 85, 179 S.E.2d 56 (1970).

**State may allege in indictment the way and manner in which bodily harm was inflicted upon kidnap victim.** Roberts v. State, 158 Ga. App. 309, 279 S.E.2d 753 (1981).

**Severance of trials.** — When defendants were convicted of kidnapping, the trial court did not abuse the court's discretion by denying their motions to sever their trials, as defendants failed to make a clear showing of prejudice and a denial of due process protection. Attaway v. State, 259 Ga. App. 822, 578 S.E.2d 529 (2003).

Because the evidence was sufficient to find defendant guilty of rape, sexual battery, false imprisonment, and kidnapping with a scheme or a common modus operandi, the trial court properly denied

defendant's motions for a directed verdict and to sever the offenses; without a completed offense, there was no basis for a lesser-included offense instruction. Quenga v. State, 270 Ga. App. 141, 605 S.E.2d 860 (2004).

**Evidence of gun used in kidnapping.** — Kidnapping was completed when defendant seized the victims and forcibly moved them from one location in the store to another, and then defendant committed the armed robbery; accordingly, convictions for both offenses did not amount to two punishments for the same conduct, nor was one offense included in the other as a matter of fact. Phillips v. State, 259 Ga. App. 331, 577 S.E.2d 25 (2003).

When the defendants were convicted of kidnapping, the trial court did not err by admitting a shotgun used in the crime spree into evidence without establishing an appropriate chain of custody as the state was not required to prove a chain of custody of the exhibit since the gun was a distinct and recognizable physical object which could be identified upon mere observation. Attaway v. State, 259 Ga. App. 822, 578 S.E.2d 529 (2003).

Evidence was sufficient to support the first defendant and the second defendant's convictions for murder, kidnapping, armed robbery, and burglary as the evidence showed that the defendants were involved in a scheme to rob a person who the defendants believed to be selling large amounts of marijuana from the apartment, that the defendants burst into the person's apartment brandishing guns, that one of the defendants fatally shot the person, and that the other defendant forced two people present to lie on the ground and divulge the location of a safe in the apartment that held money and marijuana. Howard v. State, 279 Ga. 166, 611 S.E.2d 3 (2005).

**Defendant's ineffective assistance of counsel claim did not warrant a new trial** in a prosecution for rape, kidnapping, aggravated stalking, and two counts of stalking; because of the limited nature of a challenged witnesses' trial testimony, defense counsel made a strategic decision not to seek recusal of the trial judge, who was the brother of the challenged witness, and counsel discussed

with the defendant the reasons for not seeking recusal. Pirkle v. State, 289 Ga. App. 450, 657 S.E.2d 560 (2008).

**Cited** in Henderson v. State, 227 Ga. 68, 179 S.E.2d 76 (1970); United States v. Stone, 472 F.2d 909 (5th Cir. 1973); Butler v. State, 132 Ga. App. 750, 209 S.E.2d 28 (1974); Weaver v. State, 234 Ga. 890, 218 S.E.2d 750 (1975); Weaver v. State, 137 Ga. App. 470, 224 S.E.2d 110 (1976); Atkins v. State, 236 Ga. 624, 225 S.E.2d 7 (1976); Jones v. State, 238 Ga. 51, 230 S.E.2d 865 (1976); Williams v. State, 238 Ga. 244, 232 S.E.2d 238 (1977); Molisani v. State, 142 Ga. App. 234, 235 S.E.2d 658 (1977); Carroll v. State, 143 Ga. App. 230, 237 S.E.2d 703 (1977); Eberheart v. State, 239 Ga. 407, 238 S.E.2d 1 (1977); Stewart v. State, 239 Ga. 588, 238 S.E.2d 540 (1977); Lewis v. State, 239 Ga. 732, 238 S.E.2d 892 (1977); Stanley v. State, 240 Ga. 341, 241 S.E.2d 173 (1977); Thomas v. State, 145 Ga. App. 69, 243 S.E.2d 250 (1978); Bailey v. State, 146 Ga. App. 774, 247 S.E.2d 588 (1978); Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524 (1978); Green v. State, 246 Ga. 598, 272 S.E.2d 475 (1980); Peavy v. State, 159 Ga. App. 280, 283 S.E.2d 346 (1981); Dotson v. State, 160 Ga. App. 898, 288 S.E.2d 608 (1982); Mathis v. State, 249 Ga. 454, 291 S.E.2d 489 (1982); Graham v. State, 171 Ga. App. 242, 319 S.E.2d 484 (1984); Short v. State, 256 Ga. 165, 345 S.E.2d 340 (1986); Parker v. State, 256 Ga. 543, 350 S.E.2d 570 (1986); Hamilton v. State, 185 Ga. App. 536, 365 S.E.2d 120 (1987); Dade v. State, 185 Ga. App. 748, 365 S.E.2d 543 (1988); Potts v. State, 258 Ga. 430, 369 S.E.2d 746 (1988); Potts v. State, 261 Ga. 716, 410 S.E.2d 89 (1991); Lynd v. State, 262 Ga. 58, 414 S.E.2d 5 (1992); State v. Sallie, 206 Ga. App. 732, 427 S.E.2d 11 (1992); Melton v. State, 221 Ga. App. 778, 472 S.E.2d 547 (1996); Rhode v. State, 274 Ga. 377, 552 S.E.2d 855 (2001); Hurst v. State, 258 Ga. App. 664, 574 S.E.2d 876 (2002); Hewitt v. State, 277 Ga. 327, 588 S.E.2d 722 (2003); Blake v. State, 272 Ga. App. 181, 612 S.E.2d 33 (2005); Clue v. State, 273 Ga. App. 672, 615 S.E.2d 800 (2005); Brown v. State, 280 Ga. App. 767, 634 S.E.2d 875 (2006); Opio v. State, 283 Ga. App. 894, 642 S.E.2d 906 (2007); Jaheni v. State, 285 Ga. App. 266, 645

S.E.2d 735 (2007); In the Interest of B.M., 289 Ga. App. 214, 656 S.E.2d 855 (2008); Hyde v. State, 291 Ga. App. 662, 662 S.E.2d 764 (2008); Hall v. State, 292 Ga. App. 544, 664 S.E.2d 882 (2008); Davis v. State, 292 Ga. App. 782, 666 S.E.2d 56 (2008); Burton v. State, 293 Ga. App. 822, 668 S.E.2d 306 (2008); Shearin v. State, 293 Ga. App. 794, 668 S.E.2d 300 (2008); Bradshaw v. State, 284 Ga. 675, 671 S.E.2d 485 (2008); Gonzales v. State, 298 Ga. App. 821, 681 S.E.2d 248 (2009).

### Relationship to Other Offenses

**Kidnapping with bodily injury distinct offense.** — Although the statute does not make it explicit, the courts have treated kidnapping with bodily injury as a distinct offense separate from and greater than kidnapping. Hester v. State, 216 Ga. App. 400, 454 S.E.2d 604 (1995).

Charges against the defendant for kidnapping and aggravated assault, in violation of O.C.G.A. §§ 16-5-21(a)(2) and 16-5-40(a), did not merge as a matter of law because the aggravated assault occurred when the defendant pointed a gun at one store owner to hold the owner at bay while the other owner was being robbed, and the kidnapping of that same owner who was assaulted occurred when the defendant and the defendant's cohort then forced both owners into the store's back office; the assault and kidnapping were supported by facts that were separate from each other. Owens v. State, 271 Ga. App. 365, 609 S.E.2d 670 (2005).

Defendant's rape conviction was proper, even though defendant was acquitted of kidnapping with bodily injury, false imprisonment, and aggravated assault as Georgia did not recognize the inconsistent verdict rule; further, the convictions were not necessarily inconsistent as the jury could have found that defendant raped the victim, but did not commit the other crimes. Stevenson v. State, 272 Ga. App. 335, 612 S.E.2d 521 (2005).

**Aggravated assault with intent to rape did not merge with kidnapping.**

— Evidence showed that the kidnapping conviction, O.C.G.A. § 16-5-40(a), was based on evidence showing that when the victim attempted to escape the initial attack, defendant grabbed the victim and

### Relationship to Other Offenses (Cont'd)

dragged the victim to a more secluded area of the trailer park and the aggravated assault with intent to rape conviction, O.C.G.A. § 16-5-21, was based on evidence that defendant beat the victim with the defendant's hands and fists with the intention of raping the victim; thus, the two crimes were separate offenses supported by different facts that did not merge as a matter of law. McGuire v. State, 266 Ga. App. 673, 598 S.E.2d 55 (2004).

Defendant's conviction for aggravated assault, which was based on the defendant's striking the victim with a pistol, did not merge with the defendant's kidnapping conviction, which was based on the defendant's forcing the victim upstairs, because the assault occurred prior to the kidnapping and was not necessary to accomplish the kidnapping. Williams v. State, 295 Ga. App. 9, 670 S.E.2d 828 (2008).

**Aggravated assault did not merge with kidnapping with bodily injury or aggravated battery, and aggravated battery did not merge with kidnapping, as each count referred to a separate cut of the victims with a decorative sword that defendant pulled off the wall during a domestic dispute with defendant's spouse and child.** Brown v. State, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

Aggravated assault with a rope and kidnapping with bodily injury offenses did not merge for sentencing purposes as one crime was completed before the other took place, and the crimes were established by separate and distinct facts. McCaskell v. State, 285 Ga. App. 592, 646 S.E.2d 761 (2007).

Because there was independent evidence to support each of the offenses as indicted, a defendant's aggravated assault conviction did not merge as a matter of fact with either the aggravated battery or kidnapping with bodily injury convictions. Pitts v. State, 287 Ga. App. 540, 652 S.E.2d 181 (2007).

Trial court did not err under O.C.G.A. § 16-1-7 in failing to merge convictions for aggravated assault and aggravated bat-

tery with a conviction for kidnapping with bodily injury as each crime required proof of at least one different element, and the state presented independent evidence to prove each individual crime as set out in the indictment. Evidence that the defendant pointed a gun at the victim and fired the gun at the floor near the victim, that the defendant used a wooden stick resembling a baseball bat to repeatedly hit the victim, and that the defendant hit and kicked the victim while the victim was tied up supported the three aggravated assault counts; aggravated battery was established by evidence that the defendant broke the victim's nose, wrist, and shoulder and knocked out two teeth and by evidence that the defendant burned the victim's hand and caused the victim to be bitten by fire ants; and kidnapping with bodily injury was proven by evidence of injuries to the victim due to being bound by rope. Rouse v. State, 295 Ga. App. 61, 670 S.E.2d 869 (2008).

Trial court correctly sentenced the defendant for both aggravated assault, O.C.G.A. § 16-5-21, and kidnapping with bodily injury, O.C.G.A. § 16-5-40, because the crimes did not merge since each of the two crimes required proof of at least one fact that the other did not, and the state provided such proof. Kidnapping required proof of asportation, holding the victim against the victim's will, and bodily injury, which was not required to prove aggravated assault; and aggravated assault required proof that the defendant used the defendant's hands, with either the intent to cause a violent injury or which placed the victim in reasonable fear of receiving a violent injury, but the kidnapping charge did not require such proof. Mayberry v. State, 301 Ga. App. 503, 687 S.E.2d 893 (2009).

Trial court correctly sentenced the defendant for both aggravated assault, O.C.G.A. § 16-5-21, and kidnapping with bodily injury, O.C.G.A. § 16-5-40, because the evidence was sufficient to support the charge of kidnapping, apart from the evidence of choking, since even though the victim did not testify at trial that the defendant struck the victim, there was at least some evidence to support such a conclusion. The emergency room doctor

testified that upon noticing bruising on the victim's face, the doctor "vaguely" recalled the victim saying that the victim could have been struck in the eye or struck below the eye; in addition, the evidence at trial showed that the victim had bruising not just on the victim's neck, but also on the victim's face. *Mayberry v. State*, 301 Ga. App. 503, 687 S.E.2d 893 (2009).

**Aggravated assault and armed robbery.** — Trial court's decision not to merge the conviction of kidnapping, in violation of O.C.G.A. § 16-5-40, with defendant's convictions for aggravated assault and armed robbery, in violation of O.C.G.A. §§ 16-5-21 and 16-8-41, was proper under O.C.G.A. § 16-1-7(a), as the facts that supported the kidnapping were not the same as those that supported the convictions for the other offenses; the kidnapping occurred when defendant forced three store employees into an office, the aggravated assaults occurred when defendant pointed a gun at one employee's head and hit another employee with it, and the armed robbery occurred when defendant took money from the store safe. *Hill v. State*, 279 Ga. App. 666, 632 S.E.2d 443 (2006).

**Essential difference between kidnapping and false imprisonment** is that kidnapping involves the additional element of asportation. *Raysor v. State*, 191 Ga. 422, 382 S.E.2d 162 (1989).

Evidence was sufficient to support a verdict of guilty of kidnapping where the transcript reveals that defendant assisted the sister by carrying and lifting the victim into defendant's truck and dumping the body in another county. *Vincent v. State*, 203 Ga. App. 874, 418 S.E.2d 138 (1992).

**False imprisonment as lesser included offense of kidnapping.** — When defendant had been convicted of kidnapping with bodily injury, subsequent charges of false imprisonment, arising out of the same set of facts, were barred by former jeopardy under the "required evidence test" because false imprisonment was a lesser included offense of kidnapping with bodily injury. *Sallie v. State*, 216 Ga. App. 502, 455 S.E.2d 315 (1995).

**Kidnapping as defined may be com-**

**mitted without use of deadly weapon.** Bill v. State, 153 Ga. App. 131, 264 S.E.2d 582 (1980); *Helton v. State*, 166 Ga. App. 662, 305 S.E.2d 592 (1983).

**Aggravated battery did not merge with kidnapping with bodily injury** because the battery was concluded when defendant delivered the initial blow to the victim's head before moving the victim to another place. *Deal v. State*, 233 Ga. App. 79, 503 S.E.2d 288 (1998).

**Rape of victim is sufficient evidence of bodily injury** to authorize conviction for kidnapping with bodily injury to victim. *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977).

**Kidnapping is a lesser included offense of kidnapping with bodily injury**, lacking only the element of bodily injury. *Hunter v. State*, 228 Ga. App. 846, 493 S.E.2d 44 (1997).

**Kidnapping with bodily injury and rape.** — Since kidnapping with bodily injury constituted the greater of two offenses in a kidnapping with bodily injury and rape conviction, the 20-year sentence imposed on the rape conviction should have been vacated, rather than the mandatory life sentence of kidnapping with bodily injury. *Gober v. State*, 203 Ga. App. 5, 416 S.E.2d 292, cert. denied, 203 Ga. App. 906, 416 S.E.2d 292 (1992).

When the victim alleged the defendant robbed and raped the victim at knifepoint, identified the defendant from a photo lineup and at trial, DNA on the victim's clothes matched that of the defendant, the defendant testified the defendant had consensual sex with the victim for money, and the detective who first interviewed the defendant testified that the defendant never told the detective that the defendant had consensual sex, the evidence was sufficient to convict the defendant of rape and kidnapping. *Munn v. State*, 263 Ga. App. 821, 589 S.E.2d 596 (2003).

**Offenses of kidnapping and aggravated assault with intent to rape** were not included in each other in law or in fact. *Strozier v. State*, 171 Ga. App. 703, 320 S.E.2d 764 (1984).

**Battery, simple assault, and aggravated assault as lesser included offenses.** — Battery, simple assault, and aggravated assault are not lesser included

### **Relationship to Other Offenses (Cont'd)**

offenses of kidnapping. *Boxer X v. State*, 237 Ga. App. 526, 515 S.E.2d 668 (1999).

**Kidnapping within aggravated sodomy offense.** — Defendant's conviction was reversed when the kidnapping offense was included within a charged aggravated sodomy offense because the element requiring that the victim be held "against his will" was proven by the same evidence used to establish the aggravated sodomy offense. *Fredrick v. State*, 181 Ga. App. 600, 353 S.E.2d 41 (1987).

**Kidnapping and aggravated sodomy not included offenses.** — Kidnapping and aggravated sodomy are not included offenses as a matter of law and, even though they may be included as a matter of fact, where the same evidence was not used to prove both crimes, the trial court did not err by refusing to find a merger. *Hardy v. State*, 210 Ga. App. 811, 437 S.E.2d 790 (1993).

**Evidence of victim's murder can also be basis for conviction of kidnapping with bodily injury.** — Evidence of the murder of a given victim can be used as the basis for the separate conviction of the murder count and also as the basis for the conviction of kidnapping with bodily injury to the same victim. *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, cert. denied, 454 U.S. 882, 102 S. Ct. 366, 70 L. Ed. 2d 192 (1981), overruled on other grounds, *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442 (1982), but see, *Morgan v. State*, 267 Ga. 203, 476 S.E.2d 747 (1996).

**Kidnapping and sexual battery.** — Jury's verdict finding the defendant not guilty of aggravated sexual battery was not necessarily logically inconsistent with the verdict finding the defendant guilty of kidnapping with bodily injury since the evidence was that the victim suffered bodily injury during a kidnapping when one of the men involved sexually assaulted the victim, but the victim could not identify which of the three men it was. *Kimble v. State*, 236 Ga. App. 391, 512 S.E.2d 306 (1999).

**Kidnapping is not included in crime of robbery as a matter of law.** *Chambley v. State*, 163 Ga. App. 502, 295 S.E.2d 166 (1982).

Armed robbery and kidnapping are clearly not included offenses as a matter of law. Nor are they included offenses as a matter of fact where the two offenses are based on separate acts. *Emmett v. State*, 199 Ga. App. 650, 405 S.E.2d 707 (1991), cert. denied, 199 Ga. App. 905, 405 S.E.2d 707 (1991).

Since the sentences imposed upon an inmate upon the inmate's convictions for armed robbery and kidnapping were within the statutory guidelines under both O.C.G.A. §§ 16-5-40(b) and 16-8-41(b), they were upheld; further, because armed robbery and kidnapping did not merge, the inmate was properly sentenced separately for those different crimes. *Benjamin v. State*, 269 Ga. App. 232, 603 S.E.2d 733 (2004).

**Merging kidnapping and robbery as matter of fact.** — When facts supporting robbery charge included taking property in presence of boys, and facts showing appellant's additional conduct of forcing the children into various rooms and the attic and tying the children were incidental to, but not part of, the robbery, that conduct constituted a separate crime, kidnapping, which did not merge with the robbery as a matter of fact. *Chambley v. State*, 163 Ga. App. 502, 295 S.E.2d 166 (1982).

**Kidnapping did not merge with attempted armed robbery.** — Convictions for burglary, kidnapping, terroristic threats, and possession of a firearm during the commission of a felony did not merge with attempted armed robbery conviction because the attempted armed robbery was complete before the crimes were committed inside the residence; the defendant discussed with the co-worker the idea to dress up as a heating and air technician to perform a robbery, traveled to the residence armed with handguns and a hollow clipboard used to conceal the handgun, and pointed the handgun at a victim before entering the house. *McKinney v. State*, 274 Ga. App. 32, 619 S.E.2d 299 (2005).

**No merger of kidnapping and robbery by intimidation.** — When defendant's kidnapping conviction was premised on the victim's testimony that after defendant entered the victim's home with-

out the victim's permission, the defendant forced the victim to move from a living room into the victim's bedroom with the insinuation the defendant had a weapon, the crime of kidnapping was complete. Defendant's subsequent act of asking the victim for money and taking a bank envelope from the victim's purse without permission constituted the separate crime of robbery by intimidation. Hickey v. State, 267 Ga. App. 724, 601 S.E.2d 157 (2004).

**Trial court did not err in refusing to merge kidnapping charge into rape charge** since the evidence authorized the jury to find that defendant, armed with a pistol, forced defendant's way into the victim's car and drove off with the victim to a secluded area where defendant raped and beat the victim, and moved to another location and again raped and abused the victim and then drove away with the victim's car and the property in the car, leaving the naked victim behind. Clark v. State, 166 Ga. App. 366, 304 S.E.2d 494 (1983).

**Malice murder and kidnapping are not "same offense"** for double jeopardy purposes under Georgia law even though they involve the same transaction and considerably overlap each other factually. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir.), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. Ed. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

When it was clear petitioner was tried and convicted for malice murder and that crime was not the "same offense" as the kidnapping with bodily injury for which petitioner was convicted in the first proceeding, the double jeopardy clause did not bar the malice murder conviction. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir.), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. Ed. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

Once the state tried and convicted petitioner for kidnapping, the state would be barred from prosecuting petitioner for felony murder only if the underlying felony upon which that prosecution was based were that same kidnapping. Stephens v.

Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir.), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. Ed. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

**Murder and kidnapping with bodily injury not included offenses as matter of fact and of law.** — When the defendant was convicted for the murder of and kidnapping with bodily injury of the same victim, the bodily injury alleged was the killing of the victim. As a matter of fact, as well as a matter of law, the murder of the victim and the kidnapping of the victim with bodily injury were not included offenses so as to bar the defendant from being prosecuted and subsequently convicted of both crimes. Brown v. State, 247 Ga. 298, 275 S.E.2d 52, cert. denied, 454 U.S. 882, 102 S. Ct. 366, 70 L. Ed. 2d 192 (1981), overruled on other grounds, Wilson v. Zant, 249 Ga. 393, 290 S.E.2d 442 (1982).

**Aggravated assault is included offense of kidnapping with bodily injury.** — Because the elements of the crime of aggravated assault must have been proved in order to sustain a conviction for the crime of kidnapping with bodily injury, the aggravated assault is an included offense of the crime of kidnapping with bodily injury. Brown v. State, 247 Ga. 298, 275 S.E.2d 52, cert. denied, 454 U.S. 882, 102 S. Ct. 366, 70 L. Ed. 2d 192 (1981); Herring v. State, 224 Ga. App. 809, 481 S.E.2d 842 (1997).

**Aggravated assault and kidnapping.** — Aggravated assault, with intent to rob as the factor in aggravation, is not a lesser included offense of kidnapping with bodily injury. Brown v. State, 232 Ga. App. 787, 504 S.E.2d 452 (1998).

Trial court did not err in denying defendant's motion to correct an illegal sentence, pursuant to O.C.G.A. §§ 16-1-6 and 16-1-7, as defendant's convictions for aggravated assault and kidnapping, in violation of O.C.G.A. §§ 16-5-21 and 16-5-40(a), respectively, did not merge as a matter of law, as only aggravated assault and kidnapping with bodily injury merged as a matter of law; further, the crimes did not merge as a matter of fact, as the crimes were based on separate and

### **Relationship to Other Offenses (Cont'd)**

distinct facts, and due to the timing of defendant's actions during the incident, the separate convictions were proper. *Walker v. State*, 275 Ga. App. 862, 622 S.E.2d 64 (2005).

Convictions for aggravated assault, under O.C.G.A. § 16-5-21(a)(2), and kidnapping, under O.C.G.A. § 16-5-40, did not merge because the aggravated assault was completed when the defendant pointed a gun at the victim and grabbed the victim around the neck, while the asportation for the kidnapping occurred when the defendant then dragged the victim into another room. The movement of the victim from one room to another within the hotel room, even though of minimal duration, created an additional danger to the victim by enhancing the defendant's control over the victim, and the movement was not an inherent part of the aggravated assault. *Williams v. State*, 307 Ga. App. 675, 705 S.E.2d 906 (2011).

**Aggravated assault, rape, and kidnapping.** — Kidnapping, aggravated assault, and rape were separate offenses, completed individually, and did not merge as a matter of fact; thus, the trial court did not err in refusing to merge the kidnapping counts into the aggravated assault and rape counts for purposes of sentencing. *Dasher v. State*, 281 Ga. App. 326, 636 S.E.2d 83 (2006).

**Kidnapping and false imprisonment all separate offenses.** — Charge of false imprisonment did not merge with a kidnapping charge either as a matter of fact or as a matter of law since the kidnapping (the asportation of the victim to a place where the victim did not wish to go) involved conduct distinct from that which constituted false imprisonment, which embraced appellant's chasing the victim each time the victim managed to escape from the appellant's automobile and forcing the victim to re-enter the car and remain there until it suited the appellant to release the victim. *Johnson v. State*, 195 Ga. App. 723, 394 S.E.2d 586 (1990).

Because the evidence against the defendant showed that a charge of kidnapping and a charge of false imprisonment were

not proven by the same facts, but: (1) the former occurred when the defendant abducted the victim outside of a mobile home and forced that victim inside of the home, completing the kidnapping crime at that time; and (2) the latter occurred when the defendant kept the victim inside the mobile home against the victim's will, the trial court did not err in holding that the crimes did not merge. *Chatman v. State*, 283 Ga. App. 673, 642 S.E.2d 361 (2007).

Because the kidnapping and false imprisonment convictions entered against the defendant were based on different conduct, the two did not merge. *Snelson v. State*, 286 Ga. App. 203, 648 S.E.2d 647 (2007).

Defendant committed false imprisonment by forcing the victim into a closet, binding the closet doors closed, and ordering the victim under threat of death to remain there until the defendant left. As the crime of kidnapping occurred and was complete prior to that, when the defendant forced the victim into a bedroom and held the victim there against the victim's will, the kidnapping and false imprisonment offenses were proven by different facts and did not merge. *Williams v. State*, 295 Ga. App. 9, 670 S.E.2d 828 (2008).

**False imprisonment and kidnapping merged.** — Trial court erred in failing to merge defendant's false imprisonment conviction into defendant's kidnapping conviction because false imprisonment was an integral part of the kidnapping charge, requiring the same evidence except for asportation and, accordingly, the offense of false imprisonment merged with the offense of kidnapping as a matter of fact, even though the offenses did not merge as a matter of law. *Upshaw v. State*, 249 Ga. App. 741, 549 S.E.2d 526 (2001), overruled on other grounds, *Wallace v. State*, 275 Ga. 879, 572 S.E.2d 579 (2002).

Because a jury convicted a defendant on both an indicted charge of kidnapping and an unindicted lesser charge of false imprisonment without any intervention of the trial court, the rule in *Camphor v. State*, 272 Ga. 408, 529 S.E.2d 121 (2000) did not apply; thus, the trial court properly merged the false imprisonment with the kidnapping and properly entered

judgment on the jury's verdict finding the defendant guilty of the kidnapping. Manning v. State, 296 Ga. App. 376, 674 S.E.2d 408 (2009).

**Aggravated assault did not merge with kidnapping and armed robbery** charges because each count relied on separate facts. Howard v. State, 230 Ga. App. 437, 496 S.E.2d 532 (1998).

**Theft by receiving stolen property and kidnapping.** — Kidnapping, O.C.G.A. § 16-5-40(a), had no element that the accused either stole property or received stolen property; in a case where defendant kidnapped the victim, then stole the victim's car, defendant's conviction for theft by receiving the stolen car, O.C.G.A. § 16-8-7(a), was not mutually exclusive of a kidnapping conviction and did not preclude prosecution for the kidnapping charge. State v. Fuller, No. A03A1918, 2004 Ga. App. LEXIS 329 (Mar. 9, 2004).

**Interference with custody as lesser included offense.** — Interference with custody was not a lesser included offense of kidnapping, as a matter of law or fact, since the indictment did not allege that the mother of the child was the victim of any crime. Stroud v. State, 200 Ga. App. 387, 408 S.E.2d 175 (1991).

Interference with custody is not a lesser included offense of kidnapping. Valdez-Hardin v. State, 201 Ga. App. 126, 410 S.E.2d 354 (1991).

### Jury Instructions

**Failure to instruct on bodily injury requires retrial of capital offense.** — When the judge failed to offer the jury any specific instructions on the importance of a finding of bodily injury in making kidnapping a capital offense at both the guilt/innocence and sentencing trials, a retrial at both stages was required. Potts v. Zant, 734 F.2d 526 (11th Cir. 1984), cert. denied, 475 U.S. 1068, 106 S. Ct. 1386, 89 L. Ed. 2d 610 (1986).

**Jury sufficiently instructed on essential element of "bodily injury".** — See Messer v. Kemp, 760 F.2d 1080 (11th Cir. 1985), cert. denied, 474 U.S. 1088, 106 S. Ct. 864, 88 L. Ed. 2d 902 (1986).

Trial court's instructions that merely informed the jury that it was necessary

that the injury was received during or as a result of the kidnapping was not in conflict with O.C.G.A. § 16-5-40. Lamunyon v. State, 218 Ga. App. 782, 463 S.E.2d 365 (1995).

In a prosecution for kidnapping with bodily injury, it was not error to instruct the jury that the jury must find that bodily injury occurred in conjunction with the alleged kidnapping because there was no requirement that the injury occur at the precise moment the victim was first kidnapped, and the crime, under O.C.G.A. § 16-5-40(b), required only that an injury, no matter how slight, occur during the kidnapping, so whether the bodily injury occurred at the beginning of the kidnapping or after the victim was abducted was immaterial. Nelson v. State, 278 Ga. App. 548, 629 S.E.2d 410 (2006).

**Slight movement as part of instruction.** — Trial court erred in charging the jury that "slight movement" was sufficient to prove asportation, but the error did not require reversal of the defendant's conviction for kidnapping with bodily injury because the evidence of asportation was overwhelming and undisputed; it was highly probable that any alleged error in giving the defendant's requested charge that "slight movement" was sufficient to prove asportation did not contribute to the judgment. Leverette v. State, 303 Ga. App. 849, 696 S.E.2d 62 (2010).

Conviction for kidnapping was not reversed because it was highly probable that the jury charge that the slightest movement sufficiently established asportation did not contribute to the judgment. Williams v. State, 307 Ga. App. 675, 705 S.E.2d 906 (2011).

**Failure to instruct on bodily injury was reversible error.** — Failure to instruct the jury that bodily injury is an essential element of kidnapping with bodily injury was reversible error, even though defendant failed to reserve any objection to the charge. Hunter v. State, 228 Ga. App. 846, 493 S.E.2d 44 (1997).

**Instruction on conspiracy may be proper though conspiracy not charged.** — In a trial for armed robbery and kidnapping, the trial court does not err in instructing the jury on the law of conspiracy although conspiracy is not

**Jury Instructions (Cont'd)**

charged in the indictment, where the conspiracy instruction is properly adjusted to the evidence. *Spencer v. State*, 180 Ga. App. 498, 349 S.E.2d 513 (1986).

**False imprisonment charge not warranted.** — Evidence did not require the trial court to give defendant's requested charge on false imprisonment as a lesser included offense of kidnapping. *Williams v. State*, 237 Ga. App. 555, 515 S.E.2d 862 (1999).

Trial court's jury instructions in defendant's criminal trial on multiple charges arising out of a domestic dispute were proper as: (1) there was no requirement that the jury be instructed on the element of assault (O.C.G.A. § 16-5-20) in order to be properly instructed on the crime of aggravated assault (O.C.G.A. § 16-5-21); (2) the methods of committing an aggravated battery, pursuant to O.C.G.A. § 16-5-24(a), were properly defined based on the methods asserted in the indictment; (3) there was no support for a requested charge on the lesser included offense of reckless conduct, pursuant to O.C.G.A. § 16-5-60(b); and (4) there was no possibility of a lesser included conviction for false imprisonment (O.C.G.A. § 16-5-41), such that instruction only on the indicted offense of kidnapping (O.C.G.A. § 16-5-40) was proper. *Brown v. State*, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

Counsel was not ineffective for not requesting a charge on false imprisonment as a lesser included offense of kidnapping. The only evidence was either that the defendant kidnapped the victim by dragging the victim by the hair or that the victim went with the defendant voluntarily. *Eller v. State*, 294 Ga. App. 77, 668 S.E.2d 755 (2008).

As the crime of kidnapping was complete when the defendant seized law office employees and forced the employees to a back office, and when the defendant taped up and moved an attorney from place to place in the office, the defendant was not entitled to a charge on a lesser included offense because there was no evidence that the defendant was guilty of merely false imprisonment. *Brower v. State*, 298

Ga. App. 699, 680 S.E.2d 859 (2009), cert. denied, No. S09C1845, 2010 Ga. LEXIS 13 (Ga. 2010).

**Charge of simple kidnapping as a lesser included offense of kidnapping with bodily injury was not warranted** because the evidence showed that after the defendant lured the victim into the van, the defendant drove to another location and assaulted and injured the victim; the victim was never free to leave until the defendant finally dropped the victim off after sexually assaulting and injuring the victim. *Robertson v. State*, 278 Ga. App. 376, 629 S.E.2d 79 (2006).

**Jury instruction proper.** — Trial court's jury charge in defendant's trial on charges of kidnapping by bodily injury in violation of O.C.G.A. § 16-5-40 was proper even though there was no evidence of persuasion or enticement, as indicated in the instruction, but only of abduction by force; an abduction need not be by force, actual or constructive, as inducement, persuasion, or fraud is sufficient, and the jury could possibly have interpreted the facts in such a way as to have found that defendant persuaded the victim to go to defendant's truck. *Mann v. State*, 264 Ga. App. 631, 591 S.E.2d 495 (2003), overruled on other grounds, *Kaiser v. State*, 285 Ga. App. 63, 646 S.E.2d 84 (2007).

Trial court, in response to a request by the jury during deliberations, did not erroneously give the jury a written copy of the charge on the definition of kidnapping, as such was within the court's discretion and the defendant failed to show an abuse of that discretion. *McCaskell v. State*, 285 Ga. App. 592, 646 S.E.2d 761 (2007).

With regard to a defendant's convictions for aggravated sodomy, rape, and other related crimes, trial counsel's decision not to object to the jury charge on kidnapping with bodily injury did not amount to ineffective assistance of counsel as the trial court employed the language of the relevant statute (O.C.G.A. § 16-5-40) and instructed the jury that the offense of kidnapping with bodily injury occurs when a person abducts "or" steals away any person. The fact that the indictment charged the defendant with abducting "and" stealing away the victim did not require trial counsel to object to the jury charge as the

statute provided only one way in which kidnapping can be committed, namely by abducting or stealing away the victim, and the jury charge using the statutory language was appropriate, even though the indictment used the conjunctive. *Greene v. State*, 295 Ga. App. 803, 673 S.E.2d 292 (2009), cert. denied, No. S09C0862, 2009 Ga. LEXIS 259 (Ga. 2009).

**Allen instruction proper.** — In a prosecution for aggravated battery, false imprisonment, and kidnapping, a written Allen charge issued by the court was not coercive, despite the court's use of the phrase "must be decided", given that the language was only a small portion of an otherwise fair and balanced charge, the trial court urged the jury to take their time, and the defendant was acquitted of the kidnapping charge. *Benson v. State*, 280 Ga. App. 643, 634 S.E.2d 821 (2006).

**Charge tracking statutory language sufficient.** — Since the statutory law stated that kidnapping occurred when a person abducted or stole away another without lawful authority and held that other person against the other person's will, the statutory law only permitted one way in which kidnapping could be committed; accordingly, the trial court did not err in charging the jury on the kidnapping charge and petitioner's appellate counsel could not have provided ineffective assistance for not challenging that instruction on appeal since the jury charge did not permit petitioner to be found guilty in a manner not listed in the indictment. Specifically, "bodily injury" in regard to the offense of kidnapping with bodily harm was not part of the definition of the offense of kidnapping which could only be committed in one manner; rather, bodily injury was addressed only in a statutory subsection addressing punishment and the jury was, therefore, not able to convict petitioner of kidnapping with bodily harm based on harm that was inflicted but was not listed in the indictment. *Lewis v. McDougal*, 276 Ga. 861, 583 S.E.2d 859 (2003).

Defendant cited no authority and the trial court found no authority requiring the trial court to use and explain the term asportation as formerly used in the kid-

napping statute, O.C.G.A. § 16-5-40(a); additionally, defendant did not request any additional charges on kidnapping to prevent any confusion on the requirements of asportation and, thus, could not complain about the trial court's failure to give an unrequested instruction on a collateral issue, especially when the omission was not clearly harmful and erroneous as a matter of law. *McGuire v. State*, 266 Ga. App. 673, 598 S.E.2d 55 (2004).

Since the language "with bodily injury" was not included in the kidnapping counts in the indictment, the trial court could not sentence the defendant to life on kidnapping charges, despite the fact that one of the kidnapping victims suffered bodily injury. *Smith v. State*, 302 Ga. App. 222, 690 S.E.2d 867 (2010).

**Jury sufficiently instructed on asportation.** — In a defendant's trial for kidnapping with bodily injury and related offenses, the trial court committed no error in instructing the jury on the asportation element of kidnapping; the instruction given, which stated that the victim's slightest movement was sufficient to prove asportation, accurately stated the law with regard to that element of the crime. *Wright v. State*, 282 Ga. App. 649, 639 S.E.2d 581 (2006).

Defendant's requested charge on asportation was properly denied because the charge was not a correct statement of the law and the actual jury charge correctly stated the law on asportation. *Hammond v. State*, 303 Ga. App. 176, 692 S.E.2d 760 (2010).

### Punishment

**Simple kidnapping is not a capital felony, but kidnapping for ransom or with bodily injury is.** — Since the court charged only "kidnapping" and the jury found only "kidnapping," the jury's finding could not support the death penalty. *Patrick v. State*, 247 Ga. 168, 274 S.E.2d 570 (1981), cert. denied, 459 U.S. 1089, 103 S. Ct. 575, 74 L. Ed. 2d 936 (1982).

Since kidnapping when no bodily injury occurs was not a capital crime at the time O.C.G.A. § 17-10-30 was enacted, such an offense cannot serve as a statutory aggravating circumstance. *Crawford v. State*, 254 Ga. 435, 330 S.E.2d 567 (1985), cert.

**Punishment (Cont'd)**

denied, 489 U.S. 1040, 109 S. Ct. 1098, 103 L. Ed. 2d 239 (1989); *Crawford v. State*, 256 Ga. 57, 344 S.E.2d 215, cert. denied, 479 U.S. 989, 107 S. Ct. 583, 93 L. Ed. 2d 585 (1986).

**Question of whether a kidnapping is punishable as a capital offense** is a question of the grade of crime charged in the indictment and proved at the innocence/guilt phase of the trial. The court must instruct the jury at the guilt/innocence phase that it is considering the charge of a crime involving bodily injury and the jury is required to make a specific finding or verdict as to this element. *Potts v. Zant*, 575 F. Supp. 374 (N.D. Ga. 1983), aff'd, 734 F.2d 526 (11th Cir. 1984), cert. denied, 475 U.S. 1068, 106 S. Ct. 1386, 89 L. Ed. 2d 610, judgment vacated, 478 U.S. 1017, 106 S. Ct. 3328, 92 L. Ed. 2d 734 (1986) (remanded for further consideration in light of *Rose v. Clark*, 478 U.S. 570 (1986)), aff'd, 814 F.2d 1512 (11th Cir. 1987), cert. denied, 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989).

**Punishment of death does not invariably violate Constitution.** *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

**Statutorily specified aggravating circumstance must be found beyond reasonable doubt.** — Before a convicted defendant may be sentenced to death, the jury, or the trial judge in cases tried without a jury, must find beyond a reasonable doubt one of the 10 aggravating circumstances specified in former Code 1933, § 27-2534.1 (see O.C.G.A. § 17-10-30). *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

**Death sentence for simple kidnapping is not authorized.** *Jarrell v. Zant*, 248 Ga. 492, 284 S.E.2d 17 (1981).

**Sentence for kidnapping with bodily injury.** — Upon a conviction of kidnapping with bodily injury, the trial court did not err in entering a life sentence without conducting a pre-sentence hearing, since the only sentences authorized were life imprisonment or death, and the state did not seek the death penalty. *Hasty v. State*, 210 Ga. App. 722, 437 S.E.2d 638 (1993).

Defendant was convicted of kidnapping with bodily injury, which carries a minimum life sentence; thus, the trial court did not err when it denied defendant's oral request for a presentence investigation prior to sentencing. *Bolick v. State*, 244 Ga. App. 567, 536 S.E.2d 242 (2000).

Defendant's life sentence for kidnapping with bodily injury was not improper or illegal as that crime carried the punishment of life imprisonment or death. *Fulcher v. State*, 259 Ga. App. 648, 578 S.E.2d 264 (2003).

**Sentence for kidnapping without bodily injury.** — There is no requirement that a kidnapping victim receive bodily injury when sentencing is pursuant to O.C.G.A. § 17-10-6.1; moreover, as defendant had also been convicted of armed robbery, the trial court correctly imposed a mandatory life without parole sentence for either of the defendant's second serious violent felonies: kidnapping and armed robbery. *Moorer v. State*, 286 Ga. App. 395, 649 S.E.2d 537 (2007), cert. denied, 2007 Ga. LEXIS 806 (Ga. 2007).

**First Offender Act treatment unavailable.** — There was no error in the trial court's failure to convict defendant of kidnapping and armed robbery, in violation of O.C.G.A. §§ 16-5-40 and 16-8-41, respectively, under the First Offender Act, as O.C.G.A. § 42-8-66 specifically stated that the Act did not apply to sentences for violent felonies outlined in O.C.G.A. § 17-10-6.1, and those two crimes were listed as serious violent felonies. *Isaac v. State*, 275 Ga. App. 254, 620 S.E.2d 483 (2005).

**Plea not invalid when defendant received bargained for sentence.** — Although the record did not reveal that the defendant was advised of the mandatory minimum sentences on the charges to which the defendant pled guilty, as contemplated by Ga. Unif. Super. Ct. R. 33.8(C)(4), given that the defendant received the sentence the defendant bargained for, the defendant could not establish that the defendant suffered adverse consequences from not knowing the mandatory minimum sentences for armed robbery and kidnapping. *Belcher v. State*, 304 Ga. App. 645, 697 S.E.2d 300 (2010).

**Merger.** — Defendant's aggravated assault convictions were to be merged with

armed robbery and kidnapping convictions as the same set of facts were used to prove the offenses. *Lenon v. State*, 290 Ga. App. 626, 660 S.E.2d 16 (2008).

**No merger with false imprisonment.** — Defendant's kidnapping and false imprisonment sentences did not merge for sentencing purposes where the victim had been made to drive around at gunpoint, then taken to an apartment before being forced into some woods and shot in the head; thus, the crime of false imprisonment was complete before the victim was forced into the woods and shot. *John v. State*, 282 Ga. 792, 653 S.E.2d 435 (2007).

**No merger with aggravated assault.** — Movement of each of the victims from the kitchen to the bedroom, where the intruders attempted to tie them up, was sufficient to convict the defendant for the kidnapping of both victims; the kidnappings occurred independently of the aggravated assault (pistol-whipping) of another victim and independently of the armed robbery of still another victim's purse; thus, the trial court properly declined to merge the kidnapping convictions with the aggravated assault and armed robbery convictions for sentencing purposes. *Maddox v. State*, 277 Ga. App. 580, 627 S.E.2d 166 (2006).

Defendant's guilty pleas for aggravated assault with intent to rape in violation of O.C.G.A. § 16-5-21(a)(1) and kidnapping in violation of O.C.G.A. § 16-5-40(a) were not accepted in violation of the constitutional prohibition against double jeopardy because the offenses did not merge as a matter of law since each of the offenses were separate and required proof of different facts; the state asserted that the defendant dragged the victim from the front of a laundromat facility into a bathroom in the back of the facility, which formed a basis for the kidnapping charge, and that the defendant sexually assaulted the victim while holding the victim in the bathroom, which formed a basis for the aggravated assault with the intent to rape charge. *Shelton v. State*, 307 Ga. App. 599, 705 S.E.2d 699 (2011).

**Simple assault did not merge with kidnapping.** — Trial court did not err in declining to merge a defendant's convic-

tions for assault and kidnapping with bodily injury because assault under O.C.G.A. § 16-5-20(a)(2) was established by evidence that the victim was placed in reasonable apprehension of immediately receiving a violent injury when defendant told the victim the defendant had a gun, and kidnapping with bodily injury in violation of O.C.G.A. § 16-5-40(a), on the other hand, was established by evidence that defendant abducted and held the victim against the victim's will in the victim's car, driving from one location to another, during which time the victim received bodily injuries. *Walker v. State*, 306 Ga. App. 16, 701 S.E.2d 523 (2010).

**Sentence proper.** — Trial court did not impose an unjustifiably lengthy sentence merely because a defendant chose to require the prosecution to prove the defendant's guilt at trial rather than to enter a plea of guilty because the trial court sentenced defendant to the maximum term of 20 years in prison for kidnapping and on each of the aggravated assault counts, the trial court also exercised the court's discretion to run all of the counts concurrently instead of consecutively; the defendant's claim that the trial court punished the defendant for exercising the defendant's right to a jury trial was not supported by the transcript, which revealed that the sentence imposed by the trial court was based on the defendant's lack of remorse. *Brown v. State*, 299 Ga. App. 782, 683 S.E.2d 874 (2009).

Trial court did not err in denying the defendant's motion for out-of-time appeal to vacate a void sentence because the defendant's sentence of 40 years imprisonment for aggravated assault with intent to rape in violation of O.C.G.A. § 16-5-21(a)(1) and kidnapping in violation of O.C.G.A. § 16-5-40(a) fell within the statutory range and was not void; the offenses of aggravated assault and kidnapping both carry maximum sentences of 20 years, §§ 16-5-21(b) and 16-5-40(b)(1). *Shelton v. State*, 307 Ga. App. 599, 705 S.E.2d 699 (2011).

### Application

**Offense of burglary was completed when defendant entered or remained in house with the intent to commit the**

**Application (Cont'd)**

offense of kidnapping, and it was not necessary to the burglary charge to prove that defendant actually committed the offense of kidnapping, the offense of kidnapping was not included in the offense of burglary as a matter of fact or of law, and defendant therefore was convicted properly of both offenses. *Childs v. State*, 257 Ga. 243, 357 S.E.2d 48, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

**Evidence showing that the victim was forced to go into several rooms of the victim's house** against the victim's will was sufficient evidence to support a kidnapping conviction. *Williams v. State*, 178 Ga. App. 581, 344 S.E.2d 247 (1986).

Evidence was sufficient to sustain defendant's convictions as a party to the offenses of armed robbery, kidnapping, false imprisonment, burglary, and aggravated assault with a deadly weapon, in violation of O.C.G.A. §§ 16-5-21, 16-5-40, 16-5-41, 16-7-1, and 16-8-41 because: (1) defendant received information from the defendant's love interest, about the victims' house, the location of safes, where money was located, and about the alarm system; (2) the day after the home invasion the love interest saw defendant and the defendant showed the love interest a stack of cash, and the defendant told the love interest it might be the victim's money; and (3) an FBI informant met with defendant and defendant told the informant that defendant had been shorted money from the robbery, and that the defendant got the layout of the house from the defendant's love interest. *Pope v. State*, 266 Ga. App. 658, 598 S.E.2d 48 (2004).

**Double jeopardy did not bar retrial.** — Defendant could be retried on a kidnapping charge under O.C.G.A. § 16-5-40(b) after defendant was acquitted of felony murder under O.C.G.A. § 16-5-1(c) and a mistrial was declared on the underlying felony of kidnapping; the jury could have based its acquittal on the felony murder charge on factors other than defendant's participation in the crimes that preceded the homicide. *State v. Lambert*, 276 Ga. App. 668, 624 S.E.2d 174 (2005).

**Kidnapping and aggravated sodomy crimes did not merge** since there was sufficient evidence from which the jury could have found that the defendant's action in choking the victim almost to the point of unconsciousness after forcibly taking the victim from the living room to the bedroom constituted the bodily injury necessary to establish all the elements of kidnapping with bodily injury, which was completed before the defendant committed the aggravated sodomy. *Olsen v. State*, 191 Ga. App. 763, 382 S.E.2d 715 (1989).

**Voluntarily entering car.** — Fact that victims got into defendant's car voluntarily did not protect defendant from a kidnapping prosecution since the defendant did not allow the victims to leave the vehicle after driving past the gas station to which the victims had asked to be taken. *George v. State*, 192 Ga. App. 840, 386 S.E.2d 669, cert. denied, 192 Ga. App. 901, 386 S.E.2d 669 (1989).

Sufficient evidence supported the defendant's conviction of kidnapping under O.C.G.A. § 16-5-40 although the victim entered the defendant's vehicle voluntarily; the victim testified that the defendant refused to take the victim to the victim's home despite the victim's request that the defendant do so, and that was when the kidnapping began. *Clark v. State*, 282 Ga. App. 248, 638 S.E.2d 397 (2006).

**Evidence was sufficient to sustain defendant's conviction for attempt to kidnap**, since the victim was grabbed and restrained against the victim's will and there was evidence from which the jury could find that the defendant intended to take the victim away in the defendant's truck and was thwarted only by the victim's resistance. *McGinnis v. State*, 183 Ga. App. 17, 358 S.E.2d 269 (1987).

Convictions of criminal attempt to commit kidnapping, O.C.G.A. § 16-5-40(a), and aggravated assault with intent to rape, O.C.G.A. § 16-5-21(a)(1), were supported by sufficient evidence since the victim positively identified the defendant as the attacker when the defendant was captured and again at trial, and since a store owner also identified the defendant at trial and testified that the store owner maintained sight of the defendant from which the store owner saw the defendant

attacking the victim until the defendant's capture; additionally, since the defendant made no attempt to take the victim's purse or keys, and the evidence showed that the defendant had pornographic photos of someone who looked similar to the victim, the jury was authorized to find that the defendant had the requisite intent to detain, abduct, and rape the victim as charged. *Mobley v. State*, 279 Ga. App. 476, 631 S.E.2d 491 (2006).

**Evidence sufficient to support conviction for hijacking, battery, and kidnapping.** — Defendant's convictions of hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b), battery, O.C.G.A. § 16-5-23, and two counts of kidnapping with bodily injury, O.C.G.A. § 16-5-40(b), were affirmed because sufficient evidence was presented at trial to support the charges as the victim testified that the defendant forced the defendant's way into the car at gunpoint while the victim and an infant child were in the vehicle and then sexually assaulted the victim after threatening to harm the child, the defendant's wallet was found in the abandoned car, and the defendant admitted to the hijacking. *Adams v. State*, 276 Ga. App. 319, 623 S.E.2d 525 (2005).

**Evidence admissible despite incidentally placing character in issue.** — Evidence was sufficient to find defendant guilty of assault with a deadly weapon, possession of a firearm during the commission of a crime, and kidnapping; the victim's statement that the victim's sister was afraid of defendant because defendant had done the same thing to the sister was clearly admissible as part of the res gestae even if it incidentally placed defendant's character in evidence. *McLendon v. State*, 258 Ga. App. 133, 572 S.E.2d 763 (2002).

**Kidnapping by hospital.** — Hospital did not commit kidnapping under O.C.G.A. § 16-5-40 when, after the hospital employee reported the children's situation to child services, child services took the children into custody. *Gwinnett Health Sys. v. DELU*, 264 Ga. App. 863, 592 S.E.2d 497 (2003).

**Kidnapping occurring in two counties but same offense.** — In a warden's appeal, the grant of habeas corpus relief to

an inmate based on ineffective assistance of counsel was upheld as the kidnapping charges in the two counties charged against the inmate were for the same offense and being advised by defense counsel to plead guilty in one county to avoid prosecution in the other was erroneous since double jeopardy would have barred any additional prosecution. *Upton v. Johnson*, 282 Ga. 600, 652 S.E.2d 516 (2007).

**Guilty plea free and voluntary.** — Trial court did not abuse the court's discretion in denying the defendant's motion to withdraw a guilty plea to two counts of kidnapping and two counts of aggravated assault as the trial court was well aware of the medications the defendant was taking when the plea was entered, the medications did not affect the defendant's ability to understand the proceedings, and an expert opined that the defendant was feigning hallucinations and was competent to stand trial; hence, at that point, the trial court had no duty to make any further inquiries into the defendant's ability to competently tender a plea. *McDowell v. State*, 282 Ga. App. 754, 639 S.E.2d 644 (2006).

**Factual basis sufficient for guilty plea.** — Sufficient factual basis was established for a defendant's guilty plea to armed robbery, kidnapping, and possession of a firearm during the commission of a crime when the prosecutor stated that the defendant and an accomplice entered the victims' apartment, forced the victims into rooms at gunpoint, tied the victims up, and stole some items; the prosecutor also noted that much of the crime had been recorded by a 9-1-1 operator; defense counsel stated that counsel had discussed the facts with the defendant; and the defendant conceded guilt. Therefore, it was not necessary that the indictment be read into the record. *Leary v. State*, 291 Ga. App. 754, 662 S.E.2d 733 (2008).

**Evidence sufficient to support conviction.** — See *Moore v. State*, 176 Ga. App. 882, 339 S.E.2d 271 (1985); *Huston v. State*, 256 Ga. 276, 347 S.E.2d 556 (1986); *Westbrook v. State*, 256 Ga. 776, 353 S.E.2d 504 (1987); *Riseden v. State*, 181 Ga. App. 453, 352 S.E.2d 634 (1987); *Williams v. State*, 258 Ga. 281, 368 S.E.2d

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742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989); Mincey v. State, 186 Ga. App. 839, 368 S.E.2d 796 (1988); McKenzie v. State, 187 Ga. App. 840, 371 S.E.2d 869 (1988); Shirley v. State, 188 Ga. App. 357, 373 S.E.2d 257 (1988); Scott v. State, 193 Ga. App. 577, 388 S.E.2d 416 (1989); Green v. State, 193 Ga. App. 894, 389 S.E.2d 358 (1989); Stroud v. State, 200 Ga. App. 387, 408 S.E.2d 175 (1991); Jessup v. State, 224 Ga. App. 176, 480 S.E.2d 232 (1996); Culver v. State, 230 Ga. App. 224, 496 S.E.2d 292 (1998); Anderson v. State, 238 Ga. App. 866, 519 S.E.2d 463 (1999); Evans v. State, 240 Ga. App. 215, 522 S.E.2d 506 (1999); Garcia v. State, 240 Ga. App. 53, 522 S.E.2d 530 (1999); Collins v. State, 240 Ga. App. 289, 523 S.E.2d 359 (1999); Welch v. State, 243 Ga. App. 798, 534 S.E.2d 471 (2000); Brinson v. State, 244 Ga. App. 40, 537 S.E.2d 370 (2000); Johnson v. State, 247 Ga. App. 157, 543 S.E.2d 439 (2000); Parson v. State, 245 Ga. App. 902, 539 S.E.2d 234 (2000); Powell v. State, 249 Ga. App. 344, 548 S.E.2d 447 (2001); Chemielowiec v. State, 250 Ga. App. 66, 550 S.E.2d 120 (2001); 489 U.S. 1040, 109 S. Ct. 1098, 103 L. Ed. 2d 239 (1989); Ross v. State, 264 Ga. App. 830, 592 S.E.2d 479 (2003); Griggs v. State, 264 Ga. App. 636, 592 S.E.2d 168 (2003); McGordon v. State, 298 Ga. App. 161, 679 S.E.2d 743 (2009).

When the evidence showed that defendant both held the victim at gunpoint in a motel room and took possession of the victim's wallet and car keys after they had been removed from the victim's person, the evidence was sufficient to authorize a rational trier of fact to find defendant guilty of armed robbery and kidnapping beyond a reasonable doubt. Spencer v. State, 180 Ga. App. 498, 349 S.E.2d 513 (1986), cert. denied.

Evidence presented by the prosecution was sufficient to enable any rational trier of fact to find the defendant guilty of armed robbery, kidnapping, and aggravated assault with intent to rob. Conway v. State, 183 Ga. App. 573, 359 S.E.2d 438 (1987).

Evidence showing that defendant forc-

ibly took his wife from the steps of her parents' residence; that she asked him to let her go; and that she was taken to another town against her will sufficed for a conviction. Williams v. State, 207 Ga. App. 371, 427 S.E.2d 846 (1993).

Testimony by the victim, in which the victim positively identified defendant as the man who entered defendant's home, and committed the crimes of robbery by intimidation, kidnapping, aggravated assault, aggravated assault with a knife, aggravated battery and possession of a knife during the commission of a crime, charged in the indictment and eyewitness testimony that defendant entered the victim's premises minutes before the attack of the victim was sufficient to authorize the jury's finding that defendant was guilty, beyond a reasonable doubt, of committing the crimes charged in the indictment. Mobley v. State, 211 Ga. App. 709, 441 S.E.2d 73 (1994).

Victim's testimony that defendant forced the victim out of defendant's car at gunpoint and grabbed the victim's arm when the victim tried to escape, causing the victim to fall and scrape the victim's knees was sufficient to authorize the jury's finding that defendant was guilty of kidnapping with bodily injury. Fields v. State, 216 Ga. App. 184, 453 S.E.2d 794 (1995).

Evidence that the defendant kidnapped his estranged wife, told her he would kill her and locked her in the car trunk, and that the wife received injuries in her attempts to escape was sufficient to find the defendant guilty of kidnapping with bodily injury. Stubbs v. State, 220 Ga. App. 106, 469 S.E.2d 229 (1996).

Although largely circumstantial, evidence was sufficient to authorize the jury to find defendant guilty of attempted kidnapping. Simonds v. State, 231 Ga. App. 692, 499 S.E.2d 744 (1998).

Evidence was sufficient to support a conviction for kidnapping where the defendant tried to force the victim into the victim's truck and succeeded in moving the victim a short distance toward that objective. Estes v. State, 234 Ga. App. 150, 505 S.E.2d 840 (1998).

Evidence that the defendant was one of a group of armed men who broke into the

victims' apartment and, while attempting to steal money and property, forced the victims to move from the bedrooms to the living room to the bathroom was sufficient to sustain the defendant's convictions for kidnapping. *Cosby v. State*, 234 Ga. App. 723, 507 S.E.2d 551 (1998).

Victim's injury satisfied the requirement that injury occur during a kidnapping, when the defendant threw the victim from the back of a moving truck and the victim was injured while holding on to the tailgate and being dragged along the ground. *Reynolds v. State*, 234 Ga. App. 884, 508 S.E.2d 674 (1998).

Proof that the defendant held his wife at knife point, stabbed her with a long kitchen knife, and then dragged her from the living room to the bedroom was sufficient to authorize the jury's verdict that he was guilty, beyond a reasonable doubt, of kidnapping with bodily injury. *Respers v. State*, 244 Ga. App. 689, 536 S.E.2d 586 (2000).

Evidence was sufficient to show asportation of the victim and to support a conviction for kidnapping since the victim went from one room in the victim's apartment to another in response to the defendant's threatening command. *Woodson v. State*, 273 Ga. 557, 544 S.E.2d 431 (2001).

Evidence was sufficient to sustain defendant's convictions for armed robbery and kidnapping since defendant grabbed the store clerk by the arm at gunpoint, forced the clerk behind the check out counter, emptied the store's cash register, took money from the safe, forced the clerk into a storeroom located at the rear of the store, and then, after the clerk escaped, chased the clerk with a vehicle. *Duncan v. State*, 253 Ga. App. 239, 558 S.E.2d 783 (2002).

Armed robbery and kidnapping convictions were upheld, despite defendant's contention that defendant could only be found guilty of no more than a theft by taking, because defendant participated in the crime upon the codefendant's representation that the victim was among those who planned such events and was an active participant therein; however, an accomplice's testimony to the contrary, corroborated by the victim, supported the state's theory. *Turner v. State*, 258 Ga. App. 867, 575 S.E.2d 727 (2002).

Evidence was sufficient to support defendant's conviction for kidnapping as the testimony of a laborer who worked at the home where the offense occurred established that the laborer entered the house because defendant and another individual forced the laborer to go inside and the laborer feared for the laborer's own life because defendant and the other individual threatened to shoot the laborer if the laborer ran, even though the laborer did not actually see either the defendant, the individual, or even a gun. *Singleton v. State*, 259 Ga. App. 184, 577 S.E.2d 6 (2003).

Evidence was sufficient to support defendant's conviction for kidnapping since defendant attempted to choke the victim, the victim's parent found defendant holding the victim wrapped in a sheet, and the parent identified defendant as the kidnapper in a photographic lineup. *Palmer v. State*, 260 Ga. App. 670, 580 S.E.2d 539 (2003).

Evidence was sufficient to support defendant's convictions of two counts of armed robbery, two counts of theft by taking, three counts of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2), three counts of simple battery, three counts of kidnapping, and two counts of possessing a firearm during the commission of a crime since: (1) there was evidence that defendant entered a store, placed a knife to the neck of one of the three victims, forced that victim to the back of the store, aided another assailant who was armed with a gun to bind the victims and drag them to the back of the store, and stole money and other items from two of the victims; (2) defendant confessed to the crimes during interviews with law enforcement officials; and (3) defendant's confessions were corroborated by the testimony of one of the victims who, despite earlier being unable to identify the robbers, ultimately identified defendant as one of the robbers. The corroborating victim's initial inability to identify defendant posed an issue of credibility for the jury's resolution and did not require reversal. *Phanamixay v. State*, 260 Ga. App. 177, 581 S.E.2d 286 (2003).

Evidence was sufficient to support defendant's convictions of rape, kidnapping,

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burglary, and aggravated assault since: (1) the victim testified that the victim discovered a strange person in the victim's den who grabbed the victim as the victim tried to run away, that the person held a knife to the victim's face and told the victim that the person would kill the victim if the victim screamed, that person then forced the victim to go from room to room in the victim's home to turn out the lights, and that the person then raped the victim; (2) the victim identified defendant as the victim's attacker after hearing the defendant's voice; and (3) a DNA analyst testified that, with a probability of error of one in a trillion, DNA from defendant's blood matched the DNA found in vaginal swabs that were taken from the victim. *McKinney v. State*, 261 Ga. App. 218, 582 S.E.2d 463 (2003).

Evidence was sufficient to find defendant guilty of armed robbery, kidnapping, and possession of a firearm during the commission of a felony, where defendant directed victim at gunpoint to walk toward a cash machine that could be used with the cash card in the victim's wallet, and where both the victim and a bystander had opportunities to view defendant. *Wade v. State*, 261 Ga. App. 587, 583 S.E.2d 251 (2003).

Evidence in the form of testimony from defendant's accomplices that defendant repeatedly struck the victim in the face while asking the victim "where the money was" and choked the victim when the victim could not immediately find the money in the victim's truck after defendant took the victim to the truck because the victim told defendant that the money was there, coupled with defendant's possession of the victim's beeper, was sufficient to sustain defendant's convictions for robbery, kidnapping with bodily injury, and aggravated battery. *Rutledge v. State*, 263 Ga. App. 308, 587 S.E.2d 808 (2003).

When the defendant participated in a carjacking, drove the victim's car from the scene of a murder, asked the defendant's love interest to lie about the defendant's whereabouts, and lied repeatedly to the police about what happened, a jury was free to conclude that the defendant partic-

ipated in an armed robbery and kidnapping as an accomplice under O.C.G.A. §§ 16-2-20(a), 16-5-40(a), and 16-8-41(a); thus, the trial court did not err in denying a directed verdict. *Owens v. State*, 263 Ga. App. 478, 588 S.E.2d 265 (2003).

Evidence was sufficient to support defendant's conviction for kidnapping as the evidence showed that defendant shot the victim in the chest and then helped load the victim in another person's car, which was then driven to another location where the person was shot to death. *Conaway v. State*, 277 Ga. 422, 589 S.E.2d 108 (2003).

Evidence was sufficient to support defendant's conviction of malice murder, felony murder, burglary, aggravated assault, kidnapping with bodily injury, and possession of a firearm during the commission of a felony where defendant: (1) planned the defendant's crimes, and was armed with a gun and handcuffs; (2) broke into the defendant's in-laws' house after severing their phone line; (3) shot and killed the defendant's father-in-law and wounded the defendant's mother-in-law while they lay in bed; (4) handcuffed the defendant's bleeding mother-in-law to the mother-in-law's nine-year-old child and left them tethered to a bed rail in a room with the dead father-in-law and defendant's two-year-old child; and (5) abducted the defendant's estranged spouse and the spouse's 17-year-old sibling to a mobile home where the defendant made them take showers while the defendant watched, and then raped them both. *Sallie v. State*, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

Evidence was sufficient to support all but one of defendant's convictions for burglary, kidnapping, aggravated assault, and possession of a firearm during the commission of a crime because the testimony of the three shooting victims was entirely consistent in all material respects, and any conflicts in the witnesses' testimony raised a credibility issue for jury resolution. *Squires v. State*, 265 Ga. App. 673, 595 S.E.2d 547 (2004).

Since defendant's spouse testified that after taping the spouse's wrists together, the defendant forced the spouse into the car against the spouse's will and that

while driving, the defendant backhanded the spouse on the spouse's face three or four times and "hit me upside my head across my face" with the defendant's forearm, a rational trier of fact could have found beyond a reasonable doubt that defendant committed the offense of kidnapping with bodily injury. *Carter v. State*, 268 Ga. App. 688, 603 S.E.2d 56 (2004).

Evidence was sufficient to support burglary, aggravated assault, kidnapping, false imprisonment, and armed robbery convictions where one of the victims opened the door to the victim's home when the victim recognized one of defendant's accomplices, where defendant and another then pushed the door open and rushed inside, and where defendant grabbed the first victim, pointed a gun at the first victim's head, took money from the second victim's wallet, kept the gun pointed at both victims during the entire incident, ripped the telephone cord out of the wall, and instructed the accomplices to bind and blindfold the victims, which they did; the victims both identified defendant as the gunman from a police photo array, plus made an in-court identification at trial, and any conflict between the victims' testimony that the gunman had a tattoo on the gunman's arm and a trial demonstration revealing no tattoo on defendant's arm was a matter for the jury to resolve and did not affect the sufficiency of the identification. *Kates v. State*, 269 Ga. App. 8, 603 S.E.2d 342 (2004).

Evidence supported defendant's robbery by intimidation and false imprisonment convictions and codefendant's armed robbery and kidnapping with bodily injury convictions as defendant lured the victim to defendant's apartment where codefendant struck the victim in the back of the head and robbed the victim at gunpoint. *Smith v. State*, 269 Ga. App. 133, 603 S.E.2d 445 (2004).

When the defendant's victim identified the defendant from a photo lineup and at trial as the person who forced the victim to open the vaults in the fast-food restaurant where the victim worked, then duct-taped the victim's limbs and repeatedly struck the victim as the victim lay face down on the floor, the evidence was

sufficient beyond a reasonable doubt to allow the jury to convict the defendant of kidnapping with bodily injury, armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of certain crimes. *Banks v. State*, 269 Ga. App. 653, 605 S.E.2d 47 (2004).

Sufficient evidence, including testimony from the child victim identifying defendant's vehicle, evidence of defendant's DNA matching that of the victim and expert testimony that the frequency of such occurrence was approximately one in two billion in the Caucasian population, and similar transaction evidence, supported defendant's kidnapping with bodily injury, rape, aggravated sodomy, aggravated child molestation, aggravated assault, and first-degree cruelty to children convictions. *Morita v. State*, 270 Ga. App. 372, 606 S.E.2d 595 (2004).

Defendant's multiple convictions for armed robbery, aggravated assault, kidnapping, possessing a firearm during the commission of a felony, burglary, and kidnapping with bodily injury, were supported by sufficient evidence because the defendant and another robbed a store while holding the two owners at gunpoint, defendant led police on a high-speed car chase, and the defendant broke into and robbed two homes, one of which had an occupant that defendant beat; only one store owner's testimony was needed to establish the facts to support the aggravated assault conviction. *Owens v. State*, 271 Ga. App. 365, 609 S.E.2d 670 (2005).

Sufficient evidence supported the defendant's convictions of armed robbery, burglary, possession of a firearm during the commission of a crime, and three counts of kidnapping arising from an incident in which the defendant and a companion robbed the defendant's victim at gunpoint, then forced the victim and the victim's children into their house and tied the victim up with duct tape; the victim identified the defendant from a photo line-up, the defendant's fingerprints were found at the scene, a store video showed the defendant buying the duct tape which was used, and the store manager identified the defendant as the buyer of the duct tape. *Brownlee v. State*, 271 Ga. App. 475, 610 S.E.2d 118 (2005).

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Evidence was sufficient to allow a rational finder of fact to convict defendant of kidnapping, three counts of armed robbery, and two firearms offenses beyond a reasonable doubt because defendant committed the crimes at a restaurant where defendant was a regular customer, so the victims were able to identify defendant to police, a neutral witness saw defendant hurrying away from the direction of the restaurant right after the time of the robbery, and, when defendant was arrested, new clothes and receipts dated after the robbery were discovered. *Strahan v. State*, 273 Ga. App. 116, 614 S.E.2d 227 (2005).

Evidence supported defendant's conviction for armed robbery, kidnapping, and aggravated assault as, notwithstanding the absence of an in-court identification of defendant and the state's failure to present fingerprint evidence, a victim's testimony concerning the victim's on-the-scene identification supported the finding that defendant perpetrated the crimes; there was also sufficient evidence that the cash seized from defendant's love interest's house had been put there by defendant. *Oliver v. State*, 273 Ga. App. 754, 615 S.E.2d 846 (2005).

Evidence, including a gun and penny wrappers and a green coin basket found in defendant's bedroom, was sufficient for a rational trier of fact to find defendant guilty beyond a reasonable doubt of armed robbery and kidnapping after a restaurant was robbed; the basket matched a basket used by the restaurant and the pennies had been exchanged at the same bank that supplied the restaurant. *Brown v. State*, 275 Ga. App. 66, 619 S.E.2d 759 (2005).

Defendant's convictions for aggravated assault, aggravated battery, kidnapping with bodily injury, and possession of a knife during the commission of a felony, in violation of O.C.G.A. §§ 16-5-21(a)(2), 16-5-24, 16-5-40, and 16-11-106, respectively, were supported by the evidence, as defendant was engaged in a domestic dispute with defendant's spouse and child, wherein defendant argued, threatened to kill them, and locked them in a bathroom,

punched and hit the spouse, and stabbed them each multiple times with a decorative sword that defendant removed from the wall; there was sufficient evidence to show that defendant did not stab them in the midst of a struggle over possession of the sword, but instead, that defendant intended to stab or cut them. *Brown v. State*, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

Defendant's convictions for armed robbery, kidnapping, and kidnapping with bodily injury, in violation of O.C.G.A. §§ 16-8-41 and 16-5-40, respectively, were supported by sufficient evidence, as defendant robbed a restaurant manager at gunpoint, forced the manager and others into the restaurant freezer, and defendant caused injury and made threats to the victims; defendant's claim that defendant was forced against defendant's will to participate in the crime, which was also committed by three codefendants, was not found credible, and several victims testified that defendant not only held a gun, but that defendant also threatened them with bodily harm if they did not cooperate. *Isaac v. State*, 275 Ga. App. 254, 620 S.E.2d 483 (2005).

Because the weight to be given eyewitness testimony about the victim's fear, resistance, and attempts to escape was for the jury to decide, the evidence was sufficient to find defendant guilty of kidnapping. *Carter v. State*, 275 Ga. App. 483, 621 S.E.2d 503 (2005).

Trial court's denial of defendant's motion for acquittal, pursuant to O.C.G.A. § 17-9-1, was proper, as there was sufficient evidence to support defendant's convictions for kidnapping, rape, and robbery by intimidation, in violation of O.C.G.A. §§ 16-5-40, 16-6-1, and 16-8-41, respectively, because the victim positively identified defendant upon the arrest and at trial, there was similar transaction evidence from another victim who was approached and threatened in the same manner, and there was also corroborative physical evidence; defendant threatened the victim, who was at a bus stop, with a gun, robbed the victim, forced the victim to a storage area in a garage, and raped the victim. *Sims v. State*, 275 Ga. App. 836, 621 S.E.2d 869 (2005).

Evidence regarding defendant's forcing the defendant's love interest down a street and stabbing the defendant's love interest, sustained the convictions for kidnapping with bodily injury. *Smith v. State*, 276 Ga. App. 41, 622 S.E.2d 413 (2005).

Evidence was sufficient to support defendant's conviction for malice murder, felony murder during the commission of a kidnapping, and kidnapping because defendant refused to turn the car around or to stop and let the victim exit the car; after the victim grabbed the steering wheel and fled the car, defendant shot the victim, fatally. *Pruitt v. State*, 279 Ga. 140, 611 S.E.2d 47, cert. denied, 546 U.S. 866, 126 S. Ct. 165, 163 L. Ed. 2d 152 (2005).

Evidence that defendant took money from the one man, beat the man while doing so, that defendant was armed at the time, that defendant had the victim removed from defendant's house by the co-defendants so that the one victim could be murdered elsewhere, and that the second victim was removed from defendant's house by another codefendant, all after the one victim and the second victim were suspected of plotting to rob defendant, who was selling illegal drugs from defendant's home, was sufficient to support defendant's convictions for malice murder, kidnapping, armed robbery, and being in possession of a firearm during the commission of a felony. *Mason v. State*, 279 Ga. 636, 619 S.E.2d 621 (2005).

Sufficient evidence supported convictions for aggravated assault, kidnapping, armed robbery, and possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106, even though none of the victims could identify the defendant as the gunman in the robbery due to the fact that the defendant wore a mask, because defendant was found shortly after the robbery with cash, weapons, a ski mask, a car and clothing matching the victims' description; surveillance videotape of the robbery was shown to the jury to determine whether defendant was the person on the videotape. *Johnson v. State*, 277 Ga. App. 41, 625 S.E.2d 411 (2005).

Convictions for kidnapping, aggravated assault, and malice murder, in violation of O.C.G.A. §§ 16-5-40, 16-5-21, and 16-5-1,

respectively, were supported by sufficient evidence when defendant got into a dispute with the victim over a drug deal, defendant and the codefendants kidnapped the victim, drove the victim to a remote area, and shot the victim several times. *Morris v. State*, 280 Ga. 179, 626 S.E.2d 123 (2006).

Despite the victim's recantation of the events that occurred leading up to the rape, kidnapping, and aggravated assault committed by defendant, the evidence presented of the victim's statements and the testimony of the other state witnesses and medical personnel as to the extent of the victim's injuries, was sufficient to support the convictions. *Hambrick v. State*, 278 Ga. App. 768, 629 S.E.2d 442 (2006).

Victim's testimony that the victim did not voluntarily walk to the bathroom where the victim was found, after defendant attacked the victim, and evidence that there was blood spattered in a hallway and on the bathroom cabinet and walls, that the victim's body was found wedged between a bathtub and toilet with ceramic pieces from the toilet base embedded in the victim's scalp and an electrical cord tied around the victim's neck, allowed a jury to find that the defendant forced the victim, who may have been unconscious, into the bathroom, pushed the victim's head into the toilet base and choked the victim with an electrical cord, and this was sufficient to convict defendant of kidnapping with bodily injury, under O.C.G.A. §§ 16-5-40(a) and 16-5-40(b). *Nelson v. State*, 278 Ga. App. 548, 629 S.E.2d 410 (2006).

Testimony of a single witness was sufficient to establish a fact under O.C.G.A. § 24-4-8, and defendant's convictions for kidnapping, burglary, aggravated sodomy, rape, and false imprisonment were supported by sufficient evidence where the victim testified that defendant forced the victim into a train boxcar, threatened to kill the victim, and had vaginal and oral sex with the victim against the victim's will and without the victim's consent; there was also circumstantial evidence showing the victim's lack of consent, including the victim's fleeing from the boxcar while naked, the victim's outcry to a train engineer that the victim had been

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raped, and the victim's injuries. *Davis v. State*, 278 Ga. App. 628, 629 S.E.2d 537 (2006).

Conviction of kidnapping, O.C.G.A. § 16-5-40, was supported by sufficient evidence, including testimony from the victim that the defendant forced the victim into the defendant's car at gunpoint, then drove the victim to various locations, sexually assaulted the victim, knocked the victim unconscious, grabbed the victim by the neck when the victim tried to leave the defendant's presence, strangled the victim to the point that the victim passed out, and put the victim in the trunk of the defendant's car. *Moody v. State*, 279 Ga. App. 440, 631 S.E.2d 485 (2006).

Convictions for kidnapping and aggravated assault were supported by sufficient evidence, including testimony from the victim that, when the victim stopped the victim's car at a stop sign, the defendant jumped in the car, held a knife to the victim's throat and demanded money, that, as the victim drove, the defendant held the knife on the victim and continued to demand money, that, when the victim spotted a police station, the victim sped into its parking lot, at which point, the defendant fled on foot. *Adcock v. State*, 279 Ga. App. 473, 631 S.E.2d 494 (2006).

In a case in which the victim was allegedly bound and beaten by the defendant and thrown into a camper, which the defendant towed to a motel, the victim's testimony was sufficient to support a conviction for kidnapping with bodily injury under O.C.G.A. § 16-5-40, as the testimony of a single witness was all that was necessary under O.C.G.A. § 24-4-8. *Johnson v. State*, 281 Ga. App. 7, 635 S.E.2d 278 (2006).

Convictions for kidnapping, aggravated sexual battery, sexual battery, and attempted rape were all upheld on appeal, as a photo lineup was not impermissibly suggestive, similar transaction evidence was properly admitted, the defendant had notice of the evidence, and the jury was authorized to find the victim credible and to accept the victim's testimony; hence, a rational trier of fact could have found from the evidence presented that the defendant

committed the charged crimes beyond a reasonable doubt. *Watley v. State*, 281 Ga. App. 244, 635 S.E.2d 857 (2006).

Because sufficient evidence showed that the defendant, by posing as a police officer and driving the victims to remote locations, used fear and intimidation to ensure that said victims would cooperate and agree to have sex, the defendant was not entitled to an acquittal as to the charges of impersonating an officer, aggravated sodomy, attempted aggravated sodomy, aggravated assault and rape; furthermore, though both victims willingly got into the defendant's car, after the victims pleaded to be let go and the defendant refused to grant those pleas, said act amounted to a kidnapping. *Dasher v. State*, 281 Ga. App. 326, 636 S.E.2d 83 (2006).

Based on the evidence provided by a defendant that: (1) the defendant and others severely beat the victim over a drug debt; (2) the victim wanted a ride back to a bar, but the codefendants would not allow it; (3) the defendant's former love interest testified that the defendant admitted to killing the victim; and (4) the state introduced similar transaction evidence that the defendant stood by while a codefendant savagely beat another person, the defendant's kidnapping conviction was upheld on appeal and the jury was authorized to find that the victim was involuntarily held, and that the defendant was a party to that crime. *Reagan v. State*, 281 Ga. App. 708, 637 S.E.2d 113 (2006).

Evidence was sufficient to support a defendant's conviction for kidnapping as the asportation element was shown by evidence that the defendant dragged the victim toward an open window, outside of which the defendant's truck waited with an open passenger door; evidence the defendant dragged the victim a few feet was sufficient to support the kidnapping with bodily injury conviction. *Ellis v. State*, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, 2007 Ga. LEXIS 66 (2007).

Sufficient evidence supported the defendant's convictions of enticing a child for indecent purposes under O.C.G.A. § 16-6-5(a) and kidnapping under O.C.G.A. § 16-5-40(a); the victim testified that the defendant carried the victim into

the defendant's bedroom and would not allow the victim to leave until the defendant had finished abusing the victim. *Anderson v. State*, 282 Ga. App. 58, 637 S.E.2d 790 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Evidence was sufficient to sustain a defendant's convictions for a total of 20 counts of armed robbery, possessing a firearm during the commission of a crime, terroristic threats and acts, kidnapping, and aggravated assault arising out of four separate robberies because the victims' testimony, the physical evidence, and one victim's identification of the defendant as the robber provided sufficient corroboration of the testimony of the defendant's accomplice. *Metoyer v. State*, 282 Ga. App. 810, 640 S.E.2d 345 (2006).

Pictures of a defendant withdrawing money from a victim's ATM account and evidence that the defendant repeatedly asked the victim for the PIN number for the victim's ATM card, held a knife to the victim's neck, cut the cord used to tie the victim, and had cash, an ATM receipt, and the victim's car keys when the defendant was arrested were sufficient to support the defendant's convictions for armed robbery, two counts of aggravated assault, kidnapping with bodily injury, and two counts of possessing a knife during the commission of a crime. *Wright v. State*, 282 Ga. App. 649, 639 S.E.2d 581 (2006).

Defendant's claim on appeal that convictions for aggravated assault and kidnapping had to be reversed because the victim's testimony was unworthy of belief lacked merit, as it was the role of the fact finder, not the appellate court, to determine whether a witness was credible; moreover, the testimony of the victim alone was sufficient to support a finding of guilt. *Bragg v. State*, 285 Ga. App. 408, 646 S.E.2d 508 (2007).

There was sufficient evidence to support a kidnapping conviction since having the victim sit in a chair so that the defendant could tape the victim's hands, then moving the victim to a mattress so that the defendant could tape the victim's feet, sufficed to show asportation; further, testimony that the victim had a red mark on a cheek, puffiness and redness around the

eyes and ears, and red marks where the victim had been bound, sufficed to show physical injury during the kidnapping. *Phillips v. State*, 284 Ga. App. 683, 644 S.E.2d 535 (2007).

Evidence supported the defendant's convictions of malice murder, two counts of felony murder, kidnapping with bodily injury, two counts of armed robbery, and aggravated battery since: the defendant had been seen fleeing the victim's home in a car registered to the defendant; the defendant told the defendant's spouse to discard the defendant's bloody clothing; the defendant sought treatment at a hospital after being shot during the crimes; and the defendant had initiated conversations in which the defendant described the actions of the defendant's companions in discarding guns used in the crimes and offered to reveal the names of the companions in exchange for not being charged with murder. *Davis v. State*, 281 Ga. 871, 644 S.E.2d 113 (2007).

There was sufficient evidence to support the defendant's convictions of child molestation, kidnapping with bodily injury, kidnapping, and aggravated assault, when the defendant, who lived with an ex-girlfriend and her teenage daughter, called them into a bedroom and bound the ex-girlfriend's arms, legs, and mouth with duct tape, threatened the women with a hatchet, and led the daughter to another bedroom where the defendant duct-taped her hands and feet and forced her to have intercourse with him. *Phillips v. State*, 284 Ga. App. 683, 644 S.E.2d 535 (2007).

Evidence supported a kidnapping conviction when, although the victim got into a car with the defendant willingly, the defendant then held a gun to the victim's face and forced the victim to drive with the defendant to a remote area, shot the victim in the toe after the victim jumped out of the moving car, dragged the victim back into the car, and forced the victim at gunpoint to return to and stay in the defendant's home. *Winfrey v. State*, 286 Ga. App. 450, 649 S.E.2d 561 (2007).

Because sufficient evidence was presented consisting of the victim's identification of the defendant as the perpetrator of a burglary, who threatened the victim with a sharp, knife-like letter opener, forc-

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ing the victim into a closet, and stealing the victim's camera upon fleeing, sufficient evidence supported the defendant's burglary, armed robbery, aggravated assault, and kidnapping convictions. Bryant v. State, 286 Ga. App. 493, 649 S.E.2d 597 (2007).

In a case where a 12-year-old victim testified that the victim was watching television in the den when the victim heard a loud noise in the garage and went to investigate, and the perpetrators subsequently moved the victim into the living room where the victim was kept under guard while the house was ransacked and the victim's mother was sexually molested, sufficient evidence existed to support the jury's conclusion that the defendant was guilty of kidnapping; only the slightest movement of the victim was required to constitute the necessary element of asportation. Allen v. State, 286 Ga. App. 82, 648 S.E.2d 677 (2007).

Legally sufficient evidence existed to convict the defendant of kidnapping under O.C.G.A. § 16-5-40 because the movement of the victim, who was handcuffed in a bathroom of the apartment the victim shared with the defendant, from the bathroom to the closet, although slight, met the requirement of the element of asportation. Austin v. State, 286 Ga. App. 149, 648 S.E.2d 414 (2007), cert. denied, 2007 Ga. LEXIS 687 (Ga. 2007).

Because the eyewitness testimony showed that the defendant pushed, pulled, and then carried the victim out of a restaurant as the victim yelled for a co-worker to call the police, and which was direct, not circumstantial, evidence that the victim did not go with the defendant willingly, sufficient evidence supported the defendant's kidnapping conviction. Holden v. State, 287 Ga. App. 472, 651 S.E.2d 552 (2007), cert. denied, 2008 Ga. LEXIS 153 (Ga. 2008).

There was no merit to the defendant's argument that the evidence did not support a kidnapping conviction because the victim had failed to take advantage of several escape opportunities; the victim had testified that the victim did not try to escape before convincing the defendant to

go to a fast-food restaurant because the victim feared that if the victim tried to escape in a deserted area, the defendant would catch the victim and beat the victim to death, and furthermore the jury could determine that once the defendant refused the victim's offer of the victim's money in exchange for the defendant's agreement to let the victim go, the crime of kidnapping had been completed. Smith v. State, 287 Ga. App. 222, 651 S.E.2d 133 (2007).

Defendant persuaded victims' parents that defendant was going to get defendant's own children from school and then take all of the children, including the victims, back to defendant's house to play, but instead defendant took the victims to defendant's house, while no one else was there and tied them up; thus, defendant's actions in deceiving the parents to give their permission and in inducing the children to go with defendant constituted an abduction within the meaning of O.C.G.A. § 16-5-40(a). Ayers v. State, 286 Ga. App. 898, 650 S.E.2d 370 (2007), cert. denied, 2008 Ga. LEXIS 117 (Ga. 2008).

There was sufficient evidence to support a defendant's convictions of malice murder, armed robbery, kidnapping, third-degree arson, burglary, and possession of a firearm during the commission of a crime when the evidence showed that the defendant made the defendant's accomplice shoot a convenience store clerk after the defendant forced the clerk at gunpoint into a wooded area, took money from a cash register in the store, and started a fire in the store. The accomplice's testimony was sufficiently corroborated by the defendant's admission that the defendant owned the shotgun that was used in the shooting, the defendant's admission that the defendant gave the shotgun to the accomplice, the testimony of a third person that the accomplice gave the third person the shotgun after the robbery, and the fact that shotgun shells found in the defendant's home matched shells taken from the clerk's body. Judkins v. State, 282 Ga. 580, 652 S.E.2d 537 (2007).

Evidence was sufficient to support the defendant's convictions as a party to malice murder, felony murder, kidnapping

with bodily injury, false imprisonment, and aggravated assault since: the victim, who claimed to have been robbed of money the defendant and a codefendant gave the victim for drugs, had been made to drive around while a codefendant pointed a gun at the victim; the victim was later taken to an apartment where the victim was threatened and pistol-whipped; the victim was taken out of the apartment, forced into some woods, and fatally shot; and following the killing, the defendant and a codefendant moved the victim's car from the apartment complex to a parking lot where the defendant and others had met the victim earlier that evening. *John v. State*, 282 Ga. 792, 653 S.E.2d 435 (2007).

Evidence was sufficient to support the defendant's convictions of armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and kidnapping under O.C.G.A. §§ 16-8-41, 16-5-21, 16-5-40, and 16-11-106 as: (1) a robber ordered two store employees at gunpoint to give the robber money, then ordered the employees to go into a back room; (2) the employees described the robber and the robber's vehicle in detail; (3) the employees positively identified the defendant as the robber 15 to 20 minutes after the crime following a pursuit during which the defendant fled from police first in the defendant's vehicle, then on foot; and (4) the defendant had \$281 in a pocket at the time of arrest. *Lenon v. State*, 290 Ga. App. 626, 660 S.E.2d 16 (2008).

Evidence including the victim's testimony of being dragged out of the victim's car into a house and tied up before the victim escaped bonds and broke a window, photographs of the victim's injuries, a broken window, bullets found in defendant's car, and items identified by the victim as being used by the robbers, supported a kidnapping conviction; credibility of witnesses was a question for the jury and the fact that the defendant was acquitted of related charges did not require reversal as that verdict might reflect a compromise or lenity rather than inconsistent factual conclusions. *Rogers v. State*, 291 Ga. App. 202, 661 S.E.2d 615 (2008).

In defendant's convictions for armed robbery, kidnapping, and aggravated as-

sault in connection with robbery of a fast food restaurant, sufficient evidence existed to support defendant's convictions based on a restaurant employee identifying defendant as one of two perpetrators who confronted that employee and manager at gunpoint and threatened to shoot if the victims did not comply with defendant's demand for money; also, evidence showed that defendant forced the manager out of the manager's car at gunpoint, ordered the manager back across the parking lot and into the restaurant, and stole over \$300 from the restaurant's safe as well as a cellular phone before fleeing. *Holsey v. State*, 291 Ga. App. 216, 661 S.E.2d 621 (2008).

Evidence supported the defendant's convictions of burglary, kidnapping with bodily injury, rape, aggravated assault, robbery, and theft by taking when a treating physician stated that the 86-year-old victim's injuries, including blood inside her vagina and bruises and contusions on her vagina, were consistent with forcible penetration; when the defendant admitted entering the victim's home, removing her clothing, restraining her with electrical cords, hitting her, putting a plastic bag over her head, forcing her from one room to another, and taking her money and her car; and when DNA from the defendant matched the DNA of two hair roots found on the victim's living room floor. *Smith v. State*, 291 Ga. App. 545, 662 S.E.2d 323 (2008).

Brandishing a gun, a masked individual moved a wheelchair-bound restaurant manager to a hidden safe and ordered the manager to open the safe. The manager's identification of the perpetrator as the defendant, a former employee, from the defendant's distinctive voice, and the perpetrator's knowledge of the safe's location, authorized the jury to find defendant guilty of kidnapping by moving the victim's wheelchair towards the safe. *Johnson v. State*, 293 Ga. App. 728, 667 S.E.2d 637 (2008).

Evidence was sufficient to support a kidnapping conviction when the defendant shot the defendant's child's mother and then took the child from the home where the child lived with the mother. Because there was evidence that the child

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was born out of wedlock and was not legitimated, the defendant had no right to lawful custody of the child and thus had no authority to take the child; furthermore, the facts and circumstances of the bloody and violent incident, parts of which took place in the child's bedroom, supported the inference that the child was taken from the home against the child's will. *Allen v. State*, 284 Ga. 310, 667 S.E.2d 54 (2008).

Evidence was sufficient to support a kidnapping conviction when there was evidence that the defendant grabbed the victim by the hair and dragged the victim into or toward some woods against the victim's will. *Eller v. State*, 294 Ga. App. 77, 668 S.E.2d 755 (2008).

There was sufficient evidence to uphold a defendant's convictions for aggravated sodomy and kidnapping based on the testimony of the victim; who identified the defendant as the attacker who forced the victim into a vehicle by threat of a knife; there was evidence of various injuries on the victim consistent with the victim's description of the attack; the defendant admitted to having sexual intercourse with the victim but asserted that the intercourse was consensual; and forensic biologists testified as state expert witnesses that the swab of the victim's rectal cavity contained sperm and that DNA found on that swab matched DNA from the defendant's blood sample. *Smith v. State*, 294 Ga. App. 692, 670 S.E.2d 191 (2008).

Victim's uncorroborated testimony that the defendant entered the victim's home by removing the back door from its hinges, ordered the victim at gunpoint to get in the defendant's truck, and did not bring the victim back home for hours was sufficient to convict the defendant of burglary and kidnapping. *Hollis v. State*, 295 Ga. App. 529, 672 S.E.2d 487 (2009).

Evidence that a defendant moved the victim from the victim's vehicle to a house and then from the house to the garage against the victim's will was sufficient evidence to support the defendant's conviction for kidnapping. Likewise, the victim's testimony that the defendant took

the victim into the house and tied the victim's hands against the victim's will was sufficient evidence to support the defendant's conviction for false imprisonment. *Cornette v. State*, 295 Ga. App. 877, 673 S.E.2d 531 (2009).

Evidence that a defendant falsely induced his victim to get into the defendant's car and to go to the defendant's home where, instead of fixing a promised meal, the defendant attempted to rape the victim, satisfied the asportation element of a kidnapping charge and was sufficient to support the defendant's conviction on the kidnapping charge beyond a reasonable doubt. *Manning v. State*, 296 Ga. App. 376, 674 S.E.2d 408 (2009).

Evidence supported the defendant's conviction for kidnapping even if the defendant initially abducted the victim in order to facilitate robbing the victim since the evidence would support a finding that the defendant held the victim for a significant period after the initial assault and robbery were completed. Not only did the victim's detention in a car make it easier for the defendant to commit the assault and robbery, it also placed the victim at risk of physical harm from the driver's intoxicated state. *Epps v. State*, 297 Ga. App. 66, 676 S.E.2d 791 (2009).

Evidence supported the defendant's convictions of armed robbery, kidnapping, possession of a firearm during the commission of a crime, and financial transaction card fraud. Shortly after a man called the store where the victim worked to see if the store was open, a masked man with a gun came into the store, ordered the victim to the back, and then robbed the store and took the victim's credit cards; soon afterward that same morning, the defendant bought sneakers with the victim's credit card; the clerk who sold the defendant the sneakers identified the defendant at trial and in a photographic lineup and testified that the clerk knew the defendant because the defendant was a regular customer; and the defendant's cell phone records showed that just before the robbery, the defendant called the victim's store and blocked the defendant's number. *Anderson v. State*, 297 Ga. App. 733, 678 S.E.2d 498 (2009), aff'd, 287 Ga. 159, 695 S.E.2d 26 (Ga. 2010).

Following evidence was sufficient to convict the defendant of kidnapping with bodily injury, aggravated sodomy, rape, and robbery by intimidation: 1) the victim's testimony of being repeatedly raped by the defendant at knife point, forced to perform oral sex, beaten, robbed, and threatened with death; 2) a nurse's testimony that the victim was crying, rocking back and forth, and had bruised cheeks; and 3) evidence that the defendant's DNA matched sperm cell DNA found on the victim's body. *Sanders v. State*, 297 Ga. App. 897, 678 S.E.2d 579 (2009).

Sufficient evidence supported the defendant's convictions of armed robbery, O.C.G.A. § 16-8-41(a), rape, O.C.G.A. § 16-6-1(a)(1), aggravated assault, O.C.G.A. § 16-5-21(a)(2), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), kidnapping, O.C.G.A. § 16-5-40(a), and aggravated sodomy, O.C.G.A. § 16-6-2(a)(2) involving four different victims on three separate dates; both the husband and the wife, the victims in the first criminal incident, identified the defendant in court as the perpetrator of the crimes. Two separate DNA analyses testified to by two forensic biologists showed that the defendant's sperm was present in the vaginas of the other two female victims. *Robins v. State*, 298 Ga. App. 70, 679 S.E.2d 92 (2009).

Defendant's conviction for kidnapping with injury under O.C.G.A. § 16-5-40(b)(4) was supported by evidence that the defendant helped the codefendant load up the victim into the back of the codefendant's pickup truck so that the victim could be driven to a different location and that the victim suffered many injuries during the kidnapping. *Wilkinson v. State*, 298 Ga. App. 190, 679 S.E.2d 766 (2009).

Because defendant moved the victim from a closet to the dining room and then took the victim in a car after assaulting the victim, either scenario argued by the state supported a kidnapping conviction under O.C.G.A. § 16-5-40. *Horne v. State*, 298 Ga. App. 601, 680 S.E.2d 616 (2009), cert. denied, No. S09C1835, 2010 Ga. LEXIS 46 (Ga. 2010).

Evidence was sufficient to convict the defendant of armed robbery and kidnap-

ping as a store clerk testified that the defendant, brandishing a knife, ordered the clerk to open the cash register; that the defendant took money from the register; that the defendant forced the clerk into a bathroom, blocked the door with boxes, and fled. Further, both the clerk and a customer identified the defendant from a photo lineup and at trial. *Hill v. State*, 298 Ga. App. 677, 680 S.E.2d 702 (2009).

As witnesses made in-court identifications of the defendant, and the codefendant's statements to police placed the defendant at the scene of the kidnapping of the victim in Georgia and the shooting of the victim in South Carolina, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt of kidnapping with bodily injury. *Hunsberger v. State*, 299 Ga. App. 593, 683 S.E.2d 150 (2009).

Defendant's convictions for kidnapping, hijacking a motor vehicle, armed robbery, possession of a firearm during the commission of a felony, carrying a concealed weapon, and possession of a weapon on school property were authorized because pursuant to O.C.G.A. § 24-4-8, the victim's testimony alone established the essential elements of the offenses. *Lester v. State*, No. A10A1665, 2011 Ga. App. LEXIS 310 (Mar. 30, 2011).

When the victim and the victim's two-year-old granddaughter were washing their hands in a department store ladies' restroom when the defendant stormed out of one of the stalls with a stun gun, which the defendant fired into the victim's neck and demanded that the victim join the defendant in the stall and where a violent struggle ensued, with the victim trying to exit the restroom with the victim's granddaughter while the defendant fought with the victim and cut the victim with a knife in trying to prevent the victim from leaving, the evidence was sufficient to establish the asportation element of kidnapping under O.C.G.A. § 16-5-40(a) because the defendant moved the victim in trying to force the victim into the bathroom stall and away from the bathroom exit; the movement enhanced the defendant's control over both victims by substantially isolating the

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victims from the protection of rescuers who were trying to reach the victims on the other side of the door. However, the trial court erred in failing to instruct the jury on the lesser-included offense of false imprisonment under O.C.G.A. § 16-5-41(a) because the elements of the two crimes were the same except that kidnapping also required the element of asportation, and the jury could have found that element lacking. *Hall v. State*, No. A10A2226, 2011 Ga. App. LEXIS 296 (Mar. 28, 2011).

**Evidence sufficient to support juvenile's delinquency adjudication.** — Pursuant to O.C.G.A. § 24-4-8, defendant juvenile's statements to the police corroborated an accomplice's testimony that the juvenile struck a woman unconscious, caused her serious bodily injury, used force to steal her pocketbook, and dragged her down onto her front yard; accordingly, the evidence was sufficient to adjudicate the juvenile delinquent under O.C.G.A. §§ 16-5-21(a)(2), 16-5-40(a), and 16-8-40(a)(1). *In re D. T.*, 294 Ga. App. 486, 669 S.E.2d 471 (2008).

**Evidence insufficient to support conviction.** — See *Gibson v. State*, 233 Ga. App. 838, 505 S.E.2d 63 (1998).

Evidence was insufficient to support one of defendant's kidnapping convictions as there was no evidence that the younger sibling was moved against the sibling's will and, thus, the state failed to prove the asportation element of kidnapping; the only evidence was the sibling's testimony that the sibling "somehow" got into the house and, when asked why the sibling was in the kitchen, the sibling testified that it was a natural reaction because the other sibling was being choked in there. *Squires v. State*, 265 Ga. App. 673, 595 S.E.2d 547 (2004).

Because no eyewitnesses saw a third defendant participate in an armed robbery, a kidnapping, an aggravated assault, or possess a firearm during the commission of the crimes, and because the third defendant was not implicated by the other defendants, did not confess to the crimes, and did not flee the jurisdiction, the evidence was insufficient to support a

conviction for the third defendant. *Johnson v. State*, 277 Ga. App. 499, 627 S.E.2d 116 (2006).

**Insufficient evidence of asportation.** — Conviction for kidnapping with bodily injury, in violation of O.C.G.A. § 16-5-40(a), was not supported by sufficient evidence of asportation, as the defendant brandished a gun at the victim and attempted to have the victim get into the car but instead, the victim braced the victim's back against the car and refused to move, whereupon a struggle ensued between them and they fell to the ground; such movement of the victim did not constitute asportation, and the trial court erred in denying a motion for a directed verdict pursuant to O.C.G.A. § 17-9-1. *Leppla v. State*, 277 Ga. App. 804, 627 S.E.2d 794 (2006).

Defendant's convictions for armed robbery, aggravated assault, and kidnapping of a couple in a residence were reversed on appeal as evidence that one victim was ordered from a standing to a lying position and that another was dragged around the home was insufficient to establish asportation to support the kidnapping counts since the movement was short in duration and incidental to the crimes of armed robbery and aggravated assault. *Rayshad v. State*, 295 Ga. App. 29, 670 S.E.2d 849 (2008).

Kidnapping conviction under O.C.G.A. § 16-5-40(a) was not supported by the evidence as the asportation element was not met because the victim's movement during a defendant's robbery of a restaurant was brief, occurred during and incidental to the armed robbery, and did not enhance the risk the victim already faced. *Crawford v. State*, 297 Ga. App. 187, 676 S.E.2d 843 (2009).

Evidence was insufficient to support the asportation element of kidnapping. The defendant's movement of the victim, a restaurant manager who was made to open a money cabinet and a cash register, was brief, occurred during and incidental to the armed robbery, and did not enhance significantly the risk the victim already faced as a victim of armed robbery. *Grimes v. State*, 297 Ga. App. 720, 678 S.E.2d 167 (2009).

Evidence was insufficient to establish

the asportation element of kidnapping. The defendant's movement of the victim into a bathroom was of minimal duration; occurred during the defendant's batteries and in furtherance of the batteries; and did not itself present a significant danger to the victim independent of the danger the victim already faced from the defendant's attacks. *Hargrove v. State*, 299 Ga. App. 27, 681 S.E.2d 707 (2009).

Fifteen-foot movement of a jewelry store employee across the floor to the safe, which was located in the same showroom, did not constitute the necessary asportation to support a kidnapping conviction because it was of minimal duration and was incidental to the armed robbery and aggravated assault crimes. *Harper v. State*, 300 Ga. App. 757, 686 S.E.2d 375 (2009).

Evidence that defendant moved the victim from the living room to the bedroom where a safe was located occurred during and was incidental to the offense of armed robbery and therefore was insufficient evidence of asportation; therefore, defendant's kidnapping conviction under O.C.G.A. § 16-5-40(a) was reversed. *Ham v. State*, 303 Ga. App. 232, 692 S.E.2d 828 (2010).

Evidence that, during an armed bank robbery, a defendant moved a bank employee and customer from an office out to the main lobby area of the bank was insufficient evidence of asportation to support defendant's kidnapping convictions because the movement was minimal, did not isolate the victims, and was incidental to the robbery. *Williams v. State*, 304 Ga. App. 787, 697 S.E.2d 911 (2010).

Victim was not moved in a way sufficient to establish asportation and, consequently, kidnapping, because the movement, a push of at most three or four feet, had extremely short duration, the movement occurred during at least three separate offenses, and the movement could be a part of criminal attempt to commit child molestation or cruelty to a child since the push preceded trying to remove a piece of duct tape, which could be used to bind or gag the victim as part of the defendant's effort to molest the child; the push did not present a significant danger to the victim independent of the fact that a person with

a knife and duct tape was already in the stall blocking a sixth-grade girl from leaving. *Kirt v. State*, No. A10A1933, 2011 Ga. App. LEXIS 247 (Mar. 22, 2011).

**Sufficient evidence of asportation.**

— Despite the fact that the defendant helped to drag the victim only 10 feet in order to conceal from sight the act of continuing to beat the victim, the jury was authorized to conclude that such asportation was sufficient to support a conviction for kidnapping. *Scott v. State*, 288 Ga. App. 738, 655 S.E.2d 326 (2007).

In a delinquency adjudication proceeding, sufficient evidence existed for the finding of delinquency for the act of kidnapping because, although the juvenile originally appeared to focus on stealing the victim's car, at one point the juvenile appeared to change plans and grabbed the victim around the waist and began to force the victim toward the victim's residence. When the victim told the juvenile that someone was in the house, the juvenile moved the victim back toward the car and told the victim to get into the car, which was sufficient evidence to establish a kidnapping that was not merely incidental to the other criminal acts. In the Interest of B.A.C., 289 Ga. App. 588, 657 S.E.2d 652 (2008).

As the defendant's forced removal of a child from a visible area to a secluded dark area behind the child's home was not essential to the defendant's molestation itself, but was instead an attempt to isolate the child from protection and rescue, thus increasing the danger the child faced, there was sufficient evidence of asportation to support the defendant's kidnapping conviction. *Flores v. State*, 298 Ga. App. 574, 680 S.E.2d 609 (2009), cert. denied, No. S09C1796, 2010 Ga. LEXIS 27 (Ga. 2010).

Defendant's movement of a clerk from one room to another within a store in the course of an armed robbery was sufficient to establish the asportation element of kidnapping as: 1) the victim's movement was not an inherent part of the robbery as the movement occurred after the robbery had been completed; 2) the movement created an additional danger to the victim by enhancing the defendant's control over the victim; and 3) the movement con-

**Application (Cont'd)**

sealed the victim while allowing the defendant to escape from the scene. *Hill v. State*, 298 Ga. App. 677, 680 S.E.2d 702 (2009).

As physically forcing law firm employees to a room in a more isolated area of the law office showed that their movement was not incidental to any other crime; placed the employees in additional danger by enhancing the defendant's control over the employees; and isolated the employees from protection or rescue, the element of asportation was established and the evidence was sufficient to support the defendant's kidnapping convictions. *Brower v. State*, 298 Ga. App. 699, 680 S.E.2d 859 (2009), cert. denied, No. S09C1845, 2010 Ga. LEXIS 13 (Ga. 2010).

Sufficient evidence supported a conviction of kidnapping, O.C.G.A. § 16-5-40, under circumstances in which, after a drug purchase, the defendant and the victim went to the basement of the home where the defendant lived and there, the defendant, among other things, raped the victim twice and tied the victim to a pole with duct tape; the defendant's movement of the victim after the second alleged rape constituted asportation beyond a reasonable doubt. Although the duration of the movement was minimal, not all elements of the Berry test had to favor the prosecution to prove asportation. *Brashier v. State*, 299 Ga. App. 107, 681 S.E.2d 750 (2009).

During armed robberies, defendant forced the victims into restaurants' walk-in coolers at gunpoint, told the victims not to leave, shut the door, and made the victims stay in the cooler for several minutes. As these actions were not a necessary or inherent part of the robberies, and the actions created additional dangers to the victims by subjecting the victims to cold temperatures, isolating the victims and reducing the victims chance of rescue, and enhancing the defendant's control over the victims, there was sufficient evidence of asportation to support the defendant's kidnapping convictions under O.C.G.A. § 16-5-40. *Verdree v. State*, 299 Ga. App. 673, 683 S.E.2d 632 (2009).

Evidence that, after defendant robbed a fast-food restaurant, the defendant dragged a captive employee from inside the restaurant to an outdoor parking lot was sufficient to prove kidnapping in violation of O.C.G.A. § 16-5-40(a) because the movement of the employee was not part of the robbery and put the employee in substantial additional danger. *Dixon v. State*, 300 Ga. App. 183, 684 S.E.2d 679 (2009).

Evidence was sufficient to establish the asportation element of the crime of kidnapping, O.C.G.A. § 16-5-40(a), because the evidence at trial showed that the defendant dragged the victim from the front to the rear of a house, forced the victim to get into a car, and drove a short distance before the victim escaped and jumped out of the car, and although the duration of the movement was relatively brief, the defendant's asportation of the victim ended only when the victim escaped and fled from the vehicle in fear for the victim's life; while it was arguable that at least some of the movement occurred during the commission of the theft of the victim's car, it was not an inherent part of that separate offense because the defendant did not have to force the victim back into the car in order to take the car, and the defendant's asportation of the victim presented a significant danger to the victim independent of the danger posed by the theft when it isolated the victim from contact with anyone who could have been able to provide help and further enhanced the defendant's control over the victim. *Payne v. State*, 301 Ga. App. 515, 687 S.E.2d 851 (2009).

Evidence of asportation and the remaining elements of kidnapping, O.C.G.A. § 16-5-40, were sufficient to support the defendant juvenile's delinquency adjudication for kidnapping because, after the victim told defendant that the victim did not have any money, the defendant forced the victim to continue walking to an isolated yard behind an abandoned house, where sodomy occurred. That action was not a necessary or inherent part of aggravated sodomy and created additional dangers to the victim by isolating the victim, reducing the victim's chance of rescue, and enhancing defendant's control over

the victim. *In the Interest of D. S.*, 302 Ga. App. 873, 691 S.E.2d 897 (2010).

Defendant's action in pulling a rape victim back inside a hotel room as the victim tried to escape was sufficient evidence of asportation under the kidnapping statute, O.C.G.A. § 16-5-40. Although the duration of the movement was minimal, it was not a part of the other offenses of rape and aggravated assault and posed a significant danger to the victim by isolating the victim from other hotel guests. *Dixon v. State*, 303 Ga. App. 517, 693 S.E.2d 900 (2010).

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of kidnapping with bodily injury because the element of asportation was sufficiently established when the evidence showed that the defendant beat the victim, abducted the victim, and held the victim against the victim's will; the victim's abduction was not an inherent part of aggravated assault or robbery but occurred after the offense of aggravated assault and before the offense of robbery had been completed, and the abduction of the victim through a parking lot created an additional danger to the victim independent of the assault or robbery because the movement isolated the victim from rescue or protection by the other people in the parking lot who came forward as witnesses. *Leverette v. State*, 303 Ga. App. 849, 696 S.E.2d 62 (2010).

Evidence that a defendant moved the victim, a 13-year-old child, from a relatively open back yard into the child's house was sufficient evidence of asportation to support the defendant's kidnapping conviction because the movement was not incidental to another crime, and the movement placed the boy in further danger by isolating the child from rescue. *Bryant v. State*, 304 Ga. App. 755, 697 S.E.2d 860 (2010).

Evidence was sufficient for a rational trier of fact to have found the essential elements of the crime of kidnapping beyond a reasonable doubt because the victim was dragged down the entire length of a steep hill, from a place with some light to a darker place, and when the victim attempted to escape the victim's attacker the victim was again forced down the hill;

the movement that occurred presented a significant danger to the victim independent of the danger posed by the other offenses for which the defendant was convicted, rape, aggravated sodomy, and aggravated assault, by further enhancing the defendant's control over the victim, and by dragging the victim down the hill, away from a more lighted place to a darker and more isolated place, the defendant reduced the possibility of the victim obtaining help from others or of the victim making an escape. *Humphries v. State*, 305 Ga. App. 69, 699 S.E.2d 62 (2010).

Defendant's conviction for kidnapping, O.C.G.A. § 16-5-40(a), was authorized because the defendant's asportation of the victim from a school parking deck to various locations, ultimately ending at an apartment complex where the victim was released two hours later, was sufficient asportation to authorize the kidnapping conviction. *Lester v. State*, No. A10A1665, 2011 Ga. App. LEXIS 310 (Mar. 30, 2011).

It was not error for the trial court to deny the defendant's motion for a directed verdict of acquittal on the kidnapping charge because during the incident, as the victim exited the defendant's truck, the defendant grabbed the victim by the neck and moved the victim away from the more public area near the truck into a backyard, and after beating the victim in that location, the defendant moved the victim deeper into the backyard toward the tree line; when the defendant finished beating the victim the defendant picked the victim up and carried the victim to a trailer, and the defendant moved the victim away from the area before the defendant began the beating, which was not necessary to the battery and independently increased the victim's danger and prevented the victim from making an escape, calling for help, or being spotted by witnesses. *Amaya v. State*, 308 Ga. App. 460, 708 S.E.2d 28 (2011).

**Proof of rape and kidnapping with bodily injury.** — Separate offenses of rape and kidnapping with bodily injury were shown where the evidence used to prove the kidnapping was the asportation of the victim from one room to another and bruises the victim suffered in the struggle with defendant before the subsequent in-

**Application (Cont'd)**

tercourse which supported the rape charge. Roberson v. State, 219 Ga. App. 160, 464 S.E.2d 262 (1995).

**Kidnapping with bodily injury.** — Burning of the victim's face with a stun gun at the outset of the kidnapping constituted the bodily harm necessary to support the conviction of kidnapping with bodily injury. James v. State, 239 Ga. App. 541, 521 S.E.2d 465 (1999).

Despite the defendant's contention that the circumstantial evidence presented by the state was insufficient, both malice murder and kidnapping by bodily injury convictions were upheld on appeal as: (1) the plain error rule did not apply to the identification evidence admitted via the defendant's aggravated assault and armed robbery victim, and evidence of the gun used in that case was relevant in the instant prosecution because the gun connected the defendant to the identification documents presented to police in close proximity to the victim's body; (2) a due process claim regarding the admission of a purportedly impermissibly suggestive pre-trial identification, followed by an in-court identification, was waived due to failure to object at trial; and (3) trial counsel was not ineffective by failing to seek suppression of the identification evidence or attack the reliability of the same. Brooks v. State, 281 Ga. 514, 640 S.E.2d 280 (2007).

Trial court did not abuse the court's discretion in admitting: (i) a prior difficulty between the defendant and the victim; (ii) evidence that the defendant sought to hire a hit man to kill the victim; and (iii) a prior inconsistent statement of a reluctant witness who claimed to have a loss of memory as that evidence was rele-

vant to show the defendant's motive and state of mind in committing the crime of kidnapping with bodily injury and the trial court properly ruled that the reluctant witness was a hostile witness, and allowed the state to ask leading questions, as well as admission of that witness's prior inconsistent statement as substantive evidence. LeBlanc v. State, 283 Ga. App. 434, 641 S.E.2d 646 (2007).

**Impact of significant mental and psychological impairments.** — When petitioner was sentenced to death, remand was warranted as to petitioner's ineffective assistance claim because the state court curtailed a more probing prejudice inquiry by placing undue reliance on the assumed reasonableness of counsel's mitigation theory, and failed to apply the proper prejudice inquiry; a proper analysis of prejudice would have taken into account the newly uncovered evidence of petitioner's "significant" mental and psychological impairments. Sears v. Upton, No. 09-8854, 2010 U.S. LEXIS 5540 (2010).

**Prosecution for false imprisonment and kidnapping barred by statute of limitations.** — Defendant's prosecution for the crimes of false imprisonment, O.C.G.A. § 16-5-41, and kidnapping, O.C.G.A. § 16-5-40(a), were barred by the statute of limitations, O.C.G.A. § 17-3-1, because the state did not indict the defendant on those charges until after the four-year statute of limitations ran; the state's decision to reissue the indictment to include the false imprisonment and kidnapping counts substantially amended the original charges because those offenses contained elements separate and distinct from any of the crimes charged in the original indictment. Martinez v. State, 306 Ga. App. 512, 702 S.E.2d 747 (2010).

**OPINIONS OF THE ATTORNEY GENERAL**

**When offenders under 17 years to be placed in custody of Department of Offender Rehabilitation.** — Kidnapping, not being punishable by death or imprisonment for life, is not an offense which requires the offender under 17 years of age to be placed in the sole

custody of the Department of Offender Rehabilitation; where the offender under 17 years of age is convicted of kidnapping for ransom or kidnapping in which the victim receives bodily injury, both being offenses punishable by life imprisonment or death, the juvenile offender shall only

be sentenced into the custody of the Department of Offender Rehabilitation. 1975 Op. Att'y Gen. No. 75-73.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 1 Am. Jur. 2d, Abduction and Kidnapping, § 1 et seq.

**C.J.S.** — 51 C.J.S., Kidnapping, §§ 1, 25

**ALR.** — Offense of abduction or kidnapping as affected by defendant's belief in legality of his act, 114 ALR 870.

Kidnapping by fraud or false pretenses, 95 ALR2d 450.

What is "harm" within provisions of statutes increasing penalty for kidnapping where victim suffers harm, 11 ALR3d 1053.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine, 50 ALR3d 397.

Seizure of prison official by inmates as kidnapping, 59 ALR3d 1306.

False imprisonment as included offense within charge of kidnapping, 68 ALR3d 828.

Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 ALR3d 245.

Necessity and sufficiency of showing, in kidnapping prosecution, that detention was with intent to "secretly" confine victim, 98 ALR3d 733.

Violation of state court order by one other than party as contempt, 7 ALR4th 893.

Kidnapping or related offense by taking or removing of child by or under authority of parent or one in loco parentis, 20 ALR4th 823.

Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child, 49 ALR4th 7.

Coercion, compulsion, or duress as defense to charge of kidnapping, 69 ALR4th 1005.

Validity, construction, and application of "hold to service" provision of kidnapping statute, 28 ALR5th 754.

Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping, 39 ALR5th 283.

#### 16-5-41. False imprisonment.

(a) A person commits the offense of false imprisonment when, in violation of the personal liberty of another, he arrests, confines, or detains such person without legal authority.

(b) A person convicted of the offense of false imprisonment shall be punished by imprisonment for not less than one nor more than ten years.

(c) Any person convicted under this Code section wherein the victim is not the child of the defendant and the victim is less than 14 years of age shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2. (Laws 1833, Cobb's 1851 Digest, p. 788; Code 1863, §§ 4263, 4264; Code 1868, §§ 4298, 4299; Code 1873, §§ 4364, 4365; Code 1882, §§ 4364, 4365; Penal Code 1895, §§ 106, 107; Penal Code 1910, §§ 106, 107; Code 1933, §§ 26-1501, 26-1502; Code 1933, § 26-1308, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2006, p. 379, § 6/HB 1059.)

**Cross references.** — Civil action for false imprisonment, § 51-7-20 et seq.

**Editor's notes.** — Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides that: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear

an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

**Law reviews.** — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article on 2006 amendment of this Code section, see 23 Georgia St. U.L. Rev. 11 (2006).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### APPLICATION

#### JURY INSTRUCTIONS

#### SENTENCE

### General Consideration

**Statute not unconstitutionally vague.** — Georgia's false imprisonment statute, O.C.G.A. § 16-5-41(a), was not unconstitutionally vague, as the word in it "confine" had a commonly understood meaning which would place a person of common intelligence on notice of the prohibited acts; accordingly, defendant's conviction under that statute would not be overturned on constitutional grounds. *Alexander v. State*, 279 Ga. 683, 620 S.E.2d 792 (2005).

**Essential difference between kidnapping and false imprisonment** is that kidnapping involves the additional element of asportation. *Raysor v. State*, 191 Ga. 422, 382 S.E.2d 162 (1989).

Evidence was sufficient to support a verdict of guilty of kidnapping where the transcript reveals that defendant assisted sister by carrying and lifting the victim into defendant's truck and dumping the body in another county. *Vincent v. State*, 203 Ga. App. 874, 418 S.E.2d 138 (1992).

**Conviction for aider and abettor.** — See *Vincent v. State*, 210 Ga. App. 6, 435 S.E.2d 222 (1993), aff'd, 264 Ga. 234, 442 S.E.2d 748 (1994).

**Convictions as aider and abettor proper despite lack of personal involvement.** — Defendant's contention that the crimes against a stabbing victim were solely committed by the codefendant was rejected pursuant to O.C.G.A. § 16-2-20(a), as ample evidence existed to conclude that defendant either committed the crimes or was a party to the crimes, including that both defendant and the codefendant drove to the stabbing victim's home, that victim was stabbed to death, and the victim's wallet and checkbook were stolen so that both defendants could have money to buy more drugs. *Odom v. State*, 279 Ga. 599, 619 S.E.2d 636 (2005).

**When private person arrests fugitive from justice**, that person must deliver prisoner to qualified officer without unreasonable delay, or that person becomes liable for false arrest. *Lavina v. State*, 63 Ga. 513 (1879).

**To arrest one illegally and detain that person for any length of time** is a criminal offense and a tort for which an action for damages will lie. *Duchess Che-*

*nilles, Inc. v. Masters*, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

O.C.G.A. § 16-5-41, on its face, does not require that the false imprisonment be for a specific length of time, only that there be an arrest, confinement or detention without legal authority and against that person's will. *Rehberger v. State*, 235 Ga. App. 827, 510 S.E.2d 594 (1998).

**False imprisonment is tort** for which an action for damages will lie. *Holliday v. Coleman*, 12 Ga. App. 779, 78 S.E. 482 (1913); *Duchess Chenilles, Inc. v. Masters*, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

**"Custody" is synonymous with "imprisonment,"** which is detention of person contrary to that person's will. *Everett, Ridley & Co. v. Holcomb*, 1 Ga. App. 794, 58 S.E. 287 (1907).

**Simple battery is not a lesser included offense of false imprisonment.**

— See *Reynolds v. State*, 231 Ga. App. 22, 497 S.E.2d 580 (1998).

**Court abused the court's discretion in denying defendant's motion to withdraw a guilty plea** to false imprisonment charges because the state conceded that defendant received ineffective assistance of counsel as to the less serious armed robbery and kidnapping offenses that were part of the same negotiated plea agreement, that were included in the same indictment, and that involved the same codefendants; defendant should have been permitted to withdraw the guilty plea in order to avoid a manifest injustice. *Clue v. State*, 273 Ga. App. 672, 615 S.E.2d 800 (2005).

**Cited** in *Caldwell v. State*, 167 Ga. App. 692, 307 S.E.2d 511 (1983); *Gilbert v. State*, 176 Ga. App. 561, 336 S.E.2d 828 (1985); *Grissom v. State*, 187 Ga. App. 653, 371 S.E.2d 137 (1988); *McKenzie v. State*, 187 Ga. App. 840, 371 S.E.2d 869 (1988); *Shelton v. State*, 220 Ga. App. 163, 469 S.E.2d 298 (1996); *Dorillas v. State*, 224 Ga. App. 336, 480 S.E.2d 351 (1997); *Herrin v. State*, 229 Ga. App. 260, 493 S.E.2d 634 (1997); *Markee v. State*, 229 Ga. App. 644, 494 S.E.2d 551 (1998); *Johnson v. State*, 232 Ga. App. 717, 503 S.E.2d 603 (1998); *Armstrong v. State*, 244 Ga. App. 871, 537 S.E.2d 147 (2000); *Darnell v. State*, 257 Ga. App. 555, 571 S.E.2d 547 (2002); *Upton v. Johnson*, 282

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Ga. 600, 652 S.E.2d 516 (2007); Boyd v. State, 289 Ga. App. 342, 656 S.E.2d 864 (2008); Hyde v. State, 291 Ga. App. 662, 662 S.E.2d 764 (2008); Jennings v. State, 292 Ga. App. 149, 664 S.E.2d 248 (2008); Brown v. State, 293 Ga. App. 633, 667 S.E.2d 899 (2008); Greene v. State, 295 Ga. App. 803, 673 S.E.2d 292 (2009).

**Application**

**False imprisonment charge did not merge with a kidnapping charge** either as a matter of fact or as a matter of law, where the kidnapping (the asportation of the victim to a place where the victim did not wish to go) involved conduct distinct from that which constituted false imprisonment, which embraced appellant's chasing the victim each time the victim managed to escape from the appellant's automobile and forcing the victim to re-enter the car and remain there until it suited appellant to release the victim. Johnson v. State, 195 Ga. App. 723, 394 S.E.2d 586 (1990).

Because the evidence against the defendant showed that a charge of kidnapping and a charge of false imprisonment were not proven by the same facts but: (1) the kidnapping occurred when the defendant abducted the victim outside of a mobile home and forced that victim inside the home, completing the kidnapping crime at that time; and (2) the false imprisonment occurred when the defendant kept the victim inside the mobile home against the victim's will, the trial court did not err in holding that the crimes did not merge. Chatman v. State, 283 Ga. App. 673, 642 S.E.2d 361 (2007).

Because the kidnapping and false imprisonment convictions entered against the defendant were based on different conduct, the two did not merge. Snelson v. State, 286 Ga. App. 203, 648 S.E.2d 647 (2007).

Defendant committed false imprisonment by forcing the victim into a closet, binding the closet doors closed, and ordering the victim under threat of death to remain there until the defendant left. As the crime of kidnapping occurred and was complete prior to that, when the defen-

dant forced the victim into a bedroom and held the victim there against the victim's will, the kidnapping and false imprisonment offenses were proven by different facts and did not merge. Williams v. State, 295 Ga. App. 9, 670 S.E.2d 828 (2008).

**False imprisonment charge did not merge with burglary charge.** — False imprisonment charge did not merge with a burglary charge because evidence that supported the former charge was that defendant prevented the victim from escaping the victim's home by grabbing the victim by the hair and then ordering the victim to lie on the floor while threatening the victim with a lead pipe and none of this evidence overlapped with evidence supporting the burglary conviction. Watkins v. State, 249 Ga. App. 302, 548 S.E.2d 56 (2001).

**False imprisonment does not merge with armed robbery.** — Offense of false imprisonment requires proof of at least one additional fact which the offense of armed robbery does not. Consequently, under the "required evidence" test, a defendant's false imprisonment conviction did not merge into the defendant's armed robbery conviction. Simpson v. State, 293 Ga. App. 760, 668 S.E.2d 451 (2008).

Trial court did not err in failing to merge false imprisonment with robbery because robbery did not require proof that the victim was confined and detained without legal authority and false imprisonment did not require a theft. Bonner v. State, No. A10A1670, 2011 Ga. App. LEXIS 298 (Mar. 28, 2011).

**Separate offenses.** — Criminal defendant's false imprisonment of a victim was not merely incidental to the other crimes charged and was a distinct offense which can be punished separately since the evidence showed that the defendant confined and detained the victim from the time defendant grabbed the victim from behind and stuck the knife in the victim's ribs until defendant began the actual physical assaults upon the victim. Butler v. State, 194 Ga. App. 895, 392 S.E.2d 324 (1990).

Defendant's rape conviction was proper, even though defendant was acquitted of kidnapping with bodily injury, false imprisonment, and aggravated assault, as Georgia did not recognize the inconsistent

verdict rule; further, the convictions were not necessarily inconsistent as the jury could have found that defendant raped the victim, but did not commit the other crimes. Stevenson v. State, 272 Ga. App. 335, 612 S.E.2d 521 (2005).

Because the sequential crimes of false imprisonment and robbery by intimidation were complete and independent of each other, each proven by different facts, the crimes did not merge. Lancaster v. State, 281 Ga. App. 752, 637 S.E.2d 131 (2006).

**False imprisonment and aggravated sodomy not included offenses.** — Trial court did not err in failing to merge a false imprisonment offense with an attempt to commit aggravated sodomy offense. Howard v. State, 272 Ga. 242, 527 S.E.2d 194 (2000).

**False imprisonment charge warranted.** — It could not be said under the circumstances of the crimes that the state used up the evidence establishing false imprisonment in proving the aggravated assault charge as each offense was established by proof of separate and distinct facts. Webb v. State, 210 Ga. App. 27, 435 S.E.2d 251 (1993).

**False imprisonment as lesser included offense of kidnapping with bodily injury.** — Since the defendant had been convicted of kidnapping with bodily injury, subsequent charges of false imprisonment, arising out of the same set of facts, were barred by former jeopardy under the “required evidence test” because false imprisonment was a lesser included offense of kidnapping with bodily injury. Sallie v. State, 216 Ga. App. 502, 455 S.E.2d 315 (1995).

**Kidnapping and false imprisonment.** — Trial court did not err in failing to merge defendant’s convictions for kidnapping and false imprisonment where the convictions were supported by evidence of complete, independent acts directed toward one of the victims. Upshaw v. State, 249 Ga. App. 741, 549 S.E.2d 526 (2001), overruled on other grounds, Wallace v. State, 275 Ga. 879, 572 S.E.2d 579 (2002).

Trial court erred in failing to merge defendant’s false imprisonment conviction into defendant’s kidnapping conviction be-

cause false imprisonment was an integral part of the kidnapping charge, requiring the same evidence except for asportation and, accordingly, the offense of false imprisonment merged with the offense of kidnapping as a matter of fact, even though the offenses did not merge as a matter of law. Upshaw v. State, 249 Ga. App. 741, 549 S.E.2d 526 (2001), overruled on other grounds, Wallace v. State, 275 Ga. 879, 572 S.E.2d 579 (2002).

Defendant’s kidnapping and false imprisonment sentences did not merge for sentencing purposes when the victim had been made to drive around at gunpoint, then taken to an apartment before being forced into some woods and shot in the head; thus, the crime of false imprisonment was complete before the victim was forced into the woods and shot. John v. State, 282 Ga. 792, 653 S.E.2d 435 (2007).

After a jury convicted a defendant on both an indicted charge of kidnapping and an unindicted lesser charge of false imprisonment without any intervention of the trial court, the rule in Camphor v. State, 272 Ga. 408, 529 S.E.2d 121 (2000) did not apply; thus, the trial court properly merged the false imprisonment with the kidnapping and properly entered judgment on the jury’s verdict finding the defendant guilty of the kidnapping. Manning v. State, 296 Ga. App. 376, 674 S.E.2d 408 (2009).

**Cruelty to children conviction did not merge with aggravated assault or false imprisonment.** — Defendant’s cruelty to children in the first degree charge did not merge with the aggravated assault or false imprisonment charge because neither aggravated assault nor false imprisonment required proof that the victim suffered cruel or excessive physical or mental pain. Kirt v. State, No. A10A1933, 2011 Ga. App. LEXIS 247 (Mar. 22, 2011).

**Convictions for aggravated child molestation and false imprisonment properly not merged.** — Trial court was not required to merge the defendant’s false imprisonment and aggravated child molestation convictions since the false imprisonment and aggravated child molestation convictions could be sustained based on different conduct; therefore, separate convictions were appropriate. Specifically,

**Application (Cont'd)**

the indictment averred that the defendant committed false imprisonment by unlawfully detaining the victim in violation of the victim's personal liberty and committed aggravated child molestation by forcing the victim to perform oral sex on the defendant and there was evidence that on one occasion, the defendant locked the victim in the home and would not let the victim leave and, as to the aggravated child molestation conviction, there was evidence that the defendant forced the victim to perform oral sex on the defendant on repeated occasions spanning several years. Metts v. State, 297 Ga. App. 330, 677 S.E.2d 377 (2009).

**False imprisonment convictions and rape convictions did not merge**, where a rational trier of fact could reasonably have concluded from the evidence that the confinement and detention of the victim far exceeded that which was immediately associated with the acts of sexual intercourse. Moua v. State, 200 Ga. App. 49, 406 S.E.2d 557 (1991).

**False imprisonment charge did not merge with aggravated battery charge.** — Because a victim was held against the victim's will throughout a beating ordeal, even when the defendant was not striking the victim, the crime of false imprisonment was proved by facts separate and distinct from those used for the defendant's aggravated battery conviction. The state did not use up the evidence establishing false imprisonment in proving the battery charge because each offense was established by proof of separate and distinct facts. Pierce v. State, 301 Ga. App. 167, 687 S.E.2d 185 (2009), cert. denied, No. S10C0549, 2010 Ga. LEXIS 244 (Ga. 2010).

**Evidence was properly excluded under rape shield law.** — Trial court properly applied O.C.G.A. § 24-2-3 by refusing to allow testimony that a victim of domestic violence had been seen working as a prostitute because that information had no relevance to the aggravated assault and false imprisonment charges for which a defendant was convicted, and further, the defendant failed to produce any evidence that could have provided a

nexus between the alleged prostitution and a conclusion that someone else might have inflicted the victim's injuries. Moorer v. State, 290 Ga. App. 216, 659 S.E.2d 422 (2008).

**Similar transaction evidence was properly admitted** against defendant charged with rape and false imprisonment as the state showed sufficient evidence of a proper purpose for the admission, specifically, that both sex offenses involved attacks by force against the victims for the purpose of forcing sexual intercourse upon the victims, and that both incidents occurred behind a shopping center where defendant drove after promising to take the victims home. Ingram v. State, 280 Ga. App. 467, 634 S.E.2d 430 (2006), cert. denied, 2007 Ga. LEXIS 868 (Ga. 2007).

**False imprisonment occurring during rape.** — Defendants' false imprisonment convictions were supported by the victim's testimony to the effect that the defendants had held the victim captive over a period of several hours, between separate episodes of rape. Moua v. State, 200 Ga. App. 49, 406 S.E.2d 557 (1991).

Since the victim's and a police officer's testimonies about the crime location established venue, and defendant induced a jury question as to whether a toy gun was a firearm but did not object to the trial court's instruction, defendant was properly convicted of rape, false imprisonment, and possession of a firearm during the commission of a felony under O.C.G.A. §§ 16-5-41(a), 16-6-1(a), and 16-11-106(b). Bravo v. State, 269 Ga. App. 242, 603 S.E.2d 669 (2004).

Since the rape victim testified that the victim tried to leave, but defendant would not permit the victim to do so, the evidence was sufficient to authorize the jury to convict defendant of false imprisonment. Reynolds v. State, 269 Ga. App. 268, 603 S.E.2d 779 (2004).

Testimony of a single witness was sufficient to establish a fact under O.C.G.A. § 24-4-8, and defendant's convictions for kidnapping, burglary, aggravated sodomy, rape, and false imprisonment were supported by sufficient evidence where the victim testified that defendant forced the victim into a train boxcar, threatened to kill the victim, and had vaginal and oral

sex with the victim against the victim's will and without the victim's consent; there was also circumstantial evidence showing the victim's lack of consent, including the victim fleeing from the boxcar while naked, the victim's outcry to a train engineer that the victim had been raped, and the victim's injuries. *Davis v. State*, 278 Ga. App. 628, 629 S.E.2d 537 (2006).

Defendant's convictions of rape, aggravated sodomy, false imprisonment, and two counts of aggravated assault were supported by sufficient evidence in the form of the victim's injuries, and the victim's testimony that, among other things, after the victim refused the defendant's request for sex, the defendant threw the victim on the bed, hit her in the back and on the arms with hedge clippers, ordered the victim to remove the victim's clothes, dragged the victim by the hair back into the house after the victim had escaped through a window, grabbed the victim, twisted the victim's arm, and said, "I'm trying — bitch, I'm going to kill you," hit the victim in the arm and leg with the hedge clippers, punched the victim on the lips and on the forehead, threw the victim on the bed and raped the victim and made the victim perform oral sex on the defendant. *Tarver v. State*, 280 Ga. App. 89, 633 S.E.2d 415 (2006).

**Evidence sufficient to support conviction.** — See *Furlow v. State*, 297 Ga. App. 375, 677 S.E.2d 412 (2009); *Bearfield v. State*, 305 Ga. App. 37, 699 S.E.2d 363 (2010); *Tucker v. State*, 275 Ga. App. 611, 621 S.E.2d 562 (2005).

Evidence that defendant unlawfully detained the victim over five days during which period the victim's will was overborne by the victim's fear of the brutal beatings the victim sustained day and night at defendant's hands was sufficient to support conviction. *Grier v. State*, 218 Ga. App. 637, 463 S.E.2d 130 (1995).

Evidence that defendant forcibly prevented the victim from leaving a hotel room by putting defendant's foot in front of the door and that defendant covered the victim's mouth with defendant's hand when the victim screamed was sufficient to support conviction. *Mayorga v. State*, 225 Ga. App. 496, 484 S.E.2d 292 (1997).

Evidence that defendant held the victim

against the victim's will while defendant made physical advances against the victim and physically caused the victim harm was sufficient to convict defendant of false imprisonment and simple battery. *Reynolds v. State*, 231 Ga. App. 22, 497 S.E.2d 580 (1998).

Evidence that defendants detained the victims under arms and color of authority was sufficient to authorize the jury verdicts that defendants were guilty of false imprisonment. *Thompson v. State*, 240 Ga. App. 26, 521 S.E.2d 876 (1999).

Evidence showing that defendant forced the victim at gun point to sit on the floor of the pharmacy and remain there while defendant searched the pharmacy shelves was sufficient to find defendant guilty of false imprisonment. *Brabham v. State*, 240 Ga. App. 506, 524 S.E.2d 1 (1999).

Defendant's conviction for false imprisonment was supported by evidence that the victim was bashed on the head during an armed robbery, dragged outside, placed into the back of a car with a gun to the head and driven to another location where the victim was dragged out of the car and left for dead. *Barnett v. State*, 244 Ga. App. 585, 536 S.E.2d 263 (2000).

As the jury could have believed the victim's testimony that defendant held the victim against the victim's will but discounted the victim's testimony that defendant pushed the victim into the car, defendant's conviction of false imprisonment, a lesser-included offense of the charged crime of kidnapping, was affirmed. *Shue v. State*, 251 Ga. App. 50, 553 S.E.2d 348 (2001).

Evidence that defendant raped the victim, would not allow the victim to leave the apartment, that the victim was fearful of what else defendant might do, that the defendant had struck, beaten, and attacked the victim on previous occasions, and that the victim had a bruised face shortly after the incident, sufficiently showed false imprisonment under O.C.G.A. § 16-5-41(a). *Laredo v. State*, 253 Ga. App. 155, 558 S.E.2d 742 (2002).

Evidence was sufficient to support a conviction of false imprisonment after defendant entered the premises where the victims worked brandishing a gun, instructed the victims not to move, and then

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tied the victims up with telephone cords. *Phoukphanh v. State*, 256 Ga. App. 580, 569 S.E.2d 259 (2002).

Evidence was sufficient to support defendants' false imprisonment convictions under O.C.G.A. § 16-5-41(a) after defendants' bound the victim, hung the victim from the victim's feet, and struck the victim, allegedly to punish the victim following a citizen's arrest for theft under O.C.G.A. § 17-4-60; the defense of justification was not so broad as to permit a private citizen to mete out judgment as the citizen saw fit, and the trial court properly refused to instruct the jury as to justification when there was no evidence to support it, and since, as justification was an affirmative defense, defendant failed to admit the crime. *McPetrie v. State*, 263 Ga. App. 85, 587 S.E.2d 233 (2003).

Evidence that a store employee recognized one of the robbers' voices as belonging to defendant, that defendant's car was found behind the store with proceeds of the robbery and a loaded pistol, and that defendant was found in a dumpster behind the store was sufficient to support convictions for false imprisonment and armed robbery. *Woods v. State*, 266 Ga. App. 53, 596 S.E.2d 203 (2004).

Evidence that defendants entered the victim's apartment, took the victim by the hands and demanded money, shoved a gun into the victim's side and removed the victim's ring, watch, and money, and then forced the victim into a closet blocked with a heavy table with instructions not to come out until the defendants had left was sufficient to support convictions for false imprisonment, armed robbery, burglary, and possession of a firearm during the commission of a felony. *Pinson v. State*, 266 Ga. App. 254, 596 S.E.2d 734 (2004).

Evidence was sufficient to sustain defendant's convictions as a party to the offenses of armed robbery, kidnapping, false imprisonment, burglary, and aggravated assault with a deadly weapon in violation of O.C.G.A. §§ 16-5-21, 16-5-40, 16-5-41, 16-7-1, and 16-8-41 because: (1) defendant received information from the defendant's love interest, about the vic-

tims' house, the location of safes, where money was located, and about the alarm system; (2) the day after the home invasion the love interest saw defendant and defendant showed the love interest a stack of cash, and defendant told the love interest it might be the victim's money; and (3) an FBI informant met with defendant and defendant told the informant that defendant had been shorted money from the robbery, and that defendant got the layout of the house from the love interest. *Pope v. State*, 266 Ga. App. 658, 598 S.E.2d 48 (2004).

Jury was authorized to find that defendant was a party to the crime of false imprisonment, and the conviction was affirmed, since the evidence demonstrated that defendant, along with two other co-defendants, took an active role in confining and/or detaining the victims; the victims testified that defendant was positioned at the foot of their bed, participated in tying the victims up, and, despite defendant's claim that defendant was a reluctant participant acting out of fear, that defendant never seemed afraid or intimidated. *Adcock v. State*, 269 Ga. App. 9, 603 S.E.2d 340 (2004).

Evidence was sufficient to support burglary, aggravated assault, kidnapping, false imprisonment, and armed robbery convictions after one of the victims opened the door to the victim's home when the victim recognized one of defendant's accomplices, when defendant and another then pushed the door open and rushed inside, and when defendant grabbed the first victim, pointed a gun at the first victim's head, took money from the second victim's wallet, kept the gun pointed at both victims during the entire incident, ripped the telephone cord out of the wall, and instructed defendant's accomplices to bind and blindfold the victims, which they did; the victims both identified defendant as the gunman from a police photo array, plus made an in-court identification at trial, and any conflict between the victims' testimony that the gunman had a tattoo on the gunman's arm and a trial demonstration revealing no tattoo on defendant's arm was a matter for the jury to resolve and did not affect the sufficiency of the identification. *Kates v. State*, 269 Ga. App. 8, 603 S.E.2d 342 (2004).

Evidence supported defendant's robbery by intimidation and false imprisonment convictions and codefendant's armed robbery and kidnapping with bodily injury convictions as defendant lured the victim to defendant's apartment where the codefendant struck the victim in the back of the head and robbed the victim at gunpoint. *Smith v. State*, 269 Ga. App. 133, 603 S.E.2d 445 (2004).

Sufficient evidence supported defendant's false imprisonment conviction because, in responding to a 9-1-1 call, a deputy witnessed the defendant's actions toward the victim, heard the defendant running from the bedroom and observed that the bedroom had been barricaded while the defendant had the victim inside the bedroom. *Pitts v. State*, 272 Ga. App. 182, 612 S.E.2d 1 (2005), aff'd, 280 Ga. 288, 627 S.E.2d 17 (2006).

Defendant's convictions of aggravated stalking, burglary, aggravated assault, and false imprisonment, in violation of O.C.G.A. §§ 16-5-91, 16-7-1, 16-5-21, and 16-5-41, were supported by sufficient evidence because, despite the victim's recantation at trial, the victim stated to police earlier that defendant broke into the victim's apartment, scratched and damaged furniture and other property, tied the victim up, locked the victim in the bedroom for several hours, harmed the victim, threatened that defendant and defendant's friends were going to lock the victim in a basement for a few months, and defendant had been waiting for the victim to arrive home. *Andrews v. State*, 275 Ga. App. 426, 620 S.E.2d 629 (2005).

Even in the absence of proffered evidence that an alleged victim voluntarily went to the codefendant's house for purposes of prostitution, evidence that the victim was forced into a closet against the victim's will was sufficient to sustain defendant's conviction on a false imprisonment charge. *Grier v. State*, 276 Ga. App. 655, 624 S.E.2d 149 (2005).

Sufficient evidence supported convictions for aggravated assault, kidnapping, armed robbery, and possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106, even though none of the victims could identify the defendant as the gunman in the robbery

due to the fact that the defendant wore a mask because defendant was found shortly after the robbery with cash, weapons, a ski mask, a car, and clothing matching the victims' description; surveillance videotape of the robbery was shown to the jury to determine whether defendant was the person on the videotape. *Johnson v. State*, 277 Ga. App. 41, 625 S.E.2d 411 (2005).

Convictions of armed robbery, possession of a firearm during the commission of a crime, false imprisonment, and hijacking a motor vehicle were supported by sufficient evidence since a perpetrator identified as the defendant robbed a pizza restaurant at gunpoint, ordered everyone into a cooler, and took the restaurant manager's vehicle, after which an officer discovered the defendant the next day driving the manager's vehicle and wearing a hat identical to that worn by the perpetrator, and since a customer at the restaurant identified the defendant as the robber in a photo line-up and at trial; while three of the four crimes arising out of the incident were committed after the customer, who was the only witness to identify defendant, was ordered into the cooler, only one robber entered the restaurant and the jury was authorized to infer that the man identified by the customer also committed the crimes committed after the customer was in the cooler. *Head v. State*, 279 Ga. App. 608, 631 S.E.2d 808 (2006).

Defendant's convictions for robbery, battery, false imprisonment, and obstruction of an emergency telephone call were all upheld on appeal as no error flowed from: (1) the trial court's admission of an audio recording of the attack on the victim and order granting the state two hearings regarding the admissibility of that recording; (2) the trial court's failure to give a curative instruction after the prosecutor injected a personal experience with domestic violence into the closing argument; (3) the trial court's failure to strike the testimony of similar transaction witnesses and issue a curative instruction; and (4) the trial court's order restricting the counsel's closing argument. *Ellis v. State*, 279 Ga. App. 902, 633 S.E.2d 64 (2006).

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Given that all three victims identified the defendant as the perpetrator of the crimes of armed robbery and false imprisonment, the defendant's theft of the father's money at gunpoint, as well as duct-taping the parents and detaining all three victims in the basement, the evidence sufficed to sustain the conviction for one count of armed robbery and three counts of false imprisonment; moreover, conflicts in the testimony, even between the state's witnesses, went to the credibility of the witnesses, which was a matter for the jury to resolve. *Feldman v. State*, 282 Ga. App. 390, 638 S.E.2d 822 (2006).

Because the victim's testimony, standing alone, was sufficient to establish the defendant's guilt beyond a reasonable doubt, when the evidence showed: (1) two separate aggravated assaults, one with a knife and one with a hammer; (2) two separate instances of simple battery; and (3) a hours-long detention of the victim by the defendant, the evidence amply supported the jury's conviction on the charges of false imprisonment, aggravated assault, and simple battery. *Brigman v. State*, 282 Ga. App. 481, 639 S.E.2d 359 (2006).

Evidence that the defendant and other perpetrators bound the victim with an electrical cord was sufficient for a jury to find that the victim was illegally detained against the victim's will to support the defendant's conviction for false imprisonment; similarly, the jury could have found that the victim's babies were confined without legal authority during the hour-long ordeal, and therefore the evidence supported the verdict convicting the defendant of false imprisonment. *Bills v. State*, 283 Ga. App. 660, 642 S.E.2d 352 (2007).

Legally sufficient evidence existed to convict the defendant of false imprisonment under O.C.G.A. § 16-5-41(a) because the defendant's live-in girlfriend, the victim, testified that the victim was held against the victim's will and handcuffed in a bathroom all night long; the victim was then shoved into a closet and also held there against the victim's will. *Austin v. State*, 286 Ga. App. 149, 648

S.E.2d 414 (2007), cert. denied, 2007 Ga. LEXIS 687 (Ga. 2007).

Evidence that defendant bound victims with rope was sufficient for a jury to find that the victims were illegally detained against their will. *Ayers v. State*, 286 Ga. App. 898, 650 S.E.2d 370 (2007), cert. denied, 2008 Ga. LEXIS 117 (Ga. 2008).

Because contradictions and uncertainties in the testimony did not render the evidence against the defendant insufficient, but were ultimately for the jury to decide, and the defendant's statement to the police was corroborated by other evidence, the defendant's convictions for armed robbery, false imprisonment, and possession of a firearm during the commission of a felony were upheld on appeal. *Sheely v. State*, 287 Ga. App. 92, 650 S.E.2d 762 (2007).

Evidence was sufficient to support the defendant's convictions as a party to malice murder, felony murder, kidnapping with bodily injury, false imprisonment, and aggravated assault since: the victim, who claimed to have been robbed of money the defendant and a codefendant gave the victim for drugs, had been made to drive around while a codefendant pointed a gun at the victim; the victim was later taken to an apartment where the victim was threatened and pistol-whipped; the victim was taken out of the apartment, forced into some woods, and fatally shot; and following the killing, the defendant and a codefendant moved the victim's car from the apartment complex to a parking lot where the defendant and others had met the victim earlier that evening. *John v. State*, 282 Ga. 792, 653 S.E.2d 435 (2007).

Given the undisputed evidence from two eyewitnesses that the defendant detained the murder victim at gunpoint despite the victim's pleas to be released, the elements of false imprisonment were established and supported the defendant's conviction of that offense. *Clark v. State*, 283 Ga. 234, 657 S.E.2d 872 (2008).

Trial court properly denied a defendant's motion for a new trial, and there was sufficient evidence to support defendant's conviction for false imprisonment, based on the evidence that defendant went to the victim's home uninvited; forced entry into the victim's home; as-

saulted the victim; and forced the victim to wait in a bathroom and refused to allow the victim to exit. *Griffin v. State*, 291 Ga. App. 618, 662 S.E.2d 171 (2008).

Evidence was sufficient to convict a defendant on a charge of false imprisonment since the defendant failed to carry the initial burden of establishing by a preponderance of the evidence that the defendant was involuntarily intoxicated at the time the defendant went into the victim's home and held the victim at knife point, and there was at least some evidence before the jury of each element of false imprisonment that the state was required to prove. *Stewart v. State*, 291 Ga. App. 846, 663 S.E.2d 278 (2008).

Evidence was legally sufficient to convict a defendant on charges of armed robbery, aggravated assault, false imprisonment, and possession of a firearm during the commission of a crime; the testimony of one of the defendant's accomplices, which implicated the defendant in the crimes, was corroborated by evidence that the defendant was captured with the two accomplices shortly after the robbery, that defendant had a large amount of cash, a gun, and a roll of duct tape, and that the victim was able to identify all three men as the ones who robbed and assaulted the victim. *Spragg v. State*, 292 Ga. App. 37, 663 S.E.2d 389 (2008).

Testimony by a victim that the defendant and an accomplice, armed with handguns, forcibly entered the victim's apartment, raped and sodomized the victim, struck the victim with a gun, stole jewelry, bound the victim, and escaped in a car owned by the victim's prospective spouse, and evidence that 24 fingerprints lifted from the apartment and car matched the defendant's, was sufficient to convict the defendant of false imprisonment. *Crawford v. State*, 292 Ga. App. 463, 664 S.E.2d 820 (2008).

Evidence that a defendant moved the victim from the victim's vehicle to a house and then from the house to the garage against the victim's will was sufficient evidence to support the defendant's conviction for kidnapping. Likewise, the victim's testimony that the defendant took the victim into the house and tied the

victim's hands against the victim's will was sufficient evidence to support the defendant's conviction for false imprisonment. *Cornette v. State*, 295 Ga. App. 877, 673 S.E.2d 531 (2009).

Victim's testimony that the victim was unable to leave the victim's apartment because the defendant was holding the victim, along with evidence that the defendant dragged the victim from room to room by the victim's hair while beating the victim, was enough evidence for the jury to determine the victim was detained against the victim's will and sufficient to sustain the defendant's conviction for false imprisonment. *Pierce v. State*, 301 Ga. App. 167, 687 S.E.2d 185 (2009), cert. denied, No. S10C0549, 2010 Ga. LEXIS 244 (Ga. 2010).

There was sufficient corroboration of the defendant as a perpetrator of the principal crime, and, ultimately, sufficient evidence to support the defendant's convictions for armed robbery, aggravated assault, false imprisonment, possession of a firearm during the commission of a felony, and burglary because there was circumstantial evidence to show that the defendant committed a similar transaction after the first incident, that the same gun an accomplice bought and used in the first crime was used in the second crime and ended up in a car at the house of the defendant's mother afterwards, and that the defendant was nervous and felt guilty about events that the defendant participated in with the accomplice, whom the defendant had only known a short time; that corroborative evidence connected the accomplice to the crimes. *Ward v. State*, 304 Ga. App. 517, 696 S.E.2d 471 (2010).

Trial court did not err in denying the defendant's motion for new trial under O.C.G.A. § 5-5-21 after a jury convicted the defendant of kidnapping with bodily injury, aggravated assault, and false imprisonment because the evidence was legally sufficient to support the crimes of which the defendant was convicted; the victim was shown a photo array containing six photographs and immediately picked the defendant's photo as the man who held a gun to the victim's head during the incident, and the victim also identified the defendant in court. *Delgiudice v.*

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State, 308 Ga. App. 397, 707 S.E.2d 603 (2011).

**False imprisonment of a child.** — Verdict for false imprisonment was supported by evidence that defendant illegally confined a 15-year-old child to the defendant's van, threatening to kill the child if the child disobeyed defendant's orders. *Walker v. State*, 245 Ga. App. 693, 538 S.E.2d 563 (2000).

There was sufficient evidence to support a defendant's convictions of armed robbery, aggravated assault, burglary, false imprisonment, and possession of a firearm during the commission of a felony when the state showed that the defendant intentionally aided and abetted a home invasion in which the home was burglarized and the homeowner's teenage child was detained and robbed by use of a handgun. Even in the absence of evidence sufficient to show that the defendant directly committed the charged offenses, there was sufficient evidence that the defendant was a party to the offenses in that the defendant and a person armed with a gun loaded a truck with property stolen from the home during the two-hour home invasion, the defendant was present speaking with the armed person during the home invasion, and the defendant confirmed that the child was home alone. *Whitley v. State*, 293 Ga. App. 605, 667 S.E.2d 447 (2008).

There was sufficient evidence to support a defendant's convictions for aggravated child molestation, child molestation, and false imprisonment with regard to allegations that the defendant forced a romantic friend's minor child to perform oral sex on the defendant several times over a three year period, based on the testimony of the victim (which alone was sufficient), the videotaped forensic interview of the victim, the testimony of the police investigator and the victim's mother concerning what the victim told them, as well as the testimony of the victim's siblings, who were eyewitnesses to one incident. Further, the testimony of the victim that the defendant locked the victim in the house and would not let the victim leave supported the conviction on the false impris-

onment charge. *Metts v. State*, 297 Ga. App. 330, 677 S.E.2d 377 (2009).

**False imprisonment of spouse.** — Evidence, in the form of testimony that defendant handcuffed the defendant's spouse to the bedposts so that the defendant's spouse would not leave the residence, was sufficient to support the defendant's false imprisonment conviction, pursuant to O.C.G.A. § 16-5-41. *Jones v. State*, 259 Ga. App. 698, 577 S.E.2d 878 (2003).

Reviewing the evidence in the light most favorable to the verdict, the evidence was sufficient to support the verdicts against defendant for false imprisonment, aggravated battery, and simple assault in regard to acts of domestic violence against the victim, defendant's spouse, as the evidence showed that defendant dragged the spouse down a hallway by the spouse's hair and held the spouse in a bedroom against the spouse's will, that defendant broke the spouse's nose and arm, and that defendant beat the spouse with a car-washing brush. *Mize v. State*, 262 Ga. App. 486, 585 S.E.2d 913 (2003).

**False imprisonment of a love interest.** — Evidence was sufficient to support convictions of aggravated assault with a knife, aggravated assault with defendant's fists and feet, and false imprisonment since the police found defendant's love interest laying on the floor of a hotel room, bruised, there were knives in the hotel room, and the love interest testified that the defendant had kicked and hit the love interest. *Banks v. State*, 260 Ga. App. 515, 580 S.E.2d 308 (2003).

Evidence was sufficient to find defendant committed false imprisonment after defendant repeatedly attacked the victim over a 26-hour period and did not allow the victim to leave until the victim finally told defendant what defendant wanted to hear — that the victim loved the defendant and that they could start a new life together. *Hammonds v. State*, 263 Ga. App. 5, 587 S.E.2d 161 (2003).

Evidence that defendant forced the defendant's love interest to remain in the love interest's car against the love interest's will, that the defendant chased the love interest with the love interest's car when the love interest tried to escape,

that the defendant hit the love interest with the car, and that the love interest suffered a broken ankle was sufficient to sustain defendant's convictions for false imprisonment and aggravated assault. *Scott v. State*, 268 Ga. App. 889, 602 S.E.2d 893 (2004).

There was sufficient evidence to support a defendant's convictions for false imprisonment, simple assault, and criminal trespass with regard to actions the defendant took toward the victim, who was a prior romantic friend, as the evidence established that the defendant went to the victim's home uninvited and entered the home; as the victim exited the bathroom, the defendant was standing in the hallway in front of the victim; alarmed, the victim attempted to flee into an adjacent room at which time the victim and the defendant struggled as the defendant attempted to prevent the victim from passing the defendant; once in the adjacent room, the defendant took the telephone from the victim as the victim tried to call 9-1-1; and the victim ultimately pushed out the screen and successfully exited the residence through an open window despite the defendant's attempt to pull the victim back inside. *Port v. State*, 295 Ga. App. 109, 671 S.E.2d 200 (2008).

Evidence was sufficient to prove false imprisonment because the defendant's girlfriend testified that the defendant repeatedly pushed her away from the front door of her townhouse, that she could not get to the door, and that the defendant stood right in front of the door the whole time; the defendant eventually threw the girlfriend down the stairs into the basement, where the defendant attempted to lock her in. *Wilson v. State*, 304 Ga. App. 743, 698 S.E.2d 6 (2010).

**False imprisonment of jailer.** — Evidence was sufficient to convict the defendant of robbery, under O.C.G.A. § 16-8-40(a), and false imprisonment, under O.C.G.A. § 16-5-41(a), after the defendant tricked a jailer into letting the defendant out of the defendant's cell, subsequently elbowed the jailer in the stomach, spun the jailer around, locked the jailer in the cell, and retrieved the jailer's key from the floor where the key had fallen during the scuffle. *Forehand v.*

*State*, 270 Ga. App. 365, 606 S.E.2d 589 (2004).

**False imprisonment by officer.** — When sufficient evidence was presented that defendant: (1) detained the victim in the defendant's patrol car without legal authority; and (2) grabbed the victim when the victim attempted to escape, threw the victim into the back seat of the patrol car, held the victim down, and raped the victim, a jury could have found that defendant arrested, detained, or confined the victim without legal authority and without consent; thus, defendant's false imprisonment conviction was upheld. *Walker v. State*, 267 Ga. App. 155, 598 S.E.2d 875 (2004).

**Impersonating a peace officer and handcuffing victim.** — Evidence that defendant and another person burst into a home after they had lured the victim brandishing an automatic gun and wearing black t-shirts that said "Sheriff," handcuffed the victim, took the victim's money, and forced the victim to write a bill of sale for the victim's motorcycle was sufficient to support convictions for robbery by intimidation, O.C.G.A. § 16-8-41(a), false imprisonment, O.C.G.A. § 16-5-41(a), aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), and impersonating a peace officer, O.C.G.A. § 16-10-23. *Powers v. State*, 303 Ga. App. 326, 693 S.E.2d 592 (2010).

**Insufficient evidence to support conviction.** — There was no evidence to indicate that the defendant at any time confined or detained the victim in violation of the victim's personal liberty (i.e., against the victim's will), and consequently there was no evidentiary basis for defendant's conviction of false imprisonment. *Lucas v. State*, 183 Ga. App. 637, 360 S.E.2d 12 (1987).

There was no evidence supporting the claim of false imprisonment under O.C.G.A. § 16-5-41(a) as the hospital employee did not falsely imprison the children by accepting the children from the parent. *Gwinnett Health Sys. v. DELU*, 264 Ga. App. 863, 592 S.E.2d 497 (2003).

Defendant's conviction for falsely imprisoning a young woman was reversed, but the defendant's conviction for falsely imprisoning male victims was affirmed

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because the evidence showed that there were four men in the house, and an officer testified as to their names, but there was no evidence regarding false imprisonment of the woman. *Ward v. State*, 304 Ga. App. 517, 696 S.E.2d 471 (2010).

**Prosecution for false imprisonment and kidnapping barred by statute of limitations.** — Defendant's prosecution for the crimes of false imprisonment, O.C.G.A. § 16-5-41, and kidnapping, O.C.G.A. § 16-5-40(a), were barred by the statute of limitations, O.C.G.A. § 17-3-1, because the state did not indict the defendant on those charges until after the four-year statute of limitations ran; the state's decision to reissue the indictment to include the false imprisonment and kidnapping counts substantially amended the original charges because those offenses contained elements separate and distinct from any of the crimes charged in the original indictment. *Martinez v. State*, 306 Ga. App. 512, 702 S.E.2d 747 (2010).

**Jury Instructions**

**False imprisonment charge not warranted.** — Evidence did not require the trial court to give defendant's requested charge on false imprisonment as a lesser included offense of kidnapping. *Williams v. State*, 237 Ga. App. 555, 515 S.E.2d 862 (1999).

Evidence was sufficient to support defendant's conviction for false imprisonment, as it showed that defendant entered the home of a relative through a window without permission, placed a hand over the relative's mouth, and pinned the relative to the bed, thereby restricting the relative's movement; defendant admitted as much and other family members identified defendant as the intruder. *Alexander v. State*, 279 Ga. 683, 620 S.E.2d 792 (2005).

**Charge of simple kidnapping as a lesser included offense of kidnapping with bodily injury** was not warranted because the evidence showed that after the defendant lured the victim into the van, the defendant drove to another location and assaulted and injured the victim; the victim was never free to leave until

the defendant finally dropped the victim off after sexually assaulting and injuring the victim. *Robertson v. State*, 278 Ga. App. 376, 629 S.E.2d 79 (2006).

**When error for trial court not to instruct jury on defense.** — When, on the trial of a state patrolman for false imprisonment, it appears from the evidence that the patrolman's sole defense was that the arrest for drunkenness was made upon the public highway without a warrant when the patrolman in good faith had probable cause to believe that such offense was being committed in the patrolman's presence, it is error requiring the grant of a new trial for the trial court to fail to instruct the jury on this defense. *Henderson v. State*, 95 Ga. App. 830, 99 S.E.2d 270 (1957).

**Jury instructions proper.** — Trial court's jury instructions in defendant's criminal trial on multiple charges arising out of a domestic dispute were proper as: (1) there was no requirement that the jury be instructed on the element of assault (O.C.G.A. § 16-5-20) in order to be properly instructed on the crime of aggravated assault (O.C.G.A. § 16-5-21); (2) the methods of committing an aggravated battery, pursuant to O.C.G.A. § 16-5-24(a), were properly defined based on the methods asserted in the indictment; (3) there was no support for a requested charge on the lesser included offense of reckless conduct, pursuant to O.C.G.A. § 16-5-60(b); and (4) there was no possibility of a lesser included conviction for false imprisonment (O.C.G.A. § 16-5-41), such that instruction only on the indicted offense of kidnapping (O.C.G.A. § 16-5-40) was proper. *Brown v. State*, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

**Jury instruction on false imprisonment should have been given.** — When the victim and the victim's two-year-old granddaughter were washing their hands in a department store ladies' restroom when the defendant stormed out of one of the stalls with a stun gun, which the defendant fired into the victim's neck and demanded that the victim join the defendant in the stall and where a violent struggle ensued, with the victim trying to exit the restroom with the victim's granddaughter while the defendant fought with

the victim and cut the victim with a knife in trying to prevent the victim from leaving, the evidence was sufficient to establish the asportation element of kidnapping under O.C.G.A. § 16-5-40(a) because the defendant moved the victim in trying to force the victim into the bathroom stall and away from the bathroom exit; the movement enhanced the defendant's control over both victims by substantially isolating the victims from the protection of rescuers who were trying to reach the victims on the other side of the door. However, the trial court erred in failing to instruct the jury on the lesser-included offense of false imprisonment under O.C.G.A. § 16-5-41(a) because the elements of the two crimes were the same except that kidnapping also required the element of asportation, and the jury could have found that element lacking. Hall v. State, No. A10A2226, 2011 Ga. App. LEXIS 296 (Mar. 28, 2011).

**Giving of Allen charge.** — In a prosecution for aggravated battery, false imprisonment, and kidnapping, a written Allen charge issued by the court was not coercive, despite the court's use of the phrase "must be decided", given that the language was only a small portion of an otherwise fair and balanced charge, the trial court urged the jury to take their time, and the defendant was acquitted of the kidnapping charge. Benson v. State, 280 Ga. App. 643, 634 S.E.2d 821 (2006).

**False imprisonment charge not warranted.** — As the crime of kidnapping was complete when the defendant seized law office employees and forced the employees to a back office, and when the defendant taped up and moved an attorney from place to place in the office, the defendant was not entitled to a charge on a lesser included offense because there was no evidence that the defendant was

guilty of merely false imprisonment. Brower v. State, 298 Ga. App. 699, 680 S.E.2d 859 (2009), cert. denied, No. S09C1845, 2010 Ga. LEXIS 13 (Ga. 2010).

### Sentence

**Fifteen-year sentence for false imprisonment is illegal.** Stevanus v. State, 185 Ga. App. 7, 363 S.E.2d 322 (1987).

**Sentence was proper.** — Defendant's sentence to 10 years for false imprisonment, 12 months for sexual battery, and 12 months for simple battery, to run concurrently, provided that upon service of four years in custody, defendant could serve the remaining six years on probation, was not void as it fell within the allowable sentencing ranges of no less than one nor more than 10 years for false imprisonment, and up to 12 months each for sexual battery and simple battery. Rehberger v. State, 267 Ga. App. 778, 600 S.E.2d 635 (2004).

**Judge's sentencing explanation was proper.** — Because the judge correctly explained that the defendant's suspended sentence could not possibly be revoked for more than defendant's ten-year sentence on false imprisonment because ten years was the maximum sentence for that crime, any alleged error that could have occurred in the first part of the judge's explanation was harmless in light of the explanation as a whole. Watson v. State, 275 Ga. App. 174, 620 S.E.2d 176 (2005).

**No review of sentence within statutory limit.** — Since the sentence for false imprisonment was within the statutory limits, the court would not review the sentence, holding that any question as to the excessiveness of the sentence should be addressed to the sentence review panel. Rehberger v. State, 235 Ga. App. 827, 510 S.E.2d 594 (1998).

## OPINIONS OF THE ATTORNEY GENERAL

**Sheriff subject to liability for false imprisonment for illegal arrest.** — If the sheriff, in capacity as a law enforcement officer of this state, undertakes to arrest an individual under circumstances

which do not give the sheriff the authority to make arrests, it is an illegal arrest and as such may subject the sheriff to liability for false imprisonment. 1972 Op. Att'y Gen. No. 72-24.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 32 Am. Jur. 2d, False Imprisonment, §§ 1 et seq., 111.

**Am. Jur. Proof of Facts.** — False Imprisonment — Failure to Take Arrestee Before Magistrate Without Unreasonable or Unnecessary Delay, 26 POF2d 617.

Compensatory Damages for False Imprisonment, 13 POF3d 111.

**C.J.S.** — 35 C.J.S., False Imprisonment, §§ 1 et seq., 71, 72.

**ALR.** — False imprisonment as affected by offer to release plaintiff conditionally or temporarily, 6 ALR 1475.

Civil liability of judicial officer for false imprisonment, 13 ALR 1344; 55 ALR 282; 173 ALR 802.

Malice and want of probable cause as elements of action for false imprisonment, 19 ALR 671; 137 ALR 504.

Action for malicious prosecution or false arrest based on extradition proceeding, 55 ALR 353.

Justification in action for false imprisonment by proof of existence of ground other than that on which arrest was made, or one of several grounds on which it was made, 64 ALR 653.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 79 ALR 13.

Malice and want of probable cause as element or factor of action for false imprisonment, 137 ALR 504.

Liability, for false imprisonment or arrest, of a private person answering call of known or asserted peace or police officer to assist in making arrest which turns out to be unlawful, 29 ALR2d 825.

False imprisonment as included offense within charge of kidnapping, 68 ALR3d 828.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

Liability for false arrest or imprisonment under warrant as affected by mistake as to identity of person arrested, 39 ALR4th 705.

Excessiveness or inadequacy of compensatory damages for false imprisonment or arrest, 48 ALR4th 165.

Penalties for common-law criminal offense of false imprisonment, 67 ALR4th 1103.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence, 81 ALR4th 1031.

## 16-5-42. False imprisonment under color of legal process.

When the arrest, confinement, or detention of a person by warrant, mandate, or process is manifestly illegal and shows malice and oppression, an officer issuing or knowingly and maliciously executing the same shall, upon conviction thereof, be removed from office and punished by imprisonment for not less than one nor more than ten years. (Laws 1833, Cobb's 1851 Digest, p. 788; Code 1863, § 4265; Code 1868, § 4300; Code 1873, § 4366; Code 1882, § 4366; Ga. L. 1895, p. 63, §§ 1, 2; Penal Code 1895, § 108; Penal Code 1910, § 108; Code 1933, § 26-1503; Code 1933, § 26-1309, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — Civil action for false imprisonment, § 51-7-20 et seq.

### JUDICIAL DECISIONS

**Law does not presume malice against judicial officer** because the officer renders an illegal judgment, or because, in the discharge of the officer's official functions, the officer does an illegal act. *Campbell v. State*, 48 Ga. 353 (1873).

**Justice of peace indicted under O.C.G.A. § 16-5-42 is not entitled to appear before grand jury.** — Justice of the peace indicted for false imprisonment under color of legal process is not entitled to the right of appearance and of being heard before the grand jury at the time

the true bill is found. *Campbell v. State*, 48 Ga. 353 (1873).

**When defendant was arrested without a warrant**, a charge on O.C.G.A. § 16-5-42 was not appropriate, and the refusal to give the charge was not error. *Parrish v. State*, 182 Ga. App. 247, 355 S.E.2d 682 (1987).

Cited in *Mastroianni v. Deering*, 879 F. Supp. 1245 (S.D. Ga. 1994); *Mastroianni v. Bowers*, 160 F.3d 671 (11th Cir. 1998); *Tesler v. State*, 295 Ga. App. 569, 672 S.E.2d 522 (2009).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judges, § 77.

**C.J.S.** — 35 C.J.S., False Imprisonment, § 4 et seq.

**ALR.** — Civil liability of judicial officer for false imprisonment, 13 ALR 1344; 55 ALR 282; 173 ALR 802.

Malice and want of probable cause as elements of action for false imprisonment, 19 ALR 671; 137 ALR 504.

Action for malicious prosecution or false arrest based on extradition proceeding, 55 ALR 353.

Justification in action for false imprisonment by proof of existence of ground other than that on which arrest was made, or one of several grounds on which it was made, 64 ALR 653.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 79 ALR 13.

Malice and want of probable cause as element or factor of action for false imprisonment, 137 ALR 504.

Liability for false arrest or imprisonment under a warrant as affected by mistake as to identity of person arrested, 10 ALR2d 750; 39 ALR4th 705.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence, 81 ALR4th 1031.

### 16-5-43. Malicious confinement of sane person in an asylum.

A person who maliciously causes the confinement of a sane person, knowing such person to be sane, in any asylum, public or private, shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than ten years. (Ga. L. 1890-91, p. 237, § 4; Penal Code 1895, § 560; Penal Code 1910, § 575; Code 1933, § 26-1504; Code 1933, § 26-1310, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — Procedures for detaining persons in facilities for treatment of mental illness, § 37-3-81 et seq. Petition for writ of habeas corpus to question cause and legality of detention in

facility for treatment of mental illness, § 37-3-148. Civil action for false arrest, false imprisonment, and malicious prosecution, Ch. 7, T. 51.

## JUDICIAL DECISIONS

**Convictions did not merge as a matter of fact.** — Defendant's convictions for false swearing under O.C.G.A. § 16-10-71, proven by evidence that defendant made false statements in an affidavit seeking an involuntary commitment order for the victim, and malicious confinement under O.C.G.A. § 16-5-43, supported by proof apart from the execution of the false affidavit, did not merge as a matter of fact. *Washington v. State*, 271 Ga. App. 764, 610 S.E.2d 692 (2005).

**Failure to raise void for vagueness claim not deficient performance.** — Trial counsel's failure to raise a novel legal argument, that O.C.G.A. § 16-5-43 was unconstitutionally vague, did not amount to ineffective assistance of counsel. *Washington v. State*, 271 Ga. App. 764, 610 S.E.2d 692 (2005).

**Failure to hire an expert.** — Trial counsel was not ineffective for failing to hire an expert to testify to the detrimental effects of cocaine use in a trial in which defendant was charged with violating O.C.G.A. § 16-5-43 after swearing in an affidavit that the victim was suicidal and was using crack cocaine; the relevant consideration was what defendant knew or could show concerning the victim's mental state at the time defendant had the victim confined because the defendant had not seen the victim for several months and could not have observed the victim on the date or during the time frame stated in the affidavit. *Washington v. State*, 271 Ga. App. 764, 610 S.E.2d 692 (2005).

## RESEARCH REFERENCES

**C.J.S.** — 35 C.J.S., False Imprisonment, §§ 21, 23, 24.

**ALR.** — Civil liability of judicial officer for false imprisonment, 55 ALR 282; 173 ALR 802.

Right, without judicial proceeding, to arrest and detain one who is, or is suspected of being, mentally deranged, 92 ALR2d 570.

### 16-5-44. Hijacking an aircraft.

(a) A person commits the offense of hijacking an aircraft when he (1) by use of force or (2) by intimidation by the use of threats or coercion places the pilot of an aircraft in fear of immediate serious bodily injury to himself or to another and causes the diverting of an aircraft from its intended destination to a destination dictated by such person.

(b) The offense of hijacking is declared to be a continuing offense from the point of beginning, and jurisdiction to try a person accused of the offense of hijacking shall be in any county of this state over which the aircraft is operated.

(c) A person convicted of the offense of hijacking an aircraft shall be punished by death or life imprisonment. (Code 1933, § 26-3301, enacted by Ga. L. 1969, p. 741, § 1.)

**Cross references.** — Time limitation on prosecutions for crimes punishable by death or life imprisonment, § 17-3-1.

**JUDICIAL DECISIONS**

**Punishment of death does not invariably violate the Constitution.**  
Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

**Cited** in Bradshaw v. State, 284 Ga. 675, 671 S.E.2d 485 (2008).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 8A Am. Jur. 2d, Aviation, § 215. 61 Am. Jur. 2d, Piracy, § 5.

**Am. Jur. Proof of Facts.** — Proof of Liability for Air Crash, 51 POF3d 81.

**ALR.** — Liability of air carrier for damage or injury sustained by passenger as result of hijacking, 72 ALR3d 1299.

Validity, construction, and application of provisions of Federal Aviation Act (49 USCS Appx § 1472(i)-(l), (n)) punishing air piracy and certain acts aboard aircraft in flight, or boarding aircraft, 109 ALR Fed. 488.

**16-5-44.1. Hijacking a motor vehicle.**

(a) As used in this Code section:

(1) "Firearm" means any handgun, rifle, shotgun, or similar device or weapon which will or can be converted to expel a projectile by the action of an explosive or electrical charge and includes stun guns and tasers as defined by subsection (a) of Code Section 16-11-106, as amended, and any replica, article, or device having the appearance of a firearm.

(2) "Motor vehicle" means any vehicle which is self-propelled.

(3) "Weapon" means an object, device, or instrument which when used against a person is likely to or actually does result in serious bodily injury or death or any replica, article, or device having the appearance of such a weapon including, but not limited to, any object defined as a weapon by Code Section 16-11-127.1 or as a dangerous weapon by Code Section 16-11-121.

(b) A person commits the offense of hijacking a motor vehicle when such person while in possession of a firearm or weapon obtains a motor vehicle from the person or presence of another by force and violence or intimidation or attempts or conspires to do so.

(c) A person convicted of the offense of hijacking a motor vehicle shall be punished by imprisonment for not less than ten nor more than 20 years and a fine of not less than \$10,000.00 nor more than \$100,000.00, provided that any person who has previously committed an offense under the laws of the United States or of Georgia or of any of the several states or of any foreign nation recognized by the United States which if committed in Georgia would have constituted the offense of hijacking a motor vehicle shall be punished by imprisonment for life and a fine of not less than \$100,000.00 nor more than \$500,000.00. For purposes of

this subsection, "state" shall include the District of Columbia and any territory, possession, or dominion of the United States.

(d) The offense of hijacking a motor vehicle shall be considered a separate offense and shall not merge with any other offense; and the punishment prescribed by subsection (c) of this Code section shall not be deferred, suspended, or probated.

(e) Any property which is used, intended for use, derived, or realized, directly or indirectly, from a violation of this Code section is forfeited to the state and no property interest shall exist therein. Any action declaring such forfeiture shall be governed by the provisions of Code Section 16-13-49. (Code 1981, § 16-5-44.1, enacted by Ga. L. 1994, p. 1625, § 3.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1994, "subsection (c)" was substituted for "subsection (b)" in subsection (d).

**Editor's notes.** — Ga. L. 1994, p. 1625, § 1, not codified by the General Assembly,

provides: "This Act shall be known and may be cited as the 'Anti-motor Vehicle Hijacking Act of 1994'."

**Law reviews.** — For note on the 1994 enactment of this Code section, see 11 Georgia St. U.L. Rev. 99 (1994).

## JUDICIAL DECISIONS

**Constitutional challenge waived.** — While a defendant challenged the constitutionality of the non-merger provision of the hijacking a motor vehicle statute, O.C.G.A. § 16-5-44.1(d), the Supreme Court, after the initial appeal had been filed under Ga. Const. 1983, Art. VI, Sec. VI, Para. II, had determined that the challenge was untimely and thus had been waived; thus, the defendant could not pursue the challenge at the appellate court level after the case had been transferred. *Rutland v. State*, 296 Ga. App. 471, 675 S.E.2d 506 (2009).

**Double jeopardy.** — O.C.G.A. § 16-5-44.1(d) supersedes the double jeopardy provisions of O.C.G.A. § 16-1-7 in carjacking cases. *Campbell v. State*, 223 Ga. App. 484, 477 S.E.2d 905 (1996).

Statute prohibiting the hijacking of a motor vehicle does not violate the prohibition against double jeopardy since the double jeopardy clause of the Georgia Constitution does not prohibit additional punishment for a separate offense which the General Assembly has deemed to warrant separate sanction. *Mathis v. State*, 273 Ga. 508, 543 S.E.2d 712 (2001).

Defendant's conviction of hijacking a

motor vehicle and armed robbery were properly entered, despite defendant's contention that the state used the same facts to establish both offenses and that defendant should have only been convicted of and sentenced for one of the offenses, as: (1) hijacking a motor vehicle was considered a separate offense and did not merge with any other offense; (2) O.C.G.A. § 16-5-44.1 superseded the double jeopardy provisions of O.C.G.A. § 16-1-7 in motor vehicle hijacking cases; (3) O.C.G.A. § 16-5-44.1(d) did not violate the prohibition against double jeopardy, since the double jeopardy clause of the Georgia Constitution did not prohibit additional punishment for a separate offense which the legislature deemed to warrant separate sanction; and (4) defendant failed to offer any evidence in support of defendant's allegation that O.C.G.A. § 16-5-44.1(d) otherwise violated defendant's double jeopardy rights. *Holman v. State*, 272 Ga. App. 890, 614 S.E.2d 124 (2005).

Defendant's separate convictions for armed robbery and hijacking a motor vehicle did not violate the prohibitions against double jeopardy as O.C.G.A.

§ 16-5-44.1(d) provided that hijacking a motor vehicle was a separate offense and did not merge and it therefore superseded the state statutory double jeopardy provision; further, the Georgia Constitution did not prohibit additional punishment for a separate offense that the Georgia legislature had deemed to warrant a separate sanction; defendant failed to show how the hijacking statute violated the federal double jeopardy clause. *Mullins v. State*, 280 Ga. App. 689, 634 S.E.2d 850 (2006).

Separate convictions for armed robbery and hijacking a motor vehicle did not violate the state and federal prohibitions against double jeopardy as the latter constituted a separate offense warranting a separate sanction under Georgia law, thus warranting an additional punishment. *Dumas v. State*, 283 Ga. App. 279, 641 S.E.2d 271 (2007).

Defendant's argument that separate convictions for armed robbery and hijacking a motor vehicle violated prohibitions against double jeopardy was properly rejected because O.C.G.A. § 16-5-44.1(d) expressly provided that hijacking a motor vehicle was a separate offense, superseding the statutory double jeopardy provisions of O.C.G.A. § 16-1-7. *Souder v. State*, 301 Ga. App. 348, 687 S.E.2d 594 (2009), cert. denied, No. S10C0536, 2010 Ga. LEXIS 343 (Ga. 2010).

**"Person or presence."** — Jury was authorized to find that defendant took the car from the victim's "person or presence" for purposes of O.C.G.A. § 16-5-44.1, when, although the victim, a store clerk, was not actually in the victim's car, it was parked just outside the store, and the car keys were taken directly from the victim's person upon threat of injury. *Johnson v. State*, 246 Ga. App. 109, 539 S.E.2d 605 (2000).

Because the family members in a home invasion were bound and lying in the foyer of their home when their vehicle was taken from the attached garage, the jury could have concluded that the theft of the vehicle was in the husband's presence, because the defendants took the keys to the vehicle which were under the husband's control, or the jury could have concluded that the vehicle was under the husband's control simply because the ve-

hicle was located in the attached garage. *Kollie v. State*, 301 Ga. App. 534, 687 S.E.2d 869 (2009).

**"Firearm."** — For purposes of O.C.G.A. § 16-5-44.1, threatening someone with a gun constitutes intimidation, as well as force and violence. *Collis v. State*, 252 Ga. App. 659, 556 S.E.2d 221 (2001).

**"Obtain."** — Because the text of the hijacking statute, O.C.G.A. § 16-5-44.1, does not define "obtain", a court looks to the ordinary meaning of that word given that it was not a term of art or a technical term pursuant to O.C.G.A. § 1-3-1(b); ordinarily, "obtain" means to gain or attain possession, usually by some planned action or method, and applying the ordinary meaning of "obtain", the offense of hijacking a motor vehicle is concluded when possession of the motor vehicle is attained. *Jackson v. State*, No. A10A2164, 2011 Ga. App. LEXIS 309 (Mar. 30, 2011).

**Included offenses.** — Theft by receiving a motor vehicle is not a lesser included offense of hijacking a motor vehicle. *Middlebrooks v. State*, 241 Ga. App. 193, 526 S.E.2d 406 (1999).

Trial court did not err in failing to give a requested jury instruction on a lesser offense of theft by receiving stolen property as theft by receiving stolen property is not a lesser included offense of armed robbery, theft by taking, or hijacking a motor vehicle. *Mullins v. State*, 267 Ga. App. 393, 599 S.E.2d 340 (2004).

**Merger of offenses.** — Offense of hijacking did not merge with defendant's armed robbery conviction for sentencing purposes. *Dillard v. State*, 223 Ga. App. 405, 477 S.E.2d 674 (1996).

Aggravated assault offense was properly not merged with the offense of hijacking a motor vehicle because the latter crime was considered a separate offense and would not merge with any other offense charged. *Kemper v. State*, 251 Ga. App. 665, 555 S.E.2d 40 (2001).

O.C.G.A. § 16-5-44.1(d) supersedes the double jeopardy provision contained in O.C.G.A. § 16-1-7(a). Thus, the trial court did not err in refusing to merge the defendant's armed robbery and hijacking convictions. *Boykin v. State*, 264 Ga. App. 836, 592 S.E.2d 426 (2003).

**Physical manifestation requirement.** — Because no evidence was offered

to establish the physical manifestation requirement necessary to sustain a reasonable inference that the defendant had a gun, a weapon, or any object, defendant's conviction was reversed. Bradford v. State, 223 Ga. App. 424, 477 S.E.2d 859 (1996).

**Weapon.** — O.C.G.A. § 16-5-44.1(b) does not authorize a conviction for hijacking a motor vehicle since no weapon or instrument was used other than the defendant's own hands and feet. Haugland v. State, 253 Ga. App. 423, 560 S.E.2d 50 (2002).

**Proof of venue.** — State failed to prove venue for armed robbery and hijacking a motor vehicle since the facts showed that the victim was forced at gunpoint into the victim's car in a parking lot in one county and then ordered the victim to drive into a second county (the place of trial) since the victim was taken from the car and shot; both offenses were complete in the first county and neither O.C.G.A. § 16-8-1 nor O.C.G.A. § 17-2-2(d) were applicable to confer venue in the second county. Bradley v. State, 272 Ga. 740, 533 S.E.2d 727 (2000).

**Occupancy of vehicle not required.** — O.C.G.A. § 16-5-44.1 does not require that the person be in the motor vehicle; thus, evidence that the cars were taken from the "presence of" the victims was sufficient to prove the elements of the crime. Stephens v. State, 245 Ga. App. 823, 538 S.E.2d 882 (2000).

**Identification of defendant.** — Evidence was sufficient to support defendant's conviction for hijacking a motor vehicle, as defendant's challenge to that conviction was meritless; defendant's contention that the evidence was insufficient had to be rejected because it was premised on the argument that the victims' identification of defendant as a perpetrator was tainted by an impermissibly suggestive photographic lineup and the photographic lineup procedure was not impermissibly suggestive. Evans v. State, 261 Ga. App. 22, 581 S.E.2d 676 (2003).

**Denial of motion to sever.** — In a prosecution on two counts of attempting to hijack a motor vehicle, four counts of aggravated assault, possession of a firearm during the commission of a crime, and

criminal trespass, because the offenses committed by a defendant and a codefendant amounted to a series of continuous acts connected together both in time and the area in which committed, and there was no likelihood of confusion, the trial court did not abuse its discretion in denying the defendant's motion to sever the trial from that of the codefendant; furthermore, the mere fact that the codefendants' defenses were antagonistic was insufficient in itself to warrant separate trials. Diaz v. State, 280 Ga. App. 413, 634 S.E.2d 160 (2006).

**Evidence insufficient for conviction.** — Evidence did not authorize a finding that the defendant committed the crime of hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b), because the defendant did not use a gun as a concomitant to induce the owner of the vehicle to relinquish possession of the car, but the gun was used only after the defendant had attained possession of the vehicle; when the gun was pointed at the car's owner the defendant was already inside the car and was driving away in the car, and by that point, the car had already been attained by the defendant. Jackson v. State, No. A10A2164, 2011 Ga. App. LEXIS 309 (Mar. 30, 2011).

**Evidence sufficient for conviction.** — See Anderson v. State, 246 Ga. App. 189, 539 S.E.2d 879 (2000).

Defendant's possession of a recently stolen vehicle within minutes of its hijacking; defendant's flight from the police when they attempted to stop the vehicle; the presence of a gun, which did not belong to the victim, in the victim's vehicle after defendant's arrest; and the victim's positive identification of defendant at the arrest scene not long after the hijacking, was sufficient evidence to support defendant's convictions of armed robbery in violation of O.C.G.A. § 16-8-41(a), and hijacking a motor vehicle in violation of O.C.G.A. § 16-5-44.1(b). Lane v. State, 255 Ga. App. 274, 564 S.E.2d 857 (2002).

There was sufficient evidence to convict defendant of hijacking a motor vehicle since the defendant had a weapon and took a vehicle from the person or presence of another while in possession of the weapon, and defendant used force, vio-

lence or intimidation to accomplish the taking. Pearson v. State, 258 Ga. App. 651, 574 S.E.2d 820 (2002).

When the defendant took a cab driver's fare money, a gold coin, and the cab and was apprehended after a chase, the evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of armed robbery, hijacking a motor vehicle, and obstruction of a police officer. Frazier v. State, 263 Ga. App. 12, 587 S.E.2d 173 (2003).

Evidence was sufficient to support defendant's hijacking a motor vehicle conviction under O.C.G.A. § 16-5-44.1(b) where: (1) the car was registered to an owner in another state, but the victim primarily used it; (2) although another person was holding the keys at the time of the taking, the victim was standing by the car when a gunman pointed a gun at both individuals; and (3) the gunman took the keys, and drove away. Mullins v. State, 267 Ga. App. 393, 599 S.E.2d 340 (2004).

Victim's testimony and in-court identification was sufficient evidence to convict defendant of hijacking the victim's motor vehicle at a gas station and of aggravated assault for shooting the victim three times; furthermore, the photo lineup was not unduly suggestive. Weeks v. State, 268 Ga. App. 886, 602 S.E.2d 882 (2004).

In addition to the second codefendant's testimony, the state showed that, shortly after the murder, the defendant was in possession of the victim's cab, that the victim's blood was found in the vehicle and on the defendant, and that the defendant made incriminating admissions to others; thus, the evidence was sufficient to authorize a rational trier of fact to find proof beyond a reasonable doubt of the defendant's guilt of malice murder, armed robbery, aggravated assault, hijacking a motor vehicle, and possession of a firearm during the commission of a felony. Wicks v. State, 278 Ga. 550, 604 S.E.2d 768 (2004).

Evidence that the defendant and others approached two separate victims while the defendant brandished a shotgun, that defendant threatened the victims with the gun, and that defendant and the compatriots stole both of the victims' cars, sufficed to sustain convictions of two counts of hijacking a motor vehicle, two counts of

armed robbery, two counts of aggravated assault with a deadly weapon, and two counts of possession of a firearm during the commission of a felony; the jury was free to disbelieve defendant's testimony that defendant was coerced into threatening the victims at gunpoint and participating in the car thefts. Martinez v. State, 278 Ga. App. 500, 629 S.E.2d 485 (2006).

Evidence identifying the defendant as the perpetrator who stole a victim's car and purse at gunpoint, coupled with evidence of the defendant's flight from police, possession of the stolen car, and possession of the revolver used in the crimes, was sufficient to support convictions for hijacking a motor vehicle, possession of a firearm during the commission of a felony, armed robbery, and aggravated assault with a deadly weapon; however, the conviction and sentence for aggravated assault merged as a matter of fact into the armed robbery conviction and sentence. Doublette v. State, 278 Ga. App. 746, 629 S.E.2d 602 (2006).

Convictions of armed robbery, possession of a firearm during the commission of a crime, false imprisonment, and hijacking a motor vehicle were supported by sufficient evidence since a perpetrator identified as the defendant robbed a pizza restaurant at gunpoint, ordered everyone into a cooler, and took the restaurant manager's vehicle, after which an officer discovered the defendant the next day driving the manager's vehicle and wearing a hat identical to that worn by the perpetrator, and since a customer at the restaurant identified the defendant as the robber in a photo line-up and at trial; while three of the four crimes arising out of the incident were committed after the customer, who was the only witness to identify defendant, was ordered into the cooler, only one robber entered the restaurant and the jury was authorized to infer that the person identified by the customer also committed the crimes committed after the customer was in the cooler. Head v. State, 279 Ga. App. 608, 631 S.E.2d 808 (2006).

Sufficient circumstantial evidence excluded every reasonable hypothesis of innocence in the armed robbery in violation of O.C.G.A. § 16-8-41 and hijacking a

motor vehicle in violation of O.C.G.A. § 16-5-44.1 case; after the victim's car was stolen, the defendant used the victim's cell phone, a search of the defendant's residence uncovered the victim's and the victim's spouse's keys, and prints in the car matched the defendant's prints. *Huff v. State*, 281 Ga. App. 573, 636 S.E.2d 738 (2006).

Because: (1) the trial court did not err in admitting certain identification evidence alleged to be hearsay, as testimony relative to that evidence was not offered for the truth of the matter asserted; (2) the defendant's requested instruction was not tailored to the facts and was potentially confusing; and (3) the defendant's character was not placed in issue, convictions of armed robbery, hijacking a motor vehicle, and obstruction were all upheld on appeal. *Jennings v. State*, 285 Ga. App. 774, 648 S.E.2d 105 (2007), cert. denied, No. S07C1576, 2007 Ga. LEXIS 667 (Ga. 2007).

Trial court properly convicted defendant of armed robbery and hijacking of a motor vehicle because: (1) there was sufficient evidence to establish defendant committed the crimes based on the testimony of the victim, who identified defendant as the individual who approached the victim's vehicle, pointed a gun, and demanded the vehicle; (2) two officers testified as to observing defendant driving the stolen vehicle the same night; and (3) the victim's cell phone was found on defendant's person when the defendant was arrested. *Culver v. State*, 290 Ga. App. 321, 659 S.E.2d 390 (2008).

Testimony by a victim that the defendant and an accomplice, armed with handguns, forcibly entered the victim's apartment, raped and sodomized the victim, struck the victim with a gun, stole jewelry, bound the victim, and escaped in a car owned by the victim's prospective spouse, and evidence that 24 fingerprints lifted from the apartment and car matched the defendant's, was sufficient to convict the defendant of hijacking a motor vehicle. *Crawford v. State*, 292 Ga. App. 463, 664 S.E.2d 820 (2008).

Defendant's possession of a vehicle within minutes of the vehicle's hijacking, the defendant's attempted flight when po-

lice ordered the defendant out of the car, the recovery of a .40 caliber handgun in the car, and the victim's positive identification of the defendant authorized the jury to find the defendant guilty of hijacking a motor vehicle and of possession of a firearm during the commission of a felony. *Wilcox v. State*, 297 Ga. App. 201, 677 S.E.2d 142 (2009), cert. denied, No. S09C1285, 2009 Ga. LEXIS 342 (Ga. 2009).

Even if defendant was not physically present during the hijacking, given the evidence of the defendant's agreement with defendant's passenger to steal a car, any act done in pursuance of that association by the defendant's passenger would, in legal contemplation, be the act of defendant. Additionally, defendant could have been convicted of hijacking a motor vehicle even if the defendant had no knowledge that the defendant's passenger was planning to use a gun to perpetrate the crime because defendant's passenger's use of the gun was naturally or necessarily done in furtherance of the conspiracy to steal a vehicle even though not part of the original agreement; therefore, given that the evidence supported defendant's conviction under the theories of conspiracy and parties to a crime, the evidence was sufficient to convict defendant of hijacking a motor vehicle in violation of O.C.G.A. § 16-5-44.1(b). *Johnson v. State*, 299 Ga. App. 706, 683 S.E.2d 659 (2009).

Although under Georgia law, a defendant could not be convicted solely upon the uncorroborated testimony of an accomplice, O.C.G.A. § 24-4-8, the evidence corroborated some particulars of the accomplice's testimony implicating the codefendants in the charged crimes since all three of the victims from the three separate gas stations provided descriptions of their assailants that generally matched the codefendants and the accomplice, and all three victims also testified that their assailants brandished a handgun and a shotgun, which were indeed the weapons that were found at the scene where the stolen SUV crashed and where the accomplice was arrested. Accordingly, the evidence corroborating the accomplice's testimony was sufficient to authorize the jury's determination that the codefen-

dants were guilty beyond a reasonable doubt as parties to armed robbery, O.C.G.A. § 16-8-41, hijacking a motor vehicle, O.C.G.A. § 16-5-44.1, aggravated assault, O.C.G.A. § 16-5-21, theft by taking, O.C.G.A. § 16-8-2, theft by receiving, O.C.G.A. § 16-8-7, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106. Daniels v. State, 306 Ga. App. 577, 703 S.E.2d 41 (2010).

Defendant's convictions for kidnapping, hijacking a motor vehicle, armed robbery, possession of a firearm during the commission of a felony, carrying a concealed weapon, and possession of a weapon on school property were authorized because, pursuant to O.C.G.A. § 24-4-8, the victim's testimony alone established the essential elements of the offenses. Lester v. State, No. A10A1665, 2011 Ga. App. LEXIS 310 (Mar. 30, 2011).

**Other conduct or crimes.** — Trial court did not abuse its discretion in admitting similar transaction evidence of a first car-jacking to show bent of mind, course of conduct, and identity where: (1) both incidents constituted car-jackings committed with a gun pointed at the victim; (2) the incidents occurred within six days of each other; (3) the first car-jacking involved a car of the same make and color as one used in the car-jacking that was being tried; (4) the victim of the first car-jacking positively identified defendant as the perpetrator of the first car-jacking; and (5) the testimony of the victim of the first car-jacking was sufficient to meet the elements of O.C.G.A. § 16-5-44.1(b). Mullins v. State, 267 Ga. App. 393, 599 S.E.2d 340 (2004).

**Conviction for hijacking, battery, and kidnapping supported by evidence.** — Convictions for hijacking a motor vehicle in violation of O.C.G.A. § 16-5-44.1(b), battery in violation of O.C.G.A. § 16-5-23, and two counts of kidnapping with bodily injury under O.C.G.A. § 16-5-40(b) were supported by sufficient evidence because the victim testified that defendant forced a way into the car at gunpoint while defendant and the infant child were in the vehicle and then sexually assaulted the victim after threatening to harm the child, defendant's wallet was found in the abandoned car, and

defendant admitted to the hijacking. Adams v. State, 276 Ga. App. 319, 623 S.E.2d 525 (2005).

**Jury instructions.** — Specific inclusion of conspiracy as a method of committing the crime of hijacking a motor vehicle does not alter the general rule that a conspiracy can be proven and charged without being indicted; therefore, the trial court did not err by reading the entire hijacking statute or defining "conspiracy" in response to a jury question. Middlebrooks v. State, 241 Ga. App. 193, 526 S.E.2d 406 (1999).

Defendant was properly convicted of hijacking where defendant was seen leaving a party with a pistol, discussed robbing a cab driver with two accomplices, was seen entering the victim's cab, was identified as one of the accomplices, and was identified as the person who shot the victim in the head, after which defendant participated in stealing \$ 50 from the cab. Chinn v. State, 276 Ga. 387, 578 S.E.2d 856 (2003).

Trial court did not abuse the court's discretion in the manner in which the court recharged the jury. It did not appear that the jury was confused or misled by the lack of a recharge on hijacking; moreover, counsel did not request one or submit an alternate request to charge. Wilcox v. State, 297 Ga. App. 201, 677 S.E.2d 142 (2009), cert. denied, No. S09C1285, 2009 Ga. LEXIS 342 (Ga. 2009).

Trial court did not abuse the court's discretion in charging the jury on the definitions of a firearm and a weapon in response to the jury's question regarding the offense of hijacking a motor vehicle because those terms were included within the definition of hijacking a motor vehicle. Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742 (2010).

**Sentencing.** — Defendant convicted under O.C.G.A. § 16-5-44.1 who was originally sentenced to the maximum 20 years under the recidivist provisions of O.C.G.A. § 17-10-7, with ten of the 20 years to be served on probation, was properly re-sentenced because O.C.G.A. § 16-5-44.1 provides that the prescribed punishment "shall not be deferred, suspended, or probated." Stephens v. State, 245 Ga. App. 823, 538 S.E.2d 882 (2000).

Because the trial court imposed consecutive sentences upon the defendant's conviction of hijacking a motor vehicle because it mistakenly believed it had no discretion to do otherwise, the sentence was vacated and a resentencing was ordered on remand, as O.C.G.A. § 16-5-44.1(d) did not mandate the sentence. *Smith v. State*, 278 Ga. App. 858, 630 S.E.2d 125 (2006).

**Cited** in *Callahan v. State*, 250 Ga. App. 193, 550 S.E.2d 757 (2001); *Jaheni v. State*, 285 Ga. App. 266, 645 S.E.2d 735 (2007); *Hyde v. State*, 291 Ga. App. 662, 662 S.E.2d 764 (2008); *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008); *Smith v. State*, 304 Ga. App. 708, 699 S.E.2d 742 (2010).

#### RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of state carjacking statutes, 100 ALR5th 67.

### 16-5-45. Interference with custody.

(a) As used in this Code section, the term:

(1) "Child" means any individual who is under the age of 17 years or any individual who is under the age of 18 years who is alleged to be a deprived child or an unruly child as such terms are defined in Code Section 15-11-2.

(2) "Committed person" means any child or other person whose custody is entrusted to another individual by authority of law.

(3) "Lawful custody" means that custody inherent in the natural parents, that custody awarded by proper authority as provided in Code Section 15-11-45, or that custody awarded to a parent, guardian, or other person by a court of competent jurisdiction.

(4) "Service provider" means an entity that is registered with the Department of Human Services pursuant to Article 7 of Chapter 5 of Title 49 or a child welfare agency as defined in Code Section 49-5-12 or an agent or employee acting on behalf of such entity or child welfare agency.

(b)(1) A person commits the offense of interference with custody when without lawful authority to do so, the person:

(A) Knowingly or recklessly takes or entices any child or committed person away from the individual who has lawful custody of such child or committed person;

(B) Knowingly harbors any child or committed person who has absconded; provided, however, that this subparagraph shall not apply to a service provider that notifies the child's parent, guardian, or legal custodian of the child's location and general state of well being as soon as possible but not later than 72 hours after the

child's acceptance of services; provided, further, that such notification shall not be required if:

(i) The service provider has reasonable cause to believe that the minor has been abused or neglected and makes a child abuse report pursuant to Code Section 19-7-5;

(ii) The child will not disclose the name of the child's parent, guardian, or legal custodian, and the Division of Family and Children Services within the Department of Human Services is notified within 72 hours of the child's acceptance of services; or

(iii) The child's parent, guardian, or legal custodian cannot be reached, and the Division of Family and Children Services within the Department of Human Services is notified within 72 hours of the child's acceptance of services; or

(C) Intentionally and willfully retains possession within this state of the child or committed person upon the expiration of a lawful period of visitation with the child or committed person.

(2) A person convicted of the offense of interference with custody shall be punished as follows:

(A) Upon conviction of the first offense, the defendant shall be guilty of a misdemeanor and shall be fined not less than \$200.00 nor more than \$500.00 or shall be imprisoned for not less than one month nor more than five months, or both fined and imprisoned;

(B) Upon conviction of the second offense, the defendant shall be guilty of a misdemeanor and shall be fined not less than \$400.00 nor more than \$1,000.00 or shall be imprisoned for not less than three months nor more than 12 months, or both fined and imprisoned; and

(C) Upon the conviction of the third or subsequent offense, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.

(c)(1) A person commits the offense of interstate interference with custody when without lawful authority to do so the person knowingly or recklessly takes or entices any minor or committed person away from the individual who has lawful custody of such minor or committed person and in so doing brings such minor or committed person into this state or removes such minor or committed person from this state.

(2) A person also commits the offense of interstate interference with custody when the person removes a minor or committed person from this state in the lawful exercise of a visitation right and, upon the expiration of the period of lawful visitation, intentionally retains

possession of the minor or committed person in another state for the purpose of keeping the minor or committed person away from the individual having lawful custody of the minor or committed person. The offense is deemed to be committed in the county to which the minor or committed person was to have been returned upon expiration of the period of lawful visitation.

(3) A person convicted of the offense of interstate interference with custody shall be guilty of a felony and shall be imprisoned for not less than one year nor more than five years. (Code 1933, § 26-1312, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1978, p. 1420, § 1; Ga. L. 1982, p. 970, § 2; Ga. L. 1986, p. 1325, § 1; Ga. L. 1987, p. 561, § 1; Ga. L. 1999, p. 81, § 16; Ga. L. 2000, p. 20, § 5; Ga. L. 2011, p. 470, § 2/SB 94.)

**The 2011 amendment**, effective July 1, 2011, in paragraph (a)(1), inserted "or an unruly child", substituted "such terms are defined" for "such is defined", and deleted ", relating to juvenile proceedings" following "Code Section 15-11-2" from the end; added paragraph (a)(4); inserted a comma in paragraph (b)(1); and, in subparagraph (b)(1)(B), added the proviso in the introductory language and added divisions (b)(1)(B)(i) through (b)(1)(B)(iii).

**Cross references.** — Proceedings for determination of child custody, Ch. 9, T. 19. Immunity of broadcasters from liability for Levi's Call: Georgia's Amber Alert Program, § 51-1-50.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1987, "; or" was substituted for "or;" at the end of subparagraph (b)(1)(B).

**Editor's notes.** — Ga. L. 2011, p. 470, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Runaway Youth Safety Act.'".

**Law reviews.** — For article, "Child Custody — Jurisdiction and Procedure," see 35 Emory L.J. 291 (1986).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues involved, decisions under former Penal Code 1910, § 110 and former Code 1933, § 26-1602, as it read prior to revision of the title by Ga. L. 1968, p. 1249, and former Code Section 16-5-40(b), are included in the annotations for this Code section.

**Defendant cannot be in violation unless terms of custody order are clear.** — Defendant cannot be in violation of O.C.G.A. § 16-5-45 unless the terms of the custody order are so clear that the parties have exact notice of the line which may not be transgressed. *Brassell v. State*, 259 Ga. 590, 385 S.E.2d 665 (1989).

**Interference with custody was not a lesser included offense of kidnapping**, as a matter of law or fact, where the indictment did not allege that the mother of the child was the victim of any crime.

*Stroud v. State*, 200 Ga. App. 387, 408 S.E.2d 175 (1991).

**Interference with custody is lesser included offense of kidnapping in some cases.** — Term "committed person" included a dependent child under age 16, and in some cases interference with custody becomes a lesser included offense of kidnapping under former Code 1933, § 26-1311(b). All the same facts would be proven if the child taken was under age 16. The essential difference in the two crimes laid in the degree of culpability required to establish the commission of each crime. *Watson v. State*, 235 Ga. 461, 219 S.E.2d 763 (1975) (decided prior to 1982 amendment of § 16-5-40 and this section).

**Venue.** — Evidence was sufficient to authorize a finding that the unlawful intent to interfere with custody coincided

with the taking of a child in a county so as to establish venue in that county. Avery v. State, 149 Ga. App. 414, 254 S.E.2d 408 (1979).

When a parent lawfully removes the child from the state, but unlawfully retains custody out of state, the legislature intended that the victim's domicile, i.e., the custodial parent, should be the venue of any criminal prosecution. State v. Evans, 212 Ga. App. 415, 442 S.E.2d 287 (1994).

Court erred in making findings of facts on the venue issue, including the subjective intent of the accused; these factual issues are for the jury. State v. Evans, 212 Ga. App. 415, 442 S.E.2d 287 (1994).

**When child has parent or guardian and when child has neither.** — Former Code 1933, § 26-1602 prescribes two offenses: (1) when the child has a parent or guardian; and (2) where the child has neither. In the former, the crime is against the parent. It is the fraudulent deprivation of the parent of the parent's right to the custody and dominion of a child, and the substitution of defendant's own dominion, custody, and control over the child for that of the parent. It is only when the parental control has been wrongfully attacked and abrogated that the offense of interference with custody is complete. Irby v. State, 57 Ga. App. 717, 196 S.E. 101 (1938) (decided under former Code 1933, § 26-1602); LeCroy v. State, 77 Ga. App. 851, 50 S.E.2d 148 (1948) (decided under former Code 1933, § 26-1602).

**Kidnapping by fraudulently enticing child from parent without consent or against parent's will.** — If a child be fraudulently decoyed or enticed away from its parent without the consent or against the will of the parent, it is not necessary to show that either force or malice entered into the transaction. The parental control has been wrongfully attacked and abrogated, though the child may have been willing to go away, without the necessity for the use of force, and where the accused had no ill will whatever against either parent or child. Rowell v. State, 41 Ga. App. 499, 153 S.E. 371 (1930) (decided under former Penal Code 1910, § 110).

On an indictment based on former Pe-

nal Code 1910, § 110 it is not necessary to prove that the child was "forcibly" or "maliciously" carried away, if it be shown that the child was fraudulently enticed away without the consent or against the will of the parent. Rowell v. State, 41 Ga. App. 499, 153 S.E. 371 (1930) (decided under former Penal Code 1910, § 110).

**There is no violation if parent has lost parental control over child alleged to have been kidnapped as when the child has married.** Irby v. State, 57 Ga. App. 717, 196 S.E. 101 (1938) (decided under former Code 1933, § 26-1602).

**Crime under former § 16-5-40(b) is against right of parent or guardian of the child and not against the child, and the consent of the child is immaterial.** Sawyer v. State, 112 Ga. App. 885, 147 S.E.2d 60 (1966) (former § 16-5-40(b) related to the kidnapping of a child under the age of 16).

**Consent of victim.** — That the child may have willingly allowed oneself to be enticed was of no consequence in a prosecution for kidnapping by maliciously enticing the child away against the will of the child's parents. Coker v. State, 164 Ga. App. 493, 297 S.E.2d 68 (1982).

**Interference with custody can be lesser included offense of kidnapping.** — Term "committed person" includes a dependent child under age 16 and in some cases interference with custody becomes a lesser included offense of kidnapping under former Code 1933, § 26-1311(b). All the same facts would be proven if the child taken was under age 16. The essential difference in the two crimes lies in the degree of culpability required to establish the commission of each crime. Watson v. State, 235 Ga. 461, 219 S.E.2d 763 (1975) (decided under former Code 1933, § 26-1311(b)).

**Delusion suffered by defendant that defendant could give victim better life economically does not justify kidnapping a child.** Kirk v. State, 168 Ga. App. 226, 308 S.E.2d 592 (1983).

**Father's testimony sufficient to infer lack of consent.** — Mother's lack of consent is an essential element of the offense of enticing away a female child under the age of 16 (now 17) years against the will of her parents. But the father's

testimony alone that neither he nor his wife had given consent, together with the defendant's acknowledgment that he had not known the victim or her parents prior to the abduction, is sufficient to authorize the jury to infer want of parental consent. *Kirk v. State*, 252 Ga. 133, 311 S.E.2d 821 (1984).

**Misapprehension as to age is not excuse.** — Fact that the accused was ignorant of the child's age, and that the accused believed, in good faith, and had good grounds to believe, that the child was more than eighteen years of age (now 17), is no defense to an indictment under former Penal Code 1910, § 110. *Smiley v. State*, 34 Ga. App. 513, 130 S.E. 359, cert. denied, 34 Ga. App. 836 (1925) (decided under former Penal Code 1910, § 110).

**Parent taking child from parent with temporary custody is not guilty of kidnapping.** — As between the mother and father, when parental control has not been lost, and in the absence of a decree of court awarding custody, the general rule is that a parent does not commit the crime of kidnapping by taking exclusive control of the child. *Adams v. State*, 218 Ga. 130, 126 S.E.2d 624, answer conformed to, 106 Ga. App. 531, 127 S.E.2d 477 (1962), commented on in 25 Ga. St. B.J. 327 (1963).

#### Evidence insufficient to authorize

**finding of guilt.** — Evidence showing that defendant retained possession of the minor child beyond the authorized visitation period because of unavoidable vehicle breakdowns was insufficient to authorize a finding of guilt. *Scott v. State*, 198 Ga. App. 10, 400 S.E.2d 677 (1990).

Conduct of defendant in taking a 15-year-old child to defendant's apartment when the child was supposed to be in school did not constitute a violation of O.C.G.A. § 16-5-45. *Thompson v. State*, 245 Ga. App. 396, 537 S.E.2d 807 (2000).

**Evidence insufficient to authorize finding of guilt.** — Interference with custody not shown under O.C.G.A. § 16-5-45(b)(1)(A) after a hospital employee reported the situation to child services who then took the children away. *Gwinnett Health Sys. v. DELU*, 264 Ga. App. 863, 592 S.E.2d 497 (2003).

**Sentence beyond statutory maximum.** — Sentence of 12 months confinement upon a conviction of interference with custody exceeded the applicable statutory maximum and was therefore void; furthermore, contrary to the state's contention, the defendant's failure to first file a motion to correct the sentence in the trial court did not deprive the appellate court of jurisdiction to consider the issue. *Arnold v. State*, 278 Ga. App. 188, 628 S.E.2d 605 (2006).

### OPINIONS OF THE ATTORNEY GENERAL

**Authority of Georgia Crime Information Center to maintain records.** — Georgia Crime Information Center is authorized to maintain records of reported crime and, in some instances, to record information identifying persons charged with the commission of crime; however,

the center is not authorized to maintain records identifying persons charged with disorderly conduct except when the charge is directly connected with or directly related to certain statutory offenses including interference with custody. 1976 Op. Att'y Gen. No. 76-33.

### RESEARCH REFERENCES

**C.J.S.** — 51 C.J.S., Kidnapping, § 30 et seq.

**ALR.** — Violation of state court order by one other than party as contempt, 7 ALR4th 893.

Kidnapping or related offense by taking or removing of child by or under authority

of parent or one in loco parentis, 20 ALR4th 823.

Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child, 49 ALR4th 7.

**16-5-46. Trafficking of persons for labor or sexual servitude.**

(a) As used in this Code section, the term:

(1) "Coercion" means:

(A) Causing or threatening to cause bodily harm to any person, physically restraining or confining any person, or threatening to physically restrain or confine any person;

(B) Exposing or threatening to expose any fact or information or disseminating or threatening to disseminate any fact or information that would tend to subject a person to criminal or immigration proceedings, hatred, contempt, or ridicule;

(C) Destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of any person;

(D) Providing a controlled substance, as such term is defined by Code Section 16-13-21, to such person for the purpose of compelling such person to engage in labor or sexual servitude against his or her will; or

(E) Causing or threatening to cause financial harm to any person or using financial control over any person.

(2) "Deception" means:

(A) Creating or confirming another's impression of an existing fact or past event which is false and which the accused knows or believes to be false;

(B) Maintaining the status or condition of a person arising from a pledge by that person of his or her personal services as security for a debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined, or preventing a person from acquiring information pertinent to the disposition of such debt; or

(C) Promising benefits or the performance of services which the accused does not intend to deliver or perform or knows will not be delivered or performed. Evidence of failure to deliver benefits or perform services standing alone shall not be sufficient to authorize a conviction under this Code section.

(3) "Labor servitude" means work or service of economic or financial value which is performed or provided by another person and is induced or obtained by coercion or deception.

(4) "Performance" shall have the same meaning as set forth in Code Section 16-12-100.

(5) "Sexually explicit conduct" shall have the same meaning as set forth in Code Section 16-12-100.

(6) "Sexual servitude" means:

(A) Any sexually explicit conduct or performance involving sexually explicit conduct for which anything of value is directly or indirectly given, promised to, or received by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under the age of 18 years; or

(B) Any sexually explicit conduct or performance involving sexually explicit conduct which is performed or provided by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under the age of 18 years.

(b) A person commits the offense of trafficking a person for labor servitude when that person knowingly subjects another person to or maintains another person in labor servitude or knowingly recruits, entices, harbors, transports, provides, or obtains by any means another person for the purpose of labor servitude.

(c) A person commits the offense of trafficking a person for sexual servitude when that person knowingly subjects another person to or maintains another person in sexual servitude or knowingly recruits, entices, harbors, transports, provides, or obtains by any means another person for the purpose of sexual servitude.

(d) The age of consent for sexual activity or the accused's lack of knowledge of the age of the person being trafficked shall not constitute a defense in a prosecution for a violation of this Code section.

(e) The sexual history or history of commercial sexual activity of a person alleged to have been trafficked or such person's connection by blood or marriage to an accused in the case or to anyone involved in such person's trafficking shall be excluded from evidence if the court finds at a hearing outside the presence of the jury that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

(f)(1) Except as provided in paragraph (2) of this subsection, any accused who commits the offense of trafficking a person for labor or sexual servitude shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment for not less than ten nor more than 20 years, a fine not to exceed \$100,000.00, or both.

(2) Any accused who commits the offense of trafficking a person for labor or sexual servitude against a person who is under the age of 18 years shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment for not less than ten nor more than 20 years, a fine not to exceed \$100,000.00, or both; provided, however, that if the offense is committed against a person under 18 years of age and such person under the age of 18 years was coerced or deceived into being trafficked for labor or sexual servitude, the accused shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment for not less than 25 nor more than 50 years or life imprisonment, a fine not to exceed \$100,000.00, or both.

(g) All real and personal property of every kind used or intended for use in the course of, derived from, or realized through a violation of this Code section shall be subject to forfeiture to the state. Forfeiture shall be had by the same procedure set forth in Code Section 16-14-7. Prosecuting attorneys and the Attorney General may commence forfeiture proceedings under this Code section.

(h) Prosecuting attorneys and the Attorney General shall have concurrent authority to prosecute any criminal cases arising under the provisions of this Code section and to perform any duty that necessarily appertains thereto.

(i) Each violation of this Code section shall constitute a separate offense and shall not merge with any other offense.

(j) A corporation may be prosecuted under this Code section for an act or omission constituting a crime under this Code section only if an agent of the corporation performs the conduct which is an element of the crime while acting within the scope of his or her office or employment and on behalf of the corporation and the commission of the crime was either authorized, requested, commanded, performed, or within the scope of his or her employment on behalf of the corporation or constituted a pattern of illegal activity that an agent of the company knew or should have known was occurring. (Code 1981, § 16-5-46, enacted by Ga. L. 2006, p. 105, § 3/SB 529; Ga. L. 2011, p. 217, § 1/HB 200.)

**The 2011 amendment**, effective July 1, 2011, rewrote this Code section.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2011, a comma was inserted following “of this subsection” in paragraph (f)(1).

**Editor's notes.** — Ga. L. 2006, p. 105, § 1, not codified by the General Assembly, provides that: ‘This Act shall be known and may be cited as the ‘Georgia Security and Immigration Compliance Act.’ All re-

quirements of this Act concerning immigration or the classification of immigration status shall be construed in conformity with federal immigration law.’

Ga. L. 2006, p. 105, § 10(b), not codified by the General Assembly, provides that this Code section shall not apply to any offense committed prior to July 1, 2007.

**Law reviews.** — For article on 2006 enactment of this Code section, see 23 Georgia St. U.L. Rev. 247 (2006). For an-

nual survey of labor and employment law, see 58 Mercer L. Rev. 211 (2006). For article, "The Georgia Security and Immigration Compliance Act: Comprehensive Immigration Reform in Georgia — 'Think Globally ... Act Locally,'" see 13 Ga. St. B.J. 14 (2007).

## ARTICLE 4

### RECKLESS CONDUCT

**Cross references.** — Reckless driving,  
§ 40-6-390.

**16-5-60. Reckless conduct causing harm to or endangering the bodily safety of another; conduct by HIV infected persons; assault by HIV infected persons or hepatitis infected persons.**

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) A person who causes bodily harm to or endangers the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm or endanger the safety of the other person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation is guilty of a misdemeanor.

(c) A person who is an HIV infected person who, after obtaining knowledge of being infected with HIV:

(1) Knowingly engages in sexual intercourse or performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person and the HIV infected person does not disclose to the other person the fact of that infected person's being an HIV infected person prior to that intercourse or sexual act;

(2) Knowingly allows another person to use a hypodermic needle, syringe, or both for the introduction of drugs or any other substance into or for the withdrawal of body fluids from the other person's body and the needle or syringe so used had been previously used by the HIV infected person for the introduction of drugs or any other substance into or for the withdrawal of body fluids from the HIV infected person's body and where that infected person does not disclose to the other person the fact of that infected person's being an HIV infected person prior to such use;

(3) Offers or consents to perform with another person an act of sexual intercourse for money without disclosing to that other person the fact of that infected person's being an HIV infected person prior to offering or consenting to perform that act of sexual intercourse;

(4) Solicits another person to perform or submit to an act of sodomy for money without disclosing to that other person the fact of that infected person's being an HIV infected person prior to soliciting that act of sodomy; or

(5) Donates blood, blood products, other body fluids, or any body organ or body part without previously disclosing the fact of that infected person's being an HIV infected person to the person drawing the blood or blood products or the person or entity collecting or storing the other body fluids, body organ, or body part,

is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not more than ten years.

(d) A person who is an HIV infected person or hepatitis infected person and who, after obtaining knowledge of being infected with HIV or hepatitis, commits an assault with the intent to transmit HIV or hepatitis, using his or her body fluids (blood, semen, or vaginal secretions), saliva, urine, or feces upon:

(1) A peace officer while the peace officer is engaged in the performance of his or her official duties or on account of the peace officer's performance of his or her official duties; or

(2) A correctional officer while the correctional officer is engaged in the performance of his or her official duties or on account of the correctional officer's performance of his or her official duties

is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five nor more than 20 years. (Code 1933, § 26-2910, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1988, p. 1799, § 3; Ga. L. 2003, p. 306, § 1.)

**Cross references.** — Disposition of child committing delinquent act constituting AIDS transmitting crime, § 15-11-66.1. Transmitting crimes and required reporting, § 17-10-15. Disclosure of AIDS confidential information, § 24-9-47. Control of HIV, Ch. 17A, T. 31. Use of HIV test results in granting relief from sentence, § 42-9-42.1.

**Editor's notes.** — Ga. L. 1988, p. 1799, § 1, not codified by the General Assembly, provides: "The General Assembly finds that Acquired Immunodeficiency Syndrome (AIDS) and its causative agent, including Human Immunodeficiency Virus (HIV), pose a grave threat to the health, safety, and welfare of the people of this state. In the absence of any effective vaccination or treatment for this disease, it threatens almost certain death to all

who contract it. The disease is largely transmitted through sexual contacts and intravenous drug use, not through casual contact, and, while deadly, is therefore preventable. The key component of the fight against AIDS is education. Through public education and counseling our citizens can learn how the disease is transmitted and, thus, how to protect themselves and prevent its spread. The Department of Human Resources is encouraged to continue its efforts to educate all Georgians about the disease, its causative agent, and its means of transmission. In addition, voluntary testing should be encouraged for anyone who feels at risk of infection. While education, counseling, and voluntary testing are vital to the elimination of this epidemic, other measures are needed to protect the health of

our citizens, and it is the intention of the General Assembly to enact such measures in the exercise of its police powers in order to deal with AIDS and HIV infection."

**Administrative rules and regulations.** — Acquired immune deficiency syndrome (AIDS), Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Resources, Chapter 290-5-48.

**Law reviews.** — For survey article on criminal law and procedure, see 34 Mercer

L. Rev. 89 (1982). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001). For article, "New Challenges for the Georgia General Assembly: Survey of Child Endangerment Statutes," see 7 Ga. St. B.J. 8 (2001).

For note on the 2003 amendment to this Code section, see 20 Georgia St. U.L. Rev. 81 (2003).

## JUDICIAL DECISIONS

**Former Code 1933, § 26-2910 was constitutional.** Mitchell v. State, 154 Ga. App. 399, 268 S.E.2d 360, cert. denied, 449 U.S. 1011, 101 S. Ct. 567, 66 L. Ed. 2d 469 (1980) (see O.C.G.A. § 16-5-60).

**Former Code 1933, § 26-2910 was sufficiently definite** to give person of ordinary intelligence fair notice that such conduct was forbidden by the statute. Horowitz v. State, 243 Ga. 441, 254 S.E.2d 828 (1979) (see O.C.G.A. § 16-5-60).

**Unconstitutionally vague as applied.** — Because O.C.G.A. § 16-5-60 failed to provide defendant with fair notice that defendant could be held criminally responsible for leaving children in the care of an older son, the statute failed to clearly define the statutory prohibitions, rendering the statute unconstitutionally vague as applied. Hall v. State, 268 Ga. 89, 485 S.E.2d 755 (1997).

O.C.G.A. § 16-5-60 was not unconstitutionally vague as applied when the defendant was accused of taking direct, physical, and adverse action against an infant; that statute provided ample notice to the defendant that the conduct of which defendant was accused was prohibited since roughly handling an infant clearly may endanger the bodily safety of the infant and that risk is clear, substantial and unjustifiable, and disregarding such a risk would be a gross deviation from the standard of care a reasonable person would exercise in the situation. State v. Boyer, 270 Ga. 701, 512 S.E.2d 605 (1999).

**Statute not unconstitutionally vague.** — Defendant's conviction for misdemeanor reckless conduct under O.C.G.A. § 16-5-60(b) was affirmed as the

statute was not unconstitutionally vague under the Fourteenth Amendment since the statute gave a person of ordinary intelligence fair notice that the statute prohibited a person from leaving one's children, one an infant and the other a toddler, unsupervised on the upper floor of a two-story home that was not equipped with any device to keep the children from falling down a nearby flight of stairs. Baker v. State, 280 Ga. 822, 633 S.E.2d 541 (2006).

**Civil liability.** — In a wrongful death action alleging that defendant negligently passed a loaded handgun to the shooter just before the fatal shooting of plaintiffs' decedent, the trial court erred in granting defendant's motion in limine to exclude plaintiffs' claim against defendant based on defendant's alleged violation of O.C.G.A. § 16-5-60(b). Key v. Grant, 238 Ga. App. 818, 520 S.E.2d 277 (1999).

**Mentally retarded individuals.** — Jury was authorized to convict a mentally retarded defendant of the offense of reckless conduct when defendant admitted knowing defendant should not discharge a gun within the city limits; defendant knew defendant was already in trouble for shooting a dog and defendant knew defendant was still holding the gun when defendant turned and pointed the gun at a person. Cox v. State, 216 Ga. App. 86, 453 S.E.2d 471 (1995).

**Suppression motion.** — Trial court erroneously suppressed the statements given by the defendant to law enforcement, because, given the totality of the circumstances apparent from the record, the defendant: (1) spoke clearly; (2) did

not appear to be under the influence of alcohol or drugs; (3) appeared to understand what was read; (4) was not threatened or coerced in any way; (5) appeared very calm; (6) was not promised anything by police in exchange for defendant's cooperation; (7) did not appear to have any mental issues; (8) had only been detained for approximately 20 minutes before defendant was Mirandized; and (9) asked the investigator to come back to speak with defendant after a brief interruption in the interview; the mere fact that there was no written Miranda waiver or electronic recording of the waiver did not render the waiver involuntary. *State v. Hardy*, 281 Ga. App. 365, 636 S.E.2d 36 (2006).

**Defendant's threat to get a gun and shoot the officer's car**, whereby defendant then turned back toward defendant's tavern, may very well have constituted the crime of terroristic threats under O.C.G.A. § 16-11-37, but it was not such an "act or omission" which "causes bodily harm to or endangers the bodily safety of another person" as support a conviction for reckless conduct. *Gay v. State*, 179 Ga. App. 430, 346 S.E.2d 877 (1986).

**When defendant uses gun in self-defense in "unlawful manner,"** defendant is guilty of reckless conduct, and thus the act is not a "lawful act" within the meaning of former Code 1933, § 26-1103(b). *Crawford v. State*, 245 Ga. 89, 263 S.E.2d 181 (1980); *Farmer v. State*, 246 Ga. 253, 271 S.E.2d 166 (1980); *Appleby v. State*, 247 Ga. 587, 278 S.E.2d 366 (1981) (see O.C.G.A. § 16-5-3(b)).

**Firing shots into wall.** — When the defendant, while holding the victims at gunpoint, intentionally fired what the defendant termed "warning shots" into a wall and a trash can, the defendant's act was either an act of insanity or constituted a felony, and the court did not err in refusing to give a requested charge on the misdemeanor offense of reckless conduct. *Briard v. State*, 188 Ga. App. 490, 373 S.E.2d 239, cert. denied, 188 Ga. App. 911, 373 S.E.2d 239 (1988).

**Firing shots through a door.** — When the defendant fired a shot through a door, knowing a group of law enforcement officers were present on the other side, the

evidence was sufficient to convict the defendant of reckless conduct. *Beaton v. State*, 255 Ga. App. 901, 567 S.E.2d 113 (2002).

In a criminal case wherein a gun discharged in an adjacent apartment and the bullet lodged in the head of an infant after traveling through the wall, insufficient evidence existed to support a defendant's conviction for reckless conduct since it could be inferred from the discharge of the weapon that the defendant acted recklessly, but it could also have been inferred that the weapon discharged accidentally. *Allison v. State*, 288 Ga. App. 482, 654 S.E.2d 628 (2007).

**Juvenile firing BB gun.** — Juvenile court properly denied a juvenile's motion for a new trial with regard to the juvenile's delinquency adjudication finding the juvenile guilty for aggravated assault, criminal property damage, cruelty to children, and reckless conduct arising from the shooting of a BB gun at a passing car. The juvenile was the only Caucasian identified in the group of youth; the juvenile admitted to hiding the BB gun; the juvenile did not dispute that the juvenile encouraged another youth to shoot the gun; and the judge was the final arbiter of the credibility and witness issues and had the province to reject the testimony of the juvenile and a parent that the juvenile did not shoot the gun. *In the Interest of A.A.*, 293 Ga. App. 827, 668 S.E.2d 323 (2008).

**Pitbull attack.** — Fact that there was no state law at the time of a pitbull attack specifically forbidding ownership of pitbulls or specifically outlawing any one of the defendant's isolated acts regarding the dogs did not preclude a jury from finding that the defendant's conduct was reckless; the state was not required to prove that the defendant knew of the dogs' propensity to attack, bite, and injure a child as occurred in circumstances giving rise to the charge against the defendant. *Turnipseed v. State*, 186 Ga. App. 278, 367 S.E.2d 259 (1988).

Defendant's pit bull mauled a child. The defendant's conviction in recorder's court of violating a county ordinance by failing to exercise ordinary care in controlling the defendant's pet for the protection of others was sufficiently separate from a misde-

meanor reckless conduct charge under O.C.G.A. § 16-5-60(b), which required proof of a gross deviation from the standard of care, that a successive prosecution for violating § 16-5-60(b) did not violate the double jeopardy ban. *State v. Stepp*, 295 Ga. App. 813, 673 S.E.2d 257 (2009).

Defendant's conviction of violating DeKalb County, Ga., Ordinance § 5-2(a), an animal control ordinance, did not bar the defendant's subsequent prosecution for reckless conduct under O.C.G.A. § 16-5-60(b) under double jeopardy principles because each offense required proof of an element that the other offense did not require: the ordinance required proof of ownership of the animal (in this case, a pitbull) and the reckless conduct statute required proof of actual bodily harm being caused (in this case, mauling of a child). *Stepp v. State*, 286 Ga. 556, 690 S.E.2d 161 (2010).

**A DUI accusation must allege** harm or danger in order to render reckless conduct a lesser included offense. *Barber v. State*, 204 Ga. App. 94, 418 S.E.2d 436 (1992).

**Running over victim.** — When defendant was accused of beating the victim with a pistol and running over the victim with a car, the trial court did not err in refusing to charge on the lesser included offenses of vehicular homicide and reckless conduct. The defendant's theory was that other individuals committed the crime and that the defendant accidentally ran over the victim; thus, the evidence showed either the commission of the offenses as charged or the commission of no offense. *Lupoe v. State*, 284 Ga. 576, 669 S.E.2d 133 (2008).

**Reckless conduct was not lesser included offense of cruelty to children.** — Trial court did not err in not charging reckless conduct as a lesser included offense of cruelty to children under O.C.G.A. § 16-5-70; if the jury believed the defendant's testimony, there was no conscious disregard of a substantial and unjustifiable risk, and the state's evidence was that the defendant maliciously caused the child's suffering. *Banta v. State*, 282 Ga. 392, 651 S.E.2d 21 (2007).

When the defendants were charged with first-degree cruelty to children under

O.C.G.A. § 16-5-70 on the ground that the children had caused the victim physical and mental pain by binding the victim's arms and legs, the trial court properly refused to charge on the lesser included offense of reckless conduct under O.C.G.A. § 16-5-60(b). Reckless conduct involved bodily harm, not mental pain; furthermore, as the defendants claimed that the defendants had acted out of love to prevent the victim from using drugs, their theory of defense was one of justification, on which the trial court had instructed. *Hafez v. State*, 290 Ga. App. 800, 660 S.E.2d 787 (2008).

In a shaken baby death, an involuntary manslaughter verdict was not mutually exclusive of a guilty verdict for felony murder/cruelty to children because, consistent with its guilty verdict on the felony murder charge, an offense requiring criminal intent, the jury predicated its involuntary manslaughter verdict on a misdemeanor involving criminal intent, battery or simple battery under O.C.G.A. §§ 16-5-23(a) and 16-5-23.1(a), although the jury was also instructed on reckless conduct, a misdemeanor committed by criminal negligence. O.C.G.A. § 16-5-60(b). *Drake v. State*, 288 Ga. 131, 702 S.E.2d 161 (2010).

**Reckless conduct as lesser included offense of aggravated assault.** — Refusal to give a requested charge on reckless conduct, as a lesser included offense of aggravated assault, was not error where defendant admitted firing a gun with the intent to scare the victim, although defendant testified that there was no intent to hit the victim, since using a deadly weapon to commit an act which places another in reasonable apprehension of immediately receiving a violent injury amounts to an aggravated assault, absent justification. The act testified to by defendant was either justified as an act of self-defense or constituted a felony. *Riley v. State*, 181 Ga. App. 667, 353 S.E.2d 598 (1987); *Bright v. State*, 238 Ga. App. 876, 520 S.E.2d 48 (1999).

Requested charge of reckless conduct as a lesser included offense was properly denied where the evidence was that defendant was guilty of two offenses of aggravated assault, as averred, or was not

guilty of any crime under the particular indictment counts. *Morris v. State*, 228 Ga. App. 90, 491 S.E.2d 190 (1997).

Refusal to instruct on reckless conduct was proper where the evidence presented only two possibilities: either defendant was unarmed and never fired a shot or defendant committed aggravated assault by walking toward some men and deliberately opening fire. *Carter v. State*, 228 Ga. App. 403, 492 S.E.2d 259 (1997).

Refusal to give a requested charge on reckless conduct as a lesser included offense of aggravated assault was not error where evidence showed that defendant either was unarmed and never fired a shot or defendant committed aggravated assault by intentionally firing a gun toward the victims. *Hy v. State*, 232 Ga. App. 247, 501 S.E.2d 583 (1998).

When the evidence indicated that the defendant might have merely fired a gun up into the air while the police were chasing the car in which the defendant was riding, the trial court erred in refusing to charge the jury on the offense of reckless conduct as a lesser included offense of aggravated assault by attempting to injure. *Shaw v. State*, 238 Ga. App. 757, 519 S.E.2d 486 (1999).

When the evidence, including the defendant's own admissions, clearly established that the defendant repeatedly fired a weapon with the intention of scaring the victims, even if the defendant did not intend to hit them, the evidence established aggravated assault, and there was no error in the failure to give an instruction on reckless conduct. *Huguley v. State*, 242 Ga. App. 645, 529 S.E.2d 915 (2000).

It was not error to refuse to give the requested charge on reckless conduct as a lesser included offense where there was no evidence that defendant was simply negligently handling the knife when swinging it at the victims, using profane language, and telling them they had "messed up" while lunging at them with the knife. *Merneigh v. State*, 242 Ga. App. 735, 531 S.E.2d 152 (2000).

Defendant's requested charge of reckless conduct as a lesser included offense of aggravated assault was properly denied since the only testimony was that in pointing the pistol at the victim, the defendant

did so intentionally, not "consciously dis-regarding a substantial and unjustifiable risk that his act or omission would cause harm or endanger victim's safety." *Stobart v. State*, 272 Ga. 608, 533 S.E.2d 379 (2000).

Because defendant failed to make a written request for a lesser included offense instruction on reckless conduct in a trial for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2), there could be no error found on appeal for the trial court's failure to give such an instruction. *Barber v. State*, 273 Ga. App. 129, 614 S.E.2d 105 (2005).

Trial court did not err in refusing a request to instruct the jury on the lesser included offense of reckless conduct, in violation of O.C.G.A. § 16-5-60, in a criminal trial on a charge of aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), as the essential elements of the assault charge were all shown by the evidence; the defendant's firing of a gun into a parking lot that was crowded, and in the direction of the victim, was not criminal negligence that would have supported a reckless conduct charge, but rather, was deemed intentional. *Thompson v. State*, 277 Ga. App. 323, 626 S.E.2d 825 (2006).

After threatening to kill the victim, because the defendant's actions in continuing to drive away, as the victim was caught on the outside of the car screaming, supported the crime of either aggravated or simple assault, and not simple negligence, the trial court did not err in rejecting a reckless conduct instruction. *Martin v. State*, 283 Ga. App. 652, 642 S.E.2d 340 (2007).

Because the evidence showed that defendant committed an assault with intent and a deadly weapon, the crime constituted an aggravated assault under O.C.G.A. § 16-5-21(a)(2); therefore, a charge on the lesser-included offenses of simple assault or reckless conduct under O.C.G.A. §§ 16-5-20(a)(2) and 16-5-60(b) was not warranted. *Paul v. State*, 296 Ga. App. 6, 673 S.E.2d 551 (2009).

Defendant admitted firing a gun to frighten the victims, but asserted the affirmative defense of justification. The defendant was not entitled to a jury charge

on reckless conduct as a lesser included offense of the charged offense of aggravated assault as the evidence established either the commission of an aggravated assault, or no offense at all. *Hudson v. State*, 296 Ga. App. 692, 675 S.E.2d 578 (2009).

**Merger with aggravated battery.** — Appellate court rejected the defendant's claim that insufficient evidence with respect to the requisite criminal intent failed to support an aggravated battery conviction as the jury could infer intent by: (1) the defendant's act of twisting the victim's head all the way around to the left and slamming it towards the car floorboard; (2) the fact that the incident occurred during a heated argument that extended over several hours and had previously resulted in physical violence towards the victim; (3) the defendant's refusal to take the victim to a hospital or call the victim's mother after the incident; (4) the defendant's subsequent flight from law enforcement; and (5) evidence of two prior similar transactions admitted against the defendant involving assaults on a previous girlfriend. But, while the aforementioned was also sufficient to support the defendant's reckless conduct conviction, such merged as a matter of fact into the aggravated battery conviction, as the state conceded at the beginning of sentencing, and the trial court erred in failing to so find. *Collins v. State*, 283 Ga. App. 188, 641 S.E.2d 208 (2007).

**No merger of nonhomicide counts.** — Defendant's convictions of involuntary manslaughter while in the commission of a simple battery, aggravated assault, aggravated battery, cruelty to children, and reckless conduct were not mutually exclusive, and the trial court did not err in not merging the nonhomicide counts upon sentencing. *Waits v. State*, 282 Ga. 1, 644 S.E.2d 127 (2007).

**Reckless driving and reckless conduct do not merge.** — Trial court did not err by failing to merge the crimes of reckless driving, O.C.G.A. § 40-6-390, and reckless conduct, O.C.G.A. § 16-5-60, for punishment because the two offenses did not merge for sentencing when §§ 40-6-390 and 16-5-60 each had a provision that required proof of a fact that the

other did not, and to establish a violation of § 40-6-390, the state only had to prove that the defendant drove the car in a manner exhibiting reckless disregard for the safety of persons or property; reckless conduct requires proof of harm or an actual threat of harm to the bodily safety of another person and does not require that the crime be committed while driving a motor vehicle, but reckless driving does not require that there be an injured or threatened party and instead merely requires that the state prove a general disregard for the safety of persons or property while driving a motor vehicle. *Howard v. State*, 301 Ga. App. 230, 687 S.E.2d 257 (2009).

**Aggravated assault.** — Because defendant's pointing of a firearm placed the victims in reasonable apprehension of immediate violent injury, the felony of aggravated assault, rather than the misdemeanor of intentionally and without legal justification pointing or aiming a gun or pistol at another, whether the gun or pistol was loaded or unloaded, had occurred. *Savage v. State*, 274 Ga. 692, 558 S.E.2d 701 (2002).

**Aggravated assault on emergency medical technician.** — Evidence that a defendant hit an emergency medical technician who was working on a patient, screamed obscenities, and pulled a pocket knife out and opened the knife was sufficient to support the defendant's convictions for aggravated assault and interference with emergency medical professionals. Because defense witnesses testified that the defendant did not threaten the technician with a knife, there was no evidence to support a charge on reckless conduct in violation of O.C.G.A. § 16-5-60(b). *Prince v. State*, 306 Ga. App. 604, 702 S.E.2d 785 (2010).

**Since defendant knew that defendant was HIV-infected,** evidence that defendant attempted to bite a police officer was sufficient to sustain defendant's conviction for reckless endangerment. *Burk v. State*, 223 Ga. App. 530, 478 S.E.2d 416 (1996).

As the defendant testified of knowing the defendant was HIV-positive long before the defendant had sexual intercourse with the victim, and witnesses corroboro-

rated the victim's testimony that the defendant denied being HIV-positive, the defendant was properly convicted of violating O.C.G.A. § 16-5-60(c)(1), even though the defendant and two other witnesses testified that the defendant had disclosed the defendant's infection to the victim. *Ginn v. State*, 293 Ga. App. 757, 667 S.E.2d 712 (2008).

**Sequential charges on aggravated assault and reckless battery** were proper since the jury's finding that defendant committed aggravated assault required a finding of an intentional infliction of injury, which precluded the element of criminal negligence in reckless conduct. *Sheats v. State*, 210 Ga. App. 622, 436 S.E.2d 796 (1993).

**Reckless conduct charge was not warranted in a prosecution for aggravated assault** because there was no evidence that defendant's brandishing of a knife in the presence of named victims was only criminally negligent rather than intentional. *Marion v. State*, 224 Ga. App. 413, 480 S.E.2d 869 (1997).

**Reckless conduct conviction no bar to aggressive driving conviction.** — Defendant's previous conviction for reckless conduct under O.C.G.A. § 16-5-60 did not bar later conviction for aggressive driving under O.C.G.A. § 40-6-397 when both convictions arose out of the same incident, and since conviction for aggressive driving did not require proof of the fact that defendant endangered the bodily safety of the other driver and the other driver's family, while the reckless conduct conviction did not require proof of fact that defendant drove with intent to annoy, harass, intimidate, and injure another; thus, each crime required proof of a fact that the other did not, so neither offense was included in the other so as to violate the substantive bar against double jeopardy of O.C.G.A. § 16-1-7. *Winn v. State*, 291 Ga. App. 16, 660 S.E.2d 883 (2008).

**Reckless conduct charge was not warranted in a prosecution for cruelty to children in the first degree** since the evidence showed that defendant intended the actions and intended to cause pain to the victim. *Allen v. State*, 247 Ga. App. 10, 543 S.E.2d 45 (2000).

**Driving recklessly through residential neighborhood.** — Conviction was

upheld where the evidence authorized the jury to conclude that by driving recklessly through a residential neighborhood the appellant consciously disregarded the substantial risk that appellant's conduct would endanger the safety of another. *Horowitz v. State*, 243 Ga. 441, 254 S.E.2d 828 (1979).

**Driving recklessly near road construction site.** — When it was shown that defendant drove on the wrong side of the road, extremely close to where defendant knew county employees were working in a ditch, and the side mirror of defendant's truck struck and seriously injured one of the workers, the evidence was sufficient to find defendant guilty of violating O.C.G.A. § 16-5-60. *Cowan v. State*, 218 Ga. App. 422, 461 S.E.2d 587 (1995).

**Factors leading to charge.** — There was no harmful error in a police officer's recitation of the factors that led the officer to initiate a reckless conduct charge against the defendant; the defendant's theory that the defendant had no legal duty to the defendant's nine-month-old and three-year-old children since the defendant did not live with them, despite being their parent, was rejected. *Baker v. State*, 280 Ga. 822, 633 S.E.2d 541 (2006).

**Evidence sufficient to convict.** — Evidence sufficient to enable rational trier of fact to find defendant guilty beyond reasonable doubt of theft by taking and recklessly causing harm to or endangering bodily safety of another person. *Lucas v. State*, 183 Ga. App. 637, 360 S.E.2d 12 (1987).

Evidence was sufficient to support defendant's reckless conduct conviction, where defendant drove a truck toward the victim and slammed on the brakes, stopping so close to the victim that the victim had to jump out of the way for fear that the defendant would not stop. *Wofford v. State*, 196 Ga. App. 284, 395 S.E.2d 630 (1990).

Evidence of firing a .357 handgun near a person's head, while standing inside a building gripping the person's arm, was sufficient to authorize conviction. *McDonald v. State*, 224 Ga. App. 411, 481 S.E.2d 1 (1997).

Evidence was sufficient to show reckless conduct where the mother allowed her

3-year-old daughter to wander unsupervised for over an hour before the mother began looking for her, after which the daughter was found unconscious in a neighbor's yard, having been attacked by an animal and losing between 20 and 40 percent of her blood. Reyes v. State, 242 Ga. App. 170, 529 S.E.2d 192 (2000).

Trial court properly denied defendant's motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, because there was sufficient evidence to support the convictions for aggravated assault and reckless conduct, in violation of O.C.G.A. §§ 16-5-21(a)(2) and 16-5-60(b), respectively; defendant and the codefendants were involved in a physical altercation with two restaurant patrons, and a codefendant's testimony that defendant retrieved a gun and shot the victim was sufficiently repeated by the testimony of other witnesses, who also connected defendant with the shooting pursuant to the corroboration requirement in O.C.G.A. § 24-4-8. Baker v. State, 273 Ga. App. 297, 614 S.E.2d 904 (2005).

Evidence supported the defendant's conviction for misdemeanor reckless endangerment as the act of leaving the defendant's nine-month old and three-year-old children unsupervised on the upper floor of a two-story home near an unprotected downward flight of stairs was a gross deviation from the standard of care that a reasonable person would exercise and was in conscious disregard of a substantial and unjustifiable risk such that the act endangered the children's safety. Baker v. State, 280 Ga. 822, 633 S.E.2d 541 (2006).

Evidence supported a defendant's conviction for involuntary manslaughter as there was ample evidence that the state disproved the defendant's accident defense since: (1) the defendant was hurt by the fact that the defendant's significant other had begun a relationship with the victim; (2) the defendant threatened to blow the victim's and the significant other's heads off a few weeks before the shooting; (3) defendant testified that the victim was standing in the defendant's way, that the defendant was searching for a cell phone, and that the defendant pulled out several items, including a gun;

(4) a door hit the defendant in the back, causing the gun to discharge into the victim's chest; (5) the defendant testified that the defendant was careless with the gun; and (6) a detective testified that after the detective Mirandized the defendant, the defendant stated that "(the defendant) put a shell in every chamber" and that "(the defendant) fired every shell, every round." Noble v. State, 282 Ga. App. 311, 638 S.E.2d 444 (2006).

Evidence supported the defendant's convictions of aggravated assault, aggravated battery, cruelty to children, and reckless conduct in connection with the death of the 16-month-old victim after: the defendant repeatedly fed the victim tomatoes despite the victim's allergic reactions to the tomatoes; two days before the victim's fatal injuries, the victim had numerous bruises, a black eye, and a split bottom lip; while the victim was in the hospital for the fatal injuries, the defendant repeatedly asked a babysitter to persuade the defendant's five-year-old child to say that the child had taken the victim out of the bathtub; the defendant asked medical personnel whether it could be proven that the victim was shaken; and medical evidence showed that the victim's death was consistent with violent shaking by a person of adult strength. Waits v. State, 282 Ga. 1, 644 S.E.2d 127 (2007).

Because sufficient direct and circumstantial evidence showed that the defendant, a prior felon wielding a weapon, engaged in a fight with the two victims, fatally wounding one and shooting the other in the arm, and thereafter fled from police, the defendant's convictions for involuntary manslaughter, reckless conduct, fleeing and eluding, and possession of a firearm by a convicted felon were upheld on appeal. Alvin v. State, 287 Ga. App. 350, 651 S.E.2d 489 (2007).

**Intoxication as reckless conduct.** — Reckless conduct was established where it was shown that codefendants, who had severe drinking problems in the past, became intoxicated and, in violation of order requiring them to get child care when they intended to drink, placed baby between them in bed, resulting in the baby's death. Bohannon v. State, 230 Ga. App. 829, 498 S.E.2d 316 (1998).

**Evidence insufficient.** — Defendant's conviction was reversed, where defendant's conduct in accusing the victim of theft and searching the victim did not cause bodily harm to or endanger the bodily safety of the victim, and defendant's action in running over the victim's foot was either an accident or a deliberate attack and did not constitute gross negligence so as to bring the incident within the scope of O.C.G.A. § 16-5-60(b). *Miller v. State*, 200 Ga. App. 57, 406 S.E.2d 565 (1991).

**Reckless conduct charge warranted in arson prosecution.** — In a prosecution for felony murder and arson, the trial court erred in refusing to grant defendant's charge on reckless conduct where despite defendant's concession that defendant intentionally set the fire, there was sufficient evidence from which the jury could conclude that the defendant set the fire without intending to burn down the motel building. *Reinhardt v. State*, 263 Ga. 113, 428 S.E.2d 333 (1993), overruled on other grounds, *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008).

**Reckless conduct charge not warranted as lesser-included offense in felony obstruction prosecution.** — Given that the state adduced sufficient evidence establishing all the elements of the offense of felony obstruction, in violation of O.C.G.A. § 16-10-24, the trial court did not err in refusing the defendant's request to charge on the lesser-included offense of reckless conduct. *Helton v. State*, 284 Ga. App. 777, 644 S.E.2d 896 (2007).

**Acquittal of defendant of aggravated assault charges** did not make evidence of reckless conduct any less sufficient; furthermore, even if the acquittal was inconsistent with the conviction, the inconsistency could not be used as an avenue to challenge the conviction because the "inconsistent-verdict rule" has been abolished. *Kolokouris v. State*, 271 Ga. 597, 523 S.E.2d 311 (1999).

**Jury instructions.** — Trial court did not err in refusing to charge the jury on reckless conduct in defendant's trial for felony murder where the record was devoid of evidence of reckless conduct. *Salyers v. State*, 276 Ga. 568, 580 S.E.2d 240 (2003).

Requested jury instruction on involuntary manslaughter was properly denied because defendant's conduct in producing and displaying a loaded revolver in close proximity to defendant's victim, who allegedly was under the influence of drugs, and the victim's young child, with defendant's finger inside the trigger guard while defendant was watching the road and trying to drive, constituted the crime of crime of reckless conduct under O.C.G.A. § 16-5-60(b). *Reed v. State*, 279 Ga. 81, 610 S.E.2d 35 (2005).

Trial court's jury instructions in defendant's criminal trial on multiple charges arising out of a domestic dispute were proper, as: (1) there was no requirement that the jury be instructed on the element of assault (O.C.G.A. § 16-5-20) in order to be properly instructed on the crime of aggravated assault (O.C.G.A. § 16-5-21); (2) the methods of committing an aggravated battery, pursuant to O.C.G.A. § 16-5-24(a), were properly defined based on the methods asserted in the indictment; (3) there was no support for a requested charge on the lesser included offense of reckless conduct, pursuant to O.C.G.A. § 16-5-60(b); and (4) there was no possibility of a lesser included conviction for false imprisonment (O.C.G.A. § 16-5-41), such that instruction only on the indicted offense of kidnapping (O.C.G.A. § 16-5-40) was proper. *Brown v. State*, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

In the defendant's prosecution for two counts of aggravated assault, the trial court properly refused to charge the jury on the lesser included offense of reckless conduct under O.C.G.A. § 16-5-60 because no evidence was presented that the defendant acted negligently rather than intentionally when the defendant fired a gun after a confrontation with the victims. *Cain v. State*, 288 Ga. App. 535, 654 S.E.2d 456 (2007).

In the defendant's trial on a charge of aggravated assault under O.C.G.A. § 16-5-21(a), the trial court did not err in failing to instruct the jury on reckless conduct under O.C.G.A. § 16-5-60(b) because the latter was not a lesser-included offense of the former; while both offenses proscribed the same general conduct, i.e.,

subjecting another to actual injury or the possibility of injury, aggravated assault required proof that the forbidden act was intentional, while in the case of reckless conduct, the forbidden act is the product of criminal negligence. Chambers v. State, No. A11A0034, 2011 Ga. App. LEXIS 272 (Mar. 24, 2011).

**Conviction constituted a crime of moral turpitude and removal of alien appropriate.** — Alien's conviction for criminal reckless conduct under O.C.G.A. § 16-5-60(b) constituted a crime involving moral turpitude, and thus the alien was properly found removable under 8 U.S.C. § 1227(a)(2)(A)(i); such decision was not subject to judicial review under 8 U.S.C. § 1252(a)(2)(C) since the alien raised no constitutional claims or questions of law. Keungne v. United States AG, 561 F.3d 1281 (11th Cir. 2009).

**Cited in** McCane v. State, 147 Ga. App. 730, 250 S.E.2d 181 (1978); State v. Williams, 247 Ga. 200, 275 S.E.2d 62 (1981); Raines v. State, 247 Ga. 504, 277 S.E.2d 47 (1981); Stewart v. State, 158 Ga. App. 378, 280 S.E.2d 403 (1981); Moore v. State, 158 Ga. App. 579, 281 S.E.2d 322 (1981); Nutt v. State, 159 Ga. App. 46, 282 S.E.2d 696 (1981); Neal v. State, 160 Ga.

App. 498, 287 S.E.2d 399 (1981); Cook v. State, 249 Ga. 709, 292 S.E.2d 844 (1982); Smith v. State, 249 Ga. 801, 294 S.E.2d 525 (1982); Mease v. State, 165 Ga. App. 746, 302 S.E.2d 429 (1983); Fitzhugh v. State, 166 Ga. App. 320, 304 S.E.2d 127 (1983); Blanco v. State, 185 Ga. App. 535, 364 S.E.2d 903 (1988); Weaver v. State, 185 Ga. App. 573, 365 S.E.2d 130 (1988); Harmon v. State, 259 Ga. 846, 388 S.E.2d 689 (1990); Carter v. State, 260 Ga. 575, 398 S.E.2d 21 (1990); Brown v. State, 197 Ga. App. 398, 398 S.E.2d 434 (1990); Grimes v. State, 199 Ga. App. 152, 404 S.E.2d 324 (1991); Moses v. State, 264 Ga. 313, 444 S.E.2d 767 (1994); Howard v. State, 213 Ga. App. 542, 445 S.E.2d 532 (1994); Dunagan v. State, 269 Ga. 590, 502 S.E.2d 726 (1998); Massingill v. State, 240 Ga. App. 690, 524 S.E.2d 746 (1999); Vasser v. State, 273 Ga. 747, 545 S.E.2d 906 (2001); Webb v. State, 256 Ga. App. 653, 569 S.E.2d 596 (2002); Grant v. State, 257 Ga. App. 678, 572 S.E.2d 38 (2002); Ferguson v. State, 267 Ga. App. 374, 599 S.E.2d 335 (2004); Johnson v. State, 299 Ga. App. 474, 682 S.E.2d 601 (2009); Sanchez v. State, 285 Ga. 749, 684 S.E.2d 251 (2009); Snell v. State, 306 Ga. App. 651, 703 S.E.2d 93 (2010).

## OPINIONS OF THE ATTORNEY GENERAL

**There is no restriction against carrying an unloaded shotgun in a vehicle through this state.** 1970 Op. Att'y Gen. No. U70-30.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, § 127.

Fact that gun was unloaded as affecting criminal responsibility, 68 ALR4th 507.

**C.J.S.** — 65A C.J.S., Negligence, § 1029 et seq.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 ALR5th 628.

**ALR.** — Contributory negligence or assumption of risk of one injured by firearm or air gun discharged by another, 25 ALR3d 518.

Parents' criminal liability for failure to provide medical attention to their children, 118 ALR5th 253.

Liability for injury or death of minor or other incompetent inflicted upon himself by gun made available by defendant, 75 ALR3d 825.

## 16-5-61. Hazing.

(a) As used in this Code section, the term:

(1) "Haze" means to subject a student to an activity which endangers or is likely to endanger the physical health of a student, regardless of a student's willingness to participate in such activity.

(2) "School" means any school, college, or university in this state.

(3) "School organization" means any club, society, fraternity, sorority, or a group living together which has students as its principal members.

(4) "Student" means any person enrolled in a school in this state.

(b) It shall be unlawful for any person to haze any student in connection with or as a condition or precondition of gaining acceptance, membership, office, or other status in a school organization.

(c) Any person who violates this Code section shall be guilty of a misdemeanor of a high and aggravated nature. (Code 1981, § 16-5-61, enacted by Ga. L. 1988, p. 694, § 1; Ga. L. 1990, p. 1690, § 1.)

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**Ministerial duty of school officials.** — O.C.G.A. § 16-5-61 did not transform the discretionary policing functions of school officials into a ministerial duty to

enforce the hazing prohibition. *Caldwell v. Griffin Spalding County Bd. of Educ.*, 232 Ga. App. 892, 503 S.E.2d 43 (1998).

### RESEARCH REFERENCES

**ALR.** — Tort liability of college, university, fraternity, or sorority for injury or death of member or prospective member by hazing or initiation activity, 68 ALR4th 228.

Validity, construction, and application of "hazing" statutes, 30 ALR5th 683.

## ARTICLE 5

### CRUELTY TO CHILDREN

#### 16-5-70. Cruelty to children.

(a) A parent, guardian, or other person supervising the welfare of or having immediate charge or custody of a child under the age of 18 commits the offense of cruelty to children in the first degree when such person willfully deprives the child of necessary sustenance to the extent that the child's health or well-being is jeopardized.

(b) Any person commits the offense of cruelty to children in the first degree when such person maliciously causes a child under the age of 18 cruel or excessive physical or mental pain.

(c) Any person commits the offense of cruelty to children in the second degree when such person with criminal negligence causes a child under the age of 18 cruel or excessive physical or mental pain.

(d) Any person commits the offense of cruelty to children in the third degree when:

(1) Such person, who is the primary aggressor, intentionally allows a child under the age of 18 to witness the commission of a forcible felony, battery, or family violence battery; or

(2) Such person, who is the primary aggressor, having knowledge that a child under the age of 18 is present and sees or hears the act, commits a forcible felony, battery, or family violence battery.

(e)(1) A person convicted of the offense of cruelty to children in the first degree as provided in this Code section shall be punished by imprisonment for not less than five nor more than 20 years.

(2) A person convicted of the offense of cruelty to children in the second degree shall be punished by imprisonment for not less than one nor more than ten years.

(3) A person convicted of the offense of cruelty to children in the third degree shall be punished as for a misdemeanor upon the first or second conviction. Upon conviction of a third or subsequent offense of cruelty to children in the third degree, the defendant shall be guilty of a felony and shall be sentenced to a fine not less than \$1,000.00 nor more than \$5,000.00 or imprisonment for not less than one year nor more than three years or shall be sentenced to both fine and imprisonment. (Ga. L. 1878-79, p. 162, § 3; Code 1882, § 4612h; Penal Code 1895, § 708; Penal Code 1910, § 758; Code 1933, § 26-8001; Code 1933, § 26-2801, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1978, p. 228, § 1; Ga. L. 1981, p. 683, § 1; Ga. L. 1995, p. 957, § 2; Ga. L. 1996, p. 1071, § 1; Ga. L. 1999, p. 381, § 6; Ga. L. 2004, p. 57, § 3.)

**Cross references.** — Juvenile court orders with regard to disposition of deprived children, and termination of parental rights of parents of deprived children, §§ 15-11-34, 15-11-81. Televising testimony of child who is victim of offense under subsection (b) of this Code section, § 17-8-55. Requirements regarding reporting instances of child abuse, § 19-7-5. Administration of corporal punishment in schools, §§ 20-2-731, 20-2-732.

**Editor's notes.** — Ga. L. 1995, p. 957, § 1, not codified by the General Assembly, provides: "This Act shall be known and

may be cited as the 'Child Protection Act of 1995'."

Ga. L. 1999, p. 381, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crimes Against Family Members Act of 1999'."

Ga. L. 1999, p. 381, § 7, not codified by the General Assembly, provides that: "Nothing herein shall be construed to validate a relationship between people of the same sex as a 'marriage' under the laws of this State."

Ga. L. 2004, p. 57, § 1, not codified by

the General Assembly, provides that: "The General Assembly seeks to protect the well-being of this state's children while preserving the integrity of family discipline. The General Assembly believes that balancing the protection of the health and safety of this state's children, while preserving a parent's right to discipline his or her child, is important to all Georgians and vital to the safety of this state's children."

Ga. L. 2004, p. 57, § 6, not codified by the General Assembly, provides that the amendment by that Act shall apply to all crimes which occur on or after July 1, 2004.

**Law reviews.** — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article, "New Challenges for the Georgia General Assembly: Survey of Child Endangerment Statutes," see 7 Ga. St. B.J. 8 (2001). For article on 2004 amendment of this Code section, see 21 Georgia St. U.L. Rev. 45 (2004).

For note on 1999 amendment to this Code section, see 16 Georgia St. U.L. Rev. 72 (1999).

## JUDICIAL DECISIONS

### ANALYSIS

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#### MERGER WITH OTHER OFFENSES

#### JURY ISSUES AND INSTRUCTIONS

### General Consideration

**Former Code 1933, § 26-2801 was constitutional.** Williams v. State, 144 Ga. App. 130, 240 S.E.2d 890 (1977) (see O.C.G.A. § 16-5-70).

**Former Code 1933, § 26-2801 was not void for vagueness.** Davis v. State, 234 Ga. 730, 218 S.E.2d 20 (1975); Cabv. State, 249 Ga. 32, 287 S.E.2d 200 (1982); Morrow v. State, 272 Ga. 691, 532 S.E.2d 78 (2000), cert. denied, 532 U.S. 944, 121 S. Ct. 1408, 149 L. Ed. 2d 350 (2001) (see O.C.G.A. § 16-5-70).

**Statute is not void for overbreadth.** — O.C.G.A. § 16-5-70 is clearly not void for overbreadth. It is not designed to reach legitimate child-rearing functions, nor could it reasonably be so construed. Cabv. State, 249 Ga. 32, 287 S.E.2d 200 (1982).

**Evidence of defendant's silence.** — Because defendant's cross-examination impeached the investigator, inferring the investigator was negligent or underhanded in failing to take notes during defendant's interview on assault charges and charges of child cruelty under 18 U.S.C. §§ 7 and 13, and O.C.G.A. § 16-5-70, and the government's redirect rehabilitated the in-

vestigator by clarifying that the investigator had acted in accordance with the investigator's department's policy and that the failure to take notes was due to defendant ending the interview, no due process violation occurred. United States v. Francisco-Gutierrez, No. 06-14849, 2007 U.S. App. LEXIS 22596 (11th Cir. Sept. 21, 2007) (Unpublished).

**Amendment to O.C.G.A. § 16-5-70 did not decriminalize conduct.** — An amendment to O.C.G.A. § 16-5-70 did not decriminalize the conduct with which the defendants were charged. The result of the amendment was simply to move the language formerly found in § 16-5-70(c) to § 16-5-70(d) and to change the conduct described therein from second-degree to third-degree child cruelty. Hafez v. State, 290 Ga. App. 800, 660 S.E.2d 787 (2008).

**No civil cause of action created by violation of statute.** — Because O.C.G.A. § 16-5-70 is a criminal statute, and the violation of a penal statute does not automatically give rise to a civil cause of action on the part of one who was injured thereby, the court declined to find such a private right of action after the plaintiff failed to direct the court to an instance in which the statute had been

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used to create such a private cause of action. Chisolm v. Tippens, 289 Ga. App. 757, 658 S.E.2d 147 (2008), cert. denied, 129 S. Ct. 576, 172 L.Ed.2d 431 (2008).

**Meaning of "sustenance" as used in section.** — "Sustenance" is that which supports life — food, victuals, provisions. O.C.G.A. § 16-5-70, in use of word "sustenance," means that necessary food and drink which is sufficient to support life and maintain health. Caby v. State, 249 Ga. 32, 287 S.E.2d 200 (1982); State v. Lawrence, 262 Ga. 714, 425 S.E.2d 280 (1993).

**Indictment not required to allege party status.** — Indictment's failure to allege that a defendant was a party to aggravated assault, aggravated battery, and first-degree child cruelty under O.C.G.A. §§ 16-5-21(a), 16-5-24(a), and 16-5-70(b) did not require a showing that the defendant was the principal perpetrator under O.C.G.A. § 16-2-21; the defendant's status as a party to the crimes was not an essential element used to increase the sentences for the crimes, and the trial court did not err in instructing the jury that the defendant could be convicted either as the principal perpetrator of the crimes or as a party thereto. Hill v. State, 282 Ga. App. 743, 639 S.E.2d 637 (2006).

**Sufficiency of indictment.** — Indictment for second-degree cruelty to children which stated that the defendant failed to reasonably supervise and reasonably watch the defendant's children, who drowned, was good against a general demurrer; although the failure to reasonably supervise or watch one's children might not in and of itself constitute criminal negligence, such dereliction certainly could rise to that level depending on the circumstances. Kain v. State, 287 Ga. App. 45, 650 S.E.2d 749 (2007), cert. dismissed, 2008 Ga. LEXIS 125 (Ga. 2008).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal on the ground that there was insufficient evidence that the crimes for which the defendant was charged, aggravated assault, making terroristic threats, and cruelty to children in the third degree, were committed on the date alleged in the

indictment because there was sufficient evidence to support the allegations of the indictment; the exact date of the crimes was not a material allegation of the indictment because the exact date was not an essential element with respect to any of the charged offenses, and the date of the crimes proved at trial was prior to the return of the indictment and within the limitation periods for the crimes. Coats v. State, 303 Ga. App. 818, 695 S.E.2d 285 (2010).

**Malice defined.** — Malice, in the legal sense, imports the absence of all elements of justification, excuse and the presence of an actual intent to cause the particular harm produced, or the wanton or wilful doing of an act with an awareness of a plain and strong likelihood that such harm may result. Brewton v. State, 216 Ga. App. 346, 454 S.E.2d 558 (1995), rev'd on other grounds, 266 Ga. 160, 465 S.E.2d 668 (1996).

"Malice," for purposes of O.C.G.A. § 16-5-70, imports the absence of all elements of justification or excuse and the presence of an actual intent to cause the particular harm produced, or the wanton and willful doing of an act with an awareness of a plain and strong likelihood that such harm may result. Hill v. State, 243 Ga. App. 614, 533 S.E.2d 779 (2000).

**Term "maliciously" is of such obvious significance and common understanding as to need no definition by the judiciary.** Gaddis v. State, 176 Ga. App. 526, 336 S.E.2d 587 (1985).

**Elements of proof.** — To prove the crime of cruelty to children in the first degree, there must be evidence establishing the age of the children, that the children suffered physical or mental pain, that the pain was cruel or excessive, that the defendant caused the pain, and that the defendant acted maliciously in so doing. Sims v. State, 234 Ga. App. 678, 507 S.E.2d 845 (1998).

**Actual knowledge of an injury is not a required element of malice under O.C.G.A. § 16-5-70.** Barry v. State, 214 Ga. App. 418, 448 S.E.2d 243 (1994).

**"Unreasonable" as element of "cruel or excessive" pain.** — Implicit in the statutory definition of "cruel or excessive" pain is the element of unreasonable-

ness. Boyce v. State, 198 Ga. App. 371, 401 S.E.2d 578 (1991), overruled on other grounds, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003).

**Stepfather clearly falls within scope of former Code 1933, § 26-2801.** See Morrow v. State, 155 Ga. App. 574, 271 S.E.2d 707 (1980) (see O.C.G.A. § 16-5-70).

**Father of illegitimate child within scope of section.** — Evidence supported the conviction of a father for cruelty to his four-year-old illegitimate son by depriving him of necessary sustenance. Strickland v. State, 211 Ga. App. 48, 438 S.E.2d 161 (1993).

**Permissible inference from evidence that victim was battered child.**

— Evidence that victim was a battered child, coupled with proof that child was in sole custody of parent, may well permit jury to infer not only that child's injuries were not accidental, but that they occurred deliberately, at hands of parent. United States v. Bowers, 660 F.2d 527 (5th Cir. 1981).

Defendant's intent is a question of fact to be determined upon consideration of "words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted" under O.C.G.A. § 16-2-6, and the jury's finding is not to be set aside unless clearly erroneous. McGahee v. State, 170 Ga. App. 227, 316 S.E.2d 832 (1984).

**Expert testimony about comparable child beatings relevant.** — Testimony of witnesses from the Division of Family and Children's Services and the county about comparable child beatings over the course of their experience was relevant to the issue of excessive physical pain, an essential element of the crime of cruelty to children, since the witnesses were qualified as experts in this field and their testimony concerned the physical extent of the beatings at issue. Cherry v. State, 174 Ga. App. 145, 329 S.E.2d 580 (1985).

**Alford plea to cruelty to children required registration as sexual offender.** — As a defendant entered an Alford plea to two counts of cruelty to children by committing the acts alleged in the indictment, defendant acknowledged

touching the breast and buttocks of the 14-year-old victim and although the defendant did not plead guilty to a sexual offense, the defendant pled guilty to conduct which, by its nature, was a sexual offense against a minor. Therefore, the defendant was required to register as a sexual offender under O.C.G.A. § 42-1-12(e)(1). Morrell v. State, 297 Ga. App. 592, 677 S.E.2d 771 (2009).

**Conviction used to enhance federal sentence.** — In a case in which defendant was sentenced to 18 months of imprisonment for violating 8 U.S.C. § 1326(a) and (b)(2), the district court did not err in applying the eight-level aggravated-felony enhancement in U.S. Sentencing Guidelines Manual (USSG) § 2L1.2(b)(1)(C), rather than the four-level other felony enhancement in USSG § 2L1.2(b)(1)(D), based on defendant's prior state guilty plea to three counts of cruelty to children in violation of O.C.G.A. § 16-5-70. The plea documents showed that defendant pled to maliciously causing cruel and excessive mental pain by, among other things, blatant use of force: threatening to hit a child. United States v. Castillo-Villagomez, No. 08-13290, 2008 U.S. App. LEXIS 22707 (11th Cir. Nov. 4, 2008) (Unpublished).

**Improper sentence.** — Despite enumerating such as error, a five-year concurrent sentence imposed against the defendant upon a conviction of misdemeanor cruelty to children was reversed, and the case was remanded for resentencing, as it was not authorized by law. Price v. State, 281 Ga. App. 844, 637 S.E.2d 468 (2006).

**Cited** in Newton v. State, 127 Ga. App. 64, 192 S.E.2d 526 (1972); Harmon v. State, 133 Ga. App. 720, 213 S.E.2d 23 (1975); Murray v. State, 135 Ga. App. 264, 217 S.E.2d 293 (1975); Williams v. State, 239 Ga. 50, 235 S.E.2d 386 (1977); Polk v. State, 142 Ga. App. 785, 236 S.E.2d 926 (1977); Lister v. State, 143 Ga. App. 483, 238 S.E.2d 591 (1977); Edwards v. State, 146 Ga. App. 604, 247 S.E.2d 158 (1978); Crawford v. State, 148 Ga. App. 523, 251 S.E.2d 602 (1978); Brewer v. State, 156 Ga. App. 468, 274 S.E.2d 817 (1980); Brown v. State, 173 Ga. App. 264, 326 S.E.2d 2 (1985); Owens v. State, 173 Ga. App. 309, 326 S.E.2d 509 (1985); Daniel v.

### General Consideration (Cont'd)

State, 179 Ga. App. 54, 345 S.E.2d 143 (1986); Hendrick v. State, 257 Ga. 514, 361 S.E.2d 169 (1987); Dudley v. State, 197 Ga. App. 877, 399 S.E.2d 747 (1990); Remine v. State, 203 Ga. App. 30, 416 S.E.2d 326 (1992); Reyes v. State, 250 Ga. App. 769, 552 S.E.2d 918 (2001); Williams v. State, 261 Ga. App. 410, 582 S.E.2d 556 (2003); King v. State, 282 Ga. 505, 651 S.E.2d 711 (2007); Newsome v. State, 289 Ga. App. 590, 657 S.E.2d 540 (2008); Payne v. State, 290 Ga. App. 589, 660 S.E.2d 405 (2008); Lemming v. State, 292 Ga. App. 138, 663 S.E.2d 375 (2008); Mazza v. State, 292 Ga. App. 168, 664 S.E.2d 548 (2008); Yearwood v. State, 297 Ga. App. 633, 678 S.E.2d 114 (2009); Hayes v. State, 298 Ga. App. 338, 680 S.E.2d 182 (2009).

### Application

**Whipping of child.** — Cruelty to children applies where a girl of 14 years of age was whipped for several hours, accompanied by abusive language. Stone v. State, 1 Ga. App. 292, 57 S.E. 992 (1907).

**Sufficient evidence of malice.** — Father acted maliciously in causing his children to suffer cruel or excessive mental pain when he repeatedly stabbed the children's mother in their presence, transported the wounded mother and children to a deserted place, and abandoned them there. Sims v. State, 234 Ga. App. 678, 507 S.E.2d 845 (1998).

Sufficient evidence supported the conviction of cruelty to children in violation of O.C.G.A. § 16-5-70(b) because defendant did not obtain treatment for the child, who had a broken arm and two broken legs for three days; defendant knew both the cause of the child's injuries, abuse at the hands of defendant's love interest, and the severity of those injuries, as the child cried when the child's legs were touched, and this was sufficient to support a finding of willful and wanton inaction. Withrow v. State, 275 Ga. App. 110, 619 S.E.2d 714 (2005).

Evidence was sufficient to support convictions against defendants, a parent and the parent's love interest, for cruelty to children, in violation of O.C.G.A.

§ 16-5-70(b), and to support denial of the parent's acquittal motion under O.C.G.A. § 17-9-1, where they failed to seek medical care for the parent's 15-month-old child for over a week because they feared the child's removal from their care by a social services agency after the child was seriously burned by scalding bathwater; although the parent informed the parent's love interest that they should not seek medical attention, the parent's love interest exerted malice where the parent's love interest acceded to that demand despite being aware that the child needed medical assistance. Gore v. State, 277 Ga. App. 635, 627 S.E.2d 198 (2006).

Defendant's conviction for cruelty to children under O.C.G.A. § 16-5-70(b) arising out of the repeated rape of the defendant's 11-year-old child was supported by sufficient evidence that the child pleaded for help during the period specified in the indictment; from the testimony of a neighbor, the jury could have inferred that the child screamed during the rapes, that the defendant was at home at the time and failed to intervene, that the defendant told the child that it would be over, and that these events took place after the rapist was released from jail and before the rapist's arrest, which corresponded with the time period specified in the indictment. Johnson v. State, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

There was sufficient evidence of malice to convict defendant of first degree cruelty to children under O.C.G.A. § 16-5-72(b) because the minor daughter of defendant's girlfriend had an untreated second degree burn on her leg, as well as numerous bruises on her body, and defendant failed to obtain medical care for the child. Garrett v. State, 300 Ga. App. 391, 685 S.E.2d 355 (2009).

**Murder of mother in front of child.** — Evidence supported defendant's conviction of cruelty to a child because defendant pointed a loaded revolver at the victim and pulled the trigger twice, while driving, fatally wounding the victim; the victim's two-year-old child was also in the car, defendant did not call 9-1-1 from defendant's cell phone, drove past a hospital, and the revolver had a hammer block, preventing the revolver from firing

unless pressure was applied to the trigger. Reed v. State, 279 Ga. 81, 610 S.E.2d 35 (2005).

**Murder of grandparent in front of child.** — Evidence was sufficient to support the defendant's conviction for cruelty to children because, after the entry of a family violence protective order, the defendant purchased a knife with a large blade, followed the victim, who was the defendant's estranged spouse, and attempted to talk with the victim, appeared at a grocery store where the victim was, yelled at the victim, and stabbed and slashed the victim multiple times, resulting in the victim's death in the presence of the victim's grandson. Weaver v. State, 288 Ga. 540, 705 S.E.2d 627 (2011).

**Insufficient evidence of malice.** — Trial court erred in denying defendant's motion for a directed verdict on the charge of cruelty to children, as there was insufficient evidence to support the finding that defendant acted with the malicious intent to cause the minor victim mental pain when defendant had a sexual relationship with the victim; the charge required more than the fact of a sexual relationship with victim. Hightower v. State, 256 Ga. App. 793, 570 S.E.2d 22 (2002).

**Conviction required reversal because evidence was improperly excluded.** — During a trial for felony murder while in the commission of cruelty to a child arising from the death of a defendant's child from brain trauma sustained while the child was in the defendant's care, the defendant was improperly prevented from cross-examining a person who was in the apartment at the time about the person's history of inappropriate behavior toward the person's own child, including allegations of child abuse, because it was a crucial element of the defense that the person was a likely suspect, and, under O.C.G.A. § 24-4-6, the circumstantial evidence did not exclude the reasonable hypothesis that the person was the likely culprit; the defendant's conviction required reversal because it was not highly improbable that the jury's verdict would have been different if the evidence had been admitted, and the error therefore could not be considered harmless. Scott v. State, 281 Ga. 373, 637 S.E.2d 652 (2006).

**Oxygen is not a "necessary sustenance"** within the context of O.C.G.A. § 16-5-70(a). State v. Lawrence, 262 Ga. 714, 425 S.E.2d 280 (1993).

**Blaming another child for injuries.** — After defendant shot defendant's two-year old child and blamed the shooting on defendant's four-year-old child, blaming the child for such a violent act against a loved one which resulted in the child manifesting observable psychological pathology could have authorized the jury to conclude that defendant inflicted on the child mental pain which was unreasonably cruel or excessive. Boyce v. State, 198 Ga. App. 371, 401 S.E.2d 578 (1991), overruled on other grounds, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003).

**Cruel and excessive mental pain.** — Jury was entitled to conclude beyond a reasonable doubt that the defendant's two children suffered "cruel and excessive mental pain" when they watched their parent murder another sibling and that the defendant maliciously caused this pain by wantonly and wilfully shooting the defendant's child with the awareness of a plain and strong likelihood that such harm would result. Hall v. State, 261 Ga. 778, 415 S.E.2d 158 (1991), cert. denied, 505 U.S. 1205, 112 S. Ct. 2993, 120 L. Ed. 2d 870 (1992).

Since the cruelty to children charge which was brought against the defendant was not based on battery and reckless conduct counts with which the defendant was also charged, but on the basis of the defendant's causing the defendant's small child "cruel and excessive mental pain by hitting, beating, and striking" the child's mother, the various charges did not contain the same elements, and an acquittal of the battery and reckless conduct charges did not require an acquittal on the child cruelty charge. Turney v. State, 235 Ga. App. 431, 509 S.E.2d 670 (1998).

Evidence was sufficient to sustain defendant's conviction for cruelty to children by proof defendant caused excessive mental pain by raping defendant's own daughter. Alford v. State, 243 Ga. App. 212, 534 S.E.2d 81 (2000).

Sufficient evidence supported defendant's cruelty to children conviction as: (1)

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a determination of what constituted excessive mental pain need not depend solely on the victim's testimony; and (2) testimony from the victim's parent, grandparent, a detective, and a forensic interviewer testified about the incident, that the victim became upset when the victim talked about it, and was undergoing counseling to help cope with it. *Keith v. State*, 279 Ga. App. 819, 632 S.E.2d 669 (2006).

Defendant's conviction for cruelty to children under O.C.G.A. § 16-5-70(b) arising out of the repeated rape of the defendant's 11-year-old child was supported by sufficient evidence that the child suffered from excessive mental pain caused, at least in part, by the defendant's refusal to heed the child's outcries; from the testimony of a neighbor, the jury could have found that the child screamed during the rapes, that the defendant was at home at the time and did not intervene, and that the defendant told the child that it would be over. *Johnson v. State*, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

Because there was testimony that a 14-month-old child died from multiple blunt force traumas while in the defendant's care, there was no merit to the defendant's contention that the evidence was insufficient to establish the pain element of cruelty to children; evidence of a child's age, the extent of injuries, the nature of the assault to which the child was subjected, and the force with which the child was struck was sufficient evidence from which a jury could conclude whether the defendant caused the child cruel or excessive physical pain. *Moore v. State*, 283 Ga. 151, 656 S.E.2d 796 (2008).

Trial court did not err in admitting the victim's testimony that just prior to trial, the victim had attempted suicide due to the stress caused by the molestation because this evidence was proper to show the excessive physical or mental pain needed for a cruelty-to-children conviction under O.C.G.A. § 16-5-70(b); the defendant's complaint that too much time had passed since the incidents to allow a jury to infer that the attempted suicide resulted from stress caused by the incidents was a matter for the jury to resolve.

*Bradberry v. State*, 297 Ga. App. 679, 678 S.E.2d 131 (2009).

There was sufficient evidence to support a defendant's conviction for cruelty to children because, after the defendant inappropriately touched the defendant's 16-year-old daughter in bed, the daughter fled to her boyfriend's house where she "couldn't talk" and was "shaking" and "hysterically crying." She had not spoken to her father since the incident, and for months after the incident, and when the daughter began speaking about the incident (which was rare), she began shaking. *Cline v. State*, 300 Ga. App. 615, 685 S.E.2d 501 (2009).

Evidence was sufficient to support a jury's finding that a defendant's acts of molestation caused the child victims, ages 7 and 9, cruel and excessive mental pain for purposes of the child cruelty statute, O.C.G.A. § 16-5-70(b), given evidence of school problems and aggressiveness and one victim's testimony that the victim was sad and uncomfortable. *Bunn v. State*, 307 Ga. App. 381, 705 S.E.2d 180 (2010).

Trial court did not err in convicting the defendant of cruelty to children in the first degree, O.C.G.A. § 16-5-70(b), because a jury could infer from the evidence that the defendant maliciously intended to cause the victim cruel and excessive mental pain; the evidence showed that the defendant hid in the girls' bathroom with a knife, duct tape, and a camera, laid in wait for a young lady to come in, and then held the 12-year-old victim in a bathroom stall against her will as she screamed continuously for help, during which time the defendant tried to tear off a piece of duct tape and held a knife. *Kirt v. State*, No. A10A1933, 2011 Ga. App. LEXIS 247 (Mar. 22, 2011).

**Cruel or excessive physical or mental pain.** — Evidence was sufficient to allow the jury to conclude beyond a reasonable doubt that the defendant caused the child cruel or excessive physical or mental pain by squeezing the child and causing serious abdominal injuries to the child and by failing to seek medical treatment for the fractured bones in both arms suffered by the child while the defendant and the child's parent were jointly caring for the child. *Sabbs v. State*, 248 Ga. App. 114, 545 S.E.2d 671 (2001).

Sufficient evidence supported the defendant's conviction of cruelty to children in the first degree under O.C.G.A. § 16-5-70(b) as the victim testified that the victim saw the defendant shake their two-year-old child in a rage, that the victim was attacked by the defendant and two companions in the child's presence, and that the child, after the incident, just stared and looked into space. Souder v. State, 281 Ga. App. 339, 636 S.E.2d 68 (2006), cert. denied, No. S07C0113, 2007 Ga. LEXIS 97 (Ga. 2007).

After the defendant's 11-month-old child was seriously burned by extremely hot bath water, the defendant delayed calling for emergency medical assistance for over an hour; this evidence was sufficient to authorize a rational trier of fact to find that the defendant maliciously caused the child cruel and excessive physical and mental pain by failing to promptly provide medical attention and treatment to the child. Williams v. State, 285 Ga. App. 628, 647 S.E.2d 324 (2007).

Defendant's argument that there was no evidence that the child victim suffered cruel or excessive physical or mental pain was rejected as: (1) a doctor testified that the victim's injuries were caused by "something with a lot of force that sheared at the same time"; (2) the victim had a bruised labia majora and a cut to the hymen that looked as if the cut had been bleeding at one time; (3) due to the defendant's warning, the child became visibly upset upon telling the mother about the charged incidents; and (4) in the days before the victim reluctantly told the mother about the abuse, the child was nervous and was not sleeping or eating well. Cortez v. State, 286 Ga. App. 170, 648 S.E.2d 488 (2007).

**Denial of necessary and appropriate medical care** can, under O.C.G.A. § 16-5-70(b), constitute cruelty to a child when it causes the child "cruel or excessive physical or mental pain" but it does not constitute a denial of "sustenance," which is the offense proscribed in O.C.G.A. § 16-5-70(a). Howell v. State, 180 Ga. App. 749, 350 S.E.2d 473 (1986).

Evidence of malice necessary to sustain conviction under O.C.G.A. § 16-5-70(b), the cruelty to children statute, was shown

where evidence established that the babysitter made a deliberate decision not to seek immediate medical care while knowing the infant needed it but instead spent approximately 90 minutes trying to contact the infant's parents to inform them of infant's grave medical condition. Hoang v. State, 250 Ga. App. 403, 551 S.E.2d 813 (2001).

Sufficient evidence existed to uphold defendant's conviction for cruelty to children and felony murder predicated on that offense with regard to the birth of a premature infant by the defendant's 10-year-old step-daughter as a result of sexual molestation of the step-daughter by the defendant, which infant, after receiving no medical attention, died within a few hours of birth; failure to seek timely medical care for a child may form the basis for the offense of cruelty to children and the jury could reasonably have inferred that, as a result of the defendant's refusal to allow the baby to seek medical care, the baby suffocated to death and suffered cruel and excessive pain. Grayer v. State, 282 Ga. 224, 647 S.E.2d 264 (2007).

Although the evidence was sufficient to convict of first degree cruelty to children under O.C.G.A. § 16-5-72(b) because the minor daughter of defendant's girlfriend had an untreated second degree burn on her leg, as well as numerous bruises on her body, and contrary to the defense, an examining doctor testified that the burn was not caused by pouring hot bath water on the child, the failure of defendant to obtain medical care for the child also showed child cruelty. Garrett v. State, 300 Ga. App. 391, 685 S.E.2d 355 (2009).

**Failure to procure medical treatment.** — Being afraid because one might get in trouble is neither justification nor excuse for refusing to obtain medical care for one's injured child. Hill v. State, 243 Ga. App. 614, 533 S.E.2d 779 (2000).

Evidence that defendant kicked and slammed the defendant's love interest's infant child, breaking an arm and legs, and that, although defendant knew the severity of the child's injuries, failed to procure medical treatment for the child on the day of the incident and for the following three days was sufficient to enable a

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jury to conclude that defendant was guilty of the offense of cruelty to children in the first degree, pursuant to O.C.G.A. § 16-5-70(b). McKee v. State, 275 Ga. App. 646, 621 S.E.2d 611 (2005).

Jury was authorized to conclude that the defendant participated in a pattern of child cruelty over the course of several months, and aided and abetted in the malicious acts that caused the death of the child victim where, among other things, the defendant, the father of the child, regularly beat the child with a belt, the defendant was aware that the child had experienced seizures before the night in question, the defendant observed the child in extreme distress that night but offered no assistance, and the defendant realized that the child's condition had worsened during the night but still took no action to procure medical care until the next morning. Delacruz v. State, 280 Ga. 392, 627 S.E.2d 579 (2006).

**Denying child one day's special formula.** — State failed to establish that a denial of one day's special formula was sufficient to "jeopardize" the child's health, where there was no evidence that the child was denied any milk at any time or that the child's health had been jeopardized by the defendant's failure to utilize a prescribed special formula. Howell v. State, 180 Ga. App. 749, 350 S.E.2d 473 (1986).

**Malnutrition.** — Evidence of the lack of material in both the stomach and the gastrointestinal tract precluded a finding that the child had succumbed from the effects of malabsorption syndrome and thus, the evidence supported a finding that the infant's death was due to severe growth retardation secondary to malnutrition with marked dehydration; thus, a conviction under O.C.G.A. § 16-5-70 was authorized. Beasley v. State, 161 Ga. App. 29, 288 S.E.2d 828 (1982).

Evidence was sufficient to support a father's conviction under O.C.G.A. § 16-5-70 where the defendant's 4 month old child was found severely malnourished, even though there was food in the house to feed the child properly and the child's mother and children received WIC

food and formula vouchers. Knight v. State, 233 Ga. App. 819, 505 S.E.2d 796 (1998).

Defendant's motion for a directed verdict was properly denied because evidence that defendant's 3-month-old child was underweight and severely malnourished to the point where it was too weak to feed and had to be fed initially through a naso-gastric tube, that defendant fed the child sugar water to avoid bothering with making formula, and that defendant sometimes propped up a bottle near the child instead of feeding the child, allowed a rational trier of fact to find defendant guilty beyond a reasonable doubt of the charge of cruelty to children by willfully depriving the child of necessary sustenance to the extent that the child's well-being was jeopardized. Wilson v. State, 257 Ga. App. 242, 570 S.E.2d 679 (2002).

Defendant was properly convicted of child cruelty where a doctor stated that defendant's two-month old child was suffering from one of the worse cases of malnutrition that the doctor had ever seen, as evidenced by the child's sunken eyeballs, delayed capillary refill, increased turgor of the skin, and poor reaction to the environment. Bosnak v. State, 263 Ga. App. 313, 587 S.E.2d 814 (2003).

Defendant's motion for directed verdict of acquittal on two counts of cruelty to children, in violation of O.C.G.A. § 16-5-70(a), in connection with the malnourishment of the defendant's live-in love interest's two-year-old twins was properly denied because there was direct medical, photographic, and testimonial evidence showing that the children were severely malnourished and that their health was jeopardized and that defendant wilfully deprived the children of necessary sustenance; the evidence included a doctor's testimony that the children had no subcutaneous fat, had bulging abdomens, could make sounds but not say any words, could not bear weight, had very delayed bone development, were severely malnourished, had no medical reason for their failure to thrive, and gained about as much weight during their first six weeks in foster care as they had in two years under defendant's care. Copeland v. State, 263 Ga. App. 776, 589 S.E.2d 319 (2003).

Because a pediatrician testified that a child victim's reflux condition could not have caused the degree of malnourishment that the pediatrician found in the victim, and that the child's extreme failure to thrive was caused by a failure to feed the child, because the state presented evidence that the victim was not fed, the trial court did not err in denying defendants' motion for a directed verdict of acquittal in defendants' trial for cruelty to children. *Allen v. State*, 278 Ga. App. 292, 628 S.E.2d 717 (2006).

Evidence supported the conviction of the defendants as: (1) the first defendant took custody of a healthy normal weight three-and-a-half-year-old child and after five months, the child was very ill and had lost 14 pounds; (2) having been told upon the child's discharge from a hospital to return for testing and to contact the child's regular pediatrician, the defendants did neither and took no steps to seek medical attention until the child was almost dead; (3) when the child was fed, despite the child's claimed celiac disease, the child thrived and gained weight and it was only when the child was with the defendants that the child became an emaciated waif; and (4) the first defendant's claims that the child's other biological parent caused the child's condition and that the sores on the child's body were not as severe as portrayed by the medical testimony and the photos in evidence were rejected by the jury. *Revells v. State*, 283 Ga. App. 59, 640 S.E.2d 587 (2006).

**Raising a child in unsanitary conditions** can constitute the offense of cruelty to children; however, there must be evidence establishing the age of the child, that the child suffered physical or mental pain, that the pain was cruel or excessive, that defendant caused the pain, and that defendant acted maliciously in so doing. *Brewton v. State*, 266 Ga. 160, 465 S.E.2d 668 (1996).

Evidence of unsanitary conditions is not enough, by itself, to prove the element of malice required for the offense of cruelty to children. *Brewton v. State*, 266 Ga. 160, 465 S.E.2d 668 (1996).

**Holding child in scalding water.** — Ample evidence concerning the child victim's condition and expert testimony re-

garding the same was presented to authorize the jury to find defendant guilty of committing felony murder by holding the child in scalding water, and guilty of committing cruelty to a child by failing to provide medical attention, and to reject the evidence and hypotheses defendant presented in an attempt to refute the charges. *Robles v. State*, 277 Ga. 415, 589 S.E.2d 566 (2003).

Evidence was sufficient to support defendant's convictions on four counts of aggravated battery and one count of cruelty to children in the first degree after the 17-month-old child of defendant's love interest was found with hot-water immersion burns incurred while defendant was watching the child for the love interest; the jury was free to reject the explanation that defendant had no criminal intent at the time the burns were incurred and find that the only reasonable hypothesis was that defendant maliciously and intentionally immersed the baby in hot water after the baby soiled a diaper, especially since defendant's explanations were not consistent with the evidence. *Lee v. State*, 275 Ga. App. 93, 619 S.E.2d 767 (2005).

**Felony murder conviction upheld.** — Evidence that defendant shook child repeatedly until child went limp along with pathologist testimony that injury to child's skull resulted in the child's death was sufficient to conclude that defendant was guilty beyond a reasonable doubt of felony murder in the death of the child. *McNeal v. State*, 263 Ga. 397, 435 S.E.2d 47 (1993).

Evidence that the cause of death was loss of blood due to a laceration of the liver caused by blunt force trauma to the abdomen, most likely a punch with a fist, was sufficient to show either excessive pain or the malice required for a conviction of felony murder with cruelty to children. *Folson v. State*, 278 Ga. 690, 606 S.E.2d 262 (2004).

Evidence that there was an 80 to 90 percent chance that injuries that caused the death of a defendant's 10-month-old child were inflicted within an hour of the child's death, that the defendant left the apartment at 4:10 P.M., that an attending physician was called to the emergency room at 5:46 P.M., and that the child was

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dead on arrival at the emergency room was sufficient to support the defendant's convictions for felony murder while in commission of cruelty to a child in the second degree, aggravated assault, and cruelty to a child in the first degree; the evidence permitted the jury to conclude that the time frame in which the child's injuries were inflicted included the time before the defendant left for work, there was evidence concerning the defendant's actions before and after the child's death that indicated the defendant's guilt, and the jury was not required to accept the defendant's version of events. *White v. State*, 281 Ga. 276, 637 S.E.2d 645 (2006).

Sufficient evidence supported a conviction of felony murder while in the commission of cruelty to children in the first degree: (1) the pathologist who performed the child's autopsy testified that the 14-month-old child, who had been injured while left in the defendant's care, died from multiple blunt force injuries that were inconsistent with falling off a bed or being dropped, as claimed by the defendant; (2) a defense pathologist agreed that there were at least seven distinct impact sites on the child's head and about 105 impact sites on the child's body; and (3) there was evidence that two years before, the defendant's six-month-old child had been left in the defendant's care and had been returned to the child's parent with unexplained bruises and other injuries. *Moore v. State*, 283 Ga. 151, 656 S.E.2d 796 (2008).

**Guilty verdict clearly supportable as matter of law.** *Fain v. State*, 165 Ga. App. 188, 300 S.E.2d 197 (1983).

When the testimony of defendant's wife, who was charged and pled guilty as an accomplice, was corroborated by the testimony of the wife's sister who observed defendant beating the same victim on an earlier occasion, such evidence was sufficient to sustain defendant's conviction. *Jackson v. State*, 178 Ga. App. 378, 343 S.E.2d 122 (1986).

Evidence sufficient to sustain conviction on count charging defendant with causing child excessive physical pain by striking the child in the face. *Howell v. State*, 180 Ga. App. 749, 350 S.E.2d 473 (1986).

Evidence held sufficient for rational trier of fact to find cruelty to children. *Sharp v. State*, 183 Ga. App. 641, 360 S.E.2d 50 (1987); *Lewis v. State*, 191 Ga. App. 287, 381 S.E.2d 558 (1989); *Rigenstrup v. State*, 197 Ga. App. 176, 398 S.E.2d 25 (1990).

Evidence supported defendant's conviction, where the record showed that the victim had second-degree burns which, in the expert medical opinion of an attending physician, demonstrated that the victim had been dipped into hot water. *Gatson v. State*, 198 Ga. App. 279, 401 S.E.2d 71 (1991).

Evidence was sufficient to support defendants' convictions of cruelty to children and aggravated battery where the medical testimony concerning the extent and possible cause of the victim's injuries, evidence of defendants' complacent demeanor, and testimony concerning their access to the victim were but some of the factors from which the jury could find them guilty. *Thomas v. State*, 262 Ga. App. 492, 589 S.E.2d 243 (2003).

Evidence was sufficient to support conviction for cruelty to children because defendant, a police officer on duty, repeatedly threatened minor victim with prosecution if the victim did not have sex with defendant, the act was painful and upsetting to the victim, defendant forced the victim to touch defendant's genitals, and defendant had no justification for the actions. *Wiggins v. State*, 272 Ga. App. 414, 612 S.E.2d 598 (2005), aff'd in part and rev'd in part, 280 Ga. 268, 626 S.E.2d 118 (2006).

Sufficient evidence supported defendant's convictions of felony murder and cruelty to children where defendant admitted striking the child multiple times on the night in question, causing the child to bleed, but denied striking the child with sufficient force to cause the injuries the child sustained; the child's mother testified that the bruises the mother found on the child's head and body in the morning had not been present the previous evening. *Sauerwein v. State*, 280 Ga. 438, 629 S.E.2d 235 (2006).

Defendant's malice murder and cruelty to children convictions were affirmed on appeal as post-autopsy photographs were

properly admitted to assist the jury in understanding both the internal injuries and the cause of the victim's death, and sufficient and overwhelming evidence was presented that the victim's injuries were not accidental. *Thomas v. State*, 281 Ga. 550, 640 S.E.2d 255 (2007).

Despite the defendant's claim that breaking defendant's infant daughter's arm was an accident and that the evidence of intent was insufficient to support a first-degree cruelty to children conviction, the conviction was upheld on appeal based on: (1) medical evidence regarding the normal frailty of an infant's bones; (2) evidence that the injury the child suffered was normally one caused by a non-accidental trauma; (3) evidence that the injury occurred shortly after the defendant angrily confronted the crying infant; and (4) prior difficulties evidence which showed the defendant began spanking the child when the child was two or three months old. *Cochran v. State*, 285 Ga. App. 175, 645 S.E.2d 662 (2007).

Trial court did not err in denying the defendant's motion for directed verdict of acquittal after a jury convicted the defendant of two counts of cruelty to children in violation of O.C.G.A. § 16-5-70(b) because the state did not fail to prove that the defendant used a bat and a belt as stated in the indictment; both victims, who were the defendant's adopted children, testified that the defendant beat the victims with a belt and a bat and that the beatings occurred when the victims did not complete the exercises that the defendant required the victims to do on a daily basis. *Dinkler v. State*, 305 Ga. App. 444, 699 S.E.2d 541 (2010).

**Eyewitness testimony of child's mother was sufficient** to support inferences that defendant had acted with malice in hitting the child and that defendant's acts had caused the child cruel and excessive physical pain. *Martin v. State*, 190 Ga. App. 486, 379 S.E.2d 170, cert. denied, 190 Ga. App. 898, 379 S.E.2d 170 (1989).

**Marital privilege exception applied in child cruelty case, despite lack of physical contact.** — Defendant's alleged violation of O.C.G.A. § 16-5-70(d), cruelty to children, was a "crime against the per-

son of a minor child" within the meaning of O.C.G.A. § 24-9-23(b), which provided an exception to the marital privilege against testifying in cases of crimes against the person of children, even though no physical contact was involved. Therefore, a trial court did not err in compelling defendant's spouse to testify against defendant despite invoking the privilege. *Sherman v. State*, 302 Ga. App. 312, 690 S.E.2d 915, cert. denied, No. S10C0961, 2010 Ga. LEXIS 545 (Ga. 2010).

**Circumstantial evidence was sufficient** to show that acts of cruelty committed by defendant on defendant's 13-year-old stepson were committed within the statute of limitation. *Lee v. State*, 232 Ga. App. 300, 501 S.E.2d 844 (1998).

Evidence that a defendant's 13-month-old child died while in the defendant's care from brain trauma caused by being struck by or against an object or violently shaken, at a time when one other person and that person's child were in the defendant's apartment, provided sufficient circumstantial evidence under O.C.G.A. § 24-4-6 to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder while in the commission of cruelty to a child; questions as to the reasonableness of hypotheses were to be decided by the jury, and the jury's authorized finding that evidence, though circumstantial, was sufficient to exclude every reasonable hypothesis save that of guilt was not to be disturbed unless the guilty verdict was insupportable as a matter of law. *Scott v. State*, 281 Ga. 373, 637 S.E.2d 652 (2006).

**Digital penetration sufficient.** — Evidence was sufficient to convict defendant of first degree cruelty to children, O.C.G.A. § 16-5-70(b), where the victim's testimony, the victim's mother's testimony, and the doctor's testimony all established that defendant digitally penetrated the victim, causing physical injury. *Gearin v. State*, 255 Ga. App. 329, 565 S.E.2d 540 (2002).

**Admission of irrelevant evidence did not require mistrial.** — During a trial for felony murder while in the commission of cruelty to a child, evidence that

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a defendant's romantic partner did not know that the defendant was married was irrelevant; although the defendant's objection to the admission of the evidence was improperly overruled, the defendant's motion for a mistrial was properly denied because a mistrial was not mandated. *Scott v. State*, 281 Ga. 373, 637 S.E.2d 652 (2006).

**Similar transaction evidence properly admitted.** — In a prosecution on two counts of second-degree cruelty to children and family violence battery, the trial court properly admitted similar transaction evidence against the defendant for the limited purpose of showing the defendant's course of conduct and bent of mind as identity was not an issue and the similar transaction and the charged offense were the same, except for the fact that they were committed against different family members. *Breazeale v. State*, 290 Ga. App. 632, 660 S.E.2d 376 (2008).

**Evidence properly admitted.** — With regard to a defendant's conviction on three counts of cruelty to children in the first degree based on injuries to the child of defendant's love interest, the trial court did not err by admitting the incriminating statements that the defendant used too much force in putting the child into a swing, which the defendant made to the polygraph examiner during the pre-polygraph examination interview; the examiner and the investigator testified that, prior to making any statements, the defendant was read the defendant's Miranda warnings, had voluntarily signed a waiver of rights form, and had voluntarily signed a form stipulating that the results of the polygraph examination would be admissible evidence and both the waiver of rights form and the stipulation were produced for the trial court's review during a suppression hearing and were introduced into evidence at trial after defendant's motion to suppress was denied. *Legan v. State*, 289 Ga. App. 244, 656 S.E.2d 879 (2008).

Evidence that since being raped by defendant a victim had nightmares and had to sleep with her parents was properly admitted as proof that defendant had

caused the victim the mental pain necessary to support a conviction for cruelty to a child. *Mims v. State*, 291 Ga. App. 777, 662 S.E.2d 867 (2008), cert. denied, 2008 Ga. LEXIS 768 (Ga. 2008).

In a case where a defendant was convicted of cruelty to children in violation of O.C.G.A. § 16-5-70, the trial court did not err in denying the defendant's motion for a mistrial or in refusing to strike certain testimony because hearsay statements by the defendant's daughter were admissible pursuant to O.C.G.A. § 24-3-16 since the daughter was available to appear at trial and, in fact, took the witness stand. *Stegall v. State*, 297 Ga. App. 425, 677 S.E.2d 441 (2009).

**Evidence sufficient for conviction.** — See *Black v. State*, 261 Ga. 791, 410 S.E.2d 740 (1991), cert. denied, 506 U.S. 839, 113 S. Ct. 118, 121 L. Ed. 2d 74 (1992); *Morris v. State*, 202 Ga. App. 673, 415 S.E.2d 485 (1992); *Weeks v. State*, 220 Ga. App. 141, 469 S.E.2d 316 (1996); *Glenn v. State*, 228 Ga. App. 29, 491 S.E.2d 92 (1997); *Goss v. State*, 228 Ga. App. 411, 491 S.E.2d 859 (1997); *Nunez v. State*, 237 Ga. App. 808, 516 S.E.2d 357 (1999); *Avila-Nunez v. State*, 237 Ga. App. 649, 516 S.E.2d 335 (1999); *Wilhelm v. State*, 237 Ga. App. 682, 516 S.E.2d 545 (1999); *Johnson v. State*, 239 Ga. App. 886, 522 S.E.2d 478 (1999); *Porter v. State*, 243 Ga. App. 498, 532 S.E.2d 407 (2000); *Bartlett v. State*, 244 Ga. App. 49, 537 S.E.2d 362 (2000); *Loveless v. State*, 245 Ga. App. 555, 538 S.E.2d 464 (2000).

Evidence was sufficient for the jury to conclude that the mother was guilty of cruelty to children. *Stokes v. State*, 204 Ga. App. 586, 420 S.E.2d 84 (1992).

There was ample evidence in the record from which a rational trier of fact could find beyond a reasonable doubt that defendant was guilty of cruelty to children by maliciously causing defendant's ward excessive physical pain. *Strickland v. State*, 212 Ga. App. 170, 441 S.E.2d 494 (1994); *Keller v. State*, 221 Ga. App. 846, 473 S.E.2d 194 (1996).

Convictions of cruelty to children and battery were supported by evidence that defendant caused defendant's eight-year-old child to suffer severe burns by forcing the child to sit in a bathtub

filled with hot water and caustic chemicals. *Mitchell v. State*, 233 Ga. App. 92, 503 S.E.2d 293 (1998).

There was ample evidence to support the defendant's conviction of cruelty to children, where there was videotaped testimony by the child as well as testimony by the child's relatives that the victim experienced cruel and excessive mental pain, including testimony concerning: the victim's complaints of physical pain and apparent emotional distress; her vagina appearing to be red and irritated; the child's conduct in seeking to avoid the defendant; and regression in her toilet training. *Clark v. State*, 234 Ga. App. 503, 507 S.E.2d 241 (1998).

Father's repeated stabbing of the children's mother in the children's presence supported a finding that the father was guilty of cruelty to his children. *Sims v. State*, 234 Ga. App. 678, 507 S.E.2d 845 (1998).

Ample evidence sustained defendant's convictions for cruelty to children, under O.C.G.A. § 16-5-70(b) where the evidence revealed that: (1) defendant took a two-year-old victim into the bathroom where the victim was burned; (2) the victim told other people that it was defendant who burned the victim; (3) the burns on the victim's body were consistent with purposeful immersion in excessively hot water; (4) doctors who initially treated the victim immediately suspected child abuse; and (5) the victim was burned to the point that skin melted from the victim's feet and the victim was in extreme physical and emotional pain. *Ratledge v. State*, 253 Ga. App. 5, 557 S.E.2d 458 (2001).

Considering the child's age, the child's injuries, and testimony that the defendant's blows were severe enough to make the child cry, the defendant was guilty of first degree cruelty to children where the evidence showed that the defendant maliciously struck the child in the head twice, causing numerous bruises and a fractured skull. *Smith v. State*, 261 Ga. App. 106, 581 S.E.2d 713 (2003).

Evidence that while in defendants' care the child suffered a fracture to the child's arm for which defendants refused to seek medical treatment and were evasive about explaining, although circumstan-

tial, was sufficient to support convictions for child cruelty and contributing to the deprivation of a minor. *Thompson v. State*, 262 Ga. App. 17, 585 S.E.2d 125 (2003).

Defendant's proceeding pro se after three detailed trial court warnings was not an abuse of discretion; the defendant's conviction of two counts of O.C.G.A. § 16-5-21(a)(2), aggravated assault, and one count of O.C.G.A. § 16-5-70(c), cruelty to children, (using defendant's car as a deadly weapon to run into the defendant's spouse's car with the spouse and child inside) was supported by sufficient evidence. *Bush v. State*, 268 Ga. App. 200, 601 S.E.2d 511 (2004).

Evidence of the victim alone was sufficient to authorize a guilty verdict in a child molestation case; there was no requirement that the victim's testimony be corroborated, and defendant's convictions of child molestation, aggravated child molestation, rape, aggravated sexual battery, and cruelty to children were affirmed. *McKinney v. State*, 269 Ga. App. 12, 602 S.E.2d 904 (2004).

Sufficient evidence, including testimony from the child victim identifying defendant's vehicle, evidence of defendant's DNA matching that of the victim and expert testimony that the frequency of such occurrence was approximately one in two billion in the Caucasian population, and similar transaction evidence, supported defendant's kidnapping with bodily injury, rape, aggravated sodomy, aggravated child molestation, aggravated assault, and first-degree cruelty to children convictions. *Morita v. State*, 270 Ga. App. 372, 606 S.E.2d 595 (2004).

Defendant's convictions for child molestation, aggravated child molestation, and two counts of cruelty to children in the first degree, in violation of O.C.G.A. §§ 16-5-70(b) and 16-6-4(a), (c), as well as the defendant's conviction for attempt to commit rape, were supported by evidence, including testimony by the defendant's two grandchildren who were the victims of the instant crimes, as well as the introduction of similar transaction evidence, including sex offense convictions and similar acts by the defendant against other minor victims; evidence of the similar transaction was properly admitted, as any

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issue as to its remoteness went to the weight of the evidence, not its admissibility. *Shorter v. State*, 271 Ga. App. 528, 610 S.E.2d 162 (2005).

Evidence supported defendant's conviction under O.C.G.A. § 16-5-70(b) because the five-year-old victim told a detective and two Department of Family and Children Services employees that the child's parent and defendant hit the victim with a belt; the victim's injuries included a large black eye, facial swelling, multiple facial abrasions, and multiple contusions to the chest, thorax, legs, and arms; an emergency room physician testified that the force exerted must have been severe and that the bruises were "fresh" and had been inflicted within the last 48 hours; and the victim was temporarily living with defendant and the defendant's spouse, the victim's cousin. *Morgan v. State*, 272 Ga. App. 68, 611 S.E.2d 740 (2005).

Defendant's conviction of cruelty to children was supported by sufficient evidence which showed that defendant's six-year-old victim had fresh bruises, marks, and a swollen wrist at school, that the child identified defendant as the person who caused this, and that the victim's mother testified that defendant had struck the victim with a belt. *Sims v. State*, 273 Ga. App. 723, 615 S.E.2d 785 (2005).

Evidence supported defendants' convictions for aggravated battery and cruelty to children because the jury was free not only to reject defendants' explanations of the child's injuries as unreasonable, but to find that the state's case, including testimony as to the extent and cause of the child's injuries and as to defendants' access to the child, excluded every reasonable possibility save defendants' guilt. *Hunnicutt v. State*, 276 Ga. App. 547, 623 S.E.2d 714 (2005).

Despite allegations that: (1) the victim's testimony was contradicted by the victim's parent; and (2) the victim had a motive to lie about the defendant, the appeals court refused to disturb the jury's determination as to the same, given the jury's province to resolve the conflicts in

the evidence; hence, the defendant's cruelty to children and attempted aggravated and child molestation convictions were upheld on appeal. *Chalker v. State*, 281 Ga. App. 305, 635 S.E.2d 890 (2006).

Despite the defendant's contentions that insufficient evidence as to a child's presence in the room when the victim was accosted required reversal of a cruelty to children conviction, such conviction was upheld, supported by the victim's testimony notifying the defendant of the presence of the child before the defendant fired a shot next to the victim's head. *Price v. State*, 281 Ga. App. 844, 637 S.E.2d 468 (2006).

Evidence, including the defendant's admission to squeezing and shaking the child and the testimony of the forensic pediatrician that the child's injuries were consistent with being squeezed, was sufficient to convict the defendant of child cruelty in the first degree under O.C.G.A. § 16-5-70(b) and aggravated battery under O.C.G.A. § 16-5-24(a). *Bass v. State*, 282 Ga. App. 159, 637 S.E.2d 863 (2006).

Defendant's convictions for aggravated assault, aggravated battery, and first-degree child cruelty pursuant to O.C.G.A. §§ 16-5-21(a), 16-5-24(a), and 16-5-70(b) for participating in a drive-by shooting were supported by sufficient evidence because the testimony of a single witness was generally sufficient to establish a fact pursuant to O.C.G.A. § 24-4-8 and it was the function of the jury to evaluate the credibility of witnesses; based on the testimony of the witnesses to the shooting, a reasonable jury could have rejected the defendant's claims and determined that the defendant was a party to each of the crimes. *Hill v. State*, 282 Ga. App. 743, 639 S.E.2d 637 (2006).

Sufficient evidence existed to support the defendant's conviction of cruelty to children in the first degree since the jury was authorized to conclude that the defendant's actions of maliciously causing the child of defendant's girlfriend to incur cruel and excessive pain by throwing the child to the ground and by striking the child with the defendant's hand when the child attempted to remove the defendant off of the child's mother, who was being beaten by the defendant; the evidence

showed that the defendant grabbed the 11-year-old child and slammed the child to the ground and then struck the child again after the child tried to protect the mother's face. *Ferrell v. State*, 283 Ga. App. 471, 641 S.E.2d 658 (2007).

There was sufficient evidence to support the defendant's convictions of malice murder, felony murder, aggravated assault, cruelty to children in the first degree, and possession of a firearm in the commission of a felony when the defendant waited for the victim at the victim's house, drove with the victim and the victim's 10-year-old child to a rural road and stopped, displayed a gun and refused to allow the victim to leave, and drove to the home of the defendant's child, where the defendant shot the victim in front of the victim's child. *Dalton v. State*, 282 Ga. 300, 647 S.E.2d 580 (2007).

Evidence was sufficient to support the jury's verdict of guilty with regard to the defendant's convictions on three counts of cruelty to children in the first degree based on injuries to the child of defendant's love interest because the jury was not required to believe (1) the defendant's self-serving statements that the defendant did not intend to harm the child or (2) the defendant's statements to law enforcement officers that the defendant accidentally fell on the child because the defendant's hip gave out while putting the child in a swing, and that the child's ribs may have been broken when the defendant administered CPR to save the child after a choking incident. The jury was authorized to weigh those assertions against the other evidence, including the testimony of the doctors, who stated that the child's multiple bone fractures were not the result of accidental trauma or CPR, but were the result of child abuse. *Legan v. State*, 289 Ga. App. 244, 656 S.E.2d 879 (2008).

There was sufficient evidence to support convictions of aggravated assault under O.C.G.A. § 16-5-21 and of third-degree cruelty to children under O.C.G.A. § 16-5-70. The victim, who had formerly been romantically involved with the defendant, was leaving a motel with the victim's two children, three other children, and two friends when the defendant

approached the victim from behind, put a gun to the victim's head, and told the victim that when the defendant did not care about the children anymore, the defendant was going to kill the victim, and the state introduced prior difficulties evidence about an earlier incident where the victim was asleep at a parent's house when the victim woke up to a punch in the face and saw the defendant running out the front door. *McCullors v. State*, 291 Ga. App. 393, 662 S.E.2d 197 (2008).

Evidence that a defendant forced himself on one young child and had intercourse with the child and that the defendant disciplined that child and the child's two siblings by forcing them to take their clothes off, whipping them with a belt, and beating or choking them was sufficient to convict the defendant of child molestation, O.C.G.A. § 16-6-4(a), and cruelty to children, O.C.G.A. § 16-5-70(b). *Williams v. State*, 293 Ga. App. 617, 668 S.E.2d 21 (2008).

With regard to a defendant's convictions on one count of enticing a child for indecent purposes, ten counts of child molestation, one count of aggravated child molestation, and three counts of cruelty to children in the first degree, regarding actions the defendant took toward three children and what the children were forced to do to each other by gunpoint while the defendant was a babysitter for the children, the state proved the charged offenses beyond a reasonable doubt based on the testimony of the three victims and the victims' videotaped forensic interviews. It was within the province of the jury to disbelieve the defendant's testimony that the defendant did not commit the charged crimes. *Sullivan v. State*, 295 Ga. App. 145, 671 S.E.2d 180 (2008), cert. denied, No. S09C0624, 2009 Ga. LEXIS 215 (Ga. 2009).

Trial court properly denied a defendant's motion for a directed verdict with regard to two counts of first degree cruelty to children against the defendant regarding the defendant's two children as the medical evidence indicating significant physical injuries over a period of time on both the children was sufficient to find that the defendant acted maliciously in causing the physical pain or was a party

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to such action by a romantic friend. Further, the evidence that the defendant attempted to conceal the second child's injuries by leaving that child at the house of the romantic friend's sibling, encouraging that sibling to hide the boy, and denying to the authorities that a second child existed was sufficient evidence to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of first degree cruelty to the second child. *Hinds v. State*, 296 Ga. App. 80, 673 S.E.2d 598 (2009).

Sufficient evidence supported the defendant's conviction of misdemeanor cruelty to children in the third degree under circumstances in which the victim's father received a call originating from the victim's cell phone, and, when that number was called back, all that could be heard were noises, including gasping, gurgling, and children screaming during the second call, before the line was disconnected; officers later found the victim lying on the kitchen floor with a cell phone in the victim's hand, dead from a single gunshot wound to the head, and a handgun retrieved on the premises was later determined to have fired the bullet that killed the victim. The defendant testified that the defendant and the victim were arguing inside the home, that the argument became physical, that the defendant took the children and a gun out to the defendant's truck, that the defendant returned to the house, and that the defendant did not know what happened after that. *Paslay v. State*, 285 Ga. 616, 680 S.E.2d 853 (2009).

Inasmuch as the offense of first-degree child cruelty in violation of O.C.G.A. § 16-5-70(b) was based on the victim's testimony that defendant's passenger pointed a gun at the victim's forehead, the evidence was sufficient to support defendant's conviction for first-degree child cruelty as a party and coconspirator. *Johnson v. State*, 299 Ga. App. 706, 683 S.E.2d 659 (2009).

Trial court did not err in denying the defendants' motion for a directed verdict because the evidence presented was sufficient for a rational trier of fact to have

found the defendants guilty of cruelty to children in the first degree in violation of O.C.G.A. § 16-5-70(a). Direct medical testimony revealed that the victim was severely malnourished and that the victim's health was jeopardized. *Coleman v. State*, No. A10A2255, 2011 Ga. App. LEXIS 274 (Mar. 24, 2011).

**Death resulting from or part of cruelty to children.** — Evidence was sufficient to support defendant's convictions for felony murder in violation of O.C.G.A. § 16-5-1(c) and child cruelty in violation of O.C.G.A. § 16-5-70(b), where the record revealed that the eight-month old victim suffered a lacerated liver resulting from blunt force trauma to the abdomen, the injury was inflicted 12-24 hours prior to death, and that despite the infant's obvious pain and tenderness in the abdominal area, defendant refused to take the infant, or to allow the parent to take the infant, to seek medical attention for fear that the baby would be taken away; although the indictment did not charge that defendant committed the predicate act of child cruelty with malice within the count alleging felony murder, such was not insufficient because the separate count alleging child cruelty indicated that it was committed with malice. *Mikenney v. State*, 277 Ga. 64, 586 S.E.2d 328 (2003).

Medical evidence showing that a child died of a combination of being shaken, blunt force trauma to the head, and injuries to the spinal cord, and evidence of bruising on the child's head and torso, together with defendant's varying versions of the events leading to the child's death, authorized a jury to convict defendant of felony murder based on the crime of cruelty to a child. *Miller v. State*, 277 Ga. 707, 593 S.E.2d 659 (2004).

Jury was authorized to weigh the defendant's assertion that the defendant "gently" shook a child who died while in defendant's care against the other evidence, including the testimony of the child's doctors, who said that the child's injuries were the result of "major violent force." *Johnson v. State*, 278 Ga. App. 66, 628 S.E.2d 183 (2006).

Evidence supported the defendant's convictions of aggravated assault, aggravated battery, cruelty to children, and

reckless conduct in connection with the death of the 16-month-old victim since: the defendant repeatedly fed the victim tomatoes despite the victim's allergic reactions to the tomatoes; two days before the victim's fatal injuries, the victim had numerous bruises, a black eye, and a split bottom lip; while the victim was in the hospital for the fatal injuries, the defendant repeatedly asked a babysitter to persuade the defendant's five-year-old child to say that the child had taken the victim out of the bathtub; the defendant asked medical personnel whether it could be proven that the victim was shaken; and medical evidence showed that the victim's death was consistent with violent shaking by a person of adult strength. *Waits v. State*, 282 Ga. 1, 644 S.E.2d 127 (2007).

Evidence supported the defendant's convictions of malice murder, felony murder, and cruelty to children as: the victim had not experienced any unusual injuries prior to the time the defendant moved in with the victim's mother; the defendant was alone in the house with the victim and the victim's young brothers prior to the time the victim's head began to swell and at various times on the night the victim died; the defendant told a co-worker that the defendant was beating the victim and the victim's brothers; and the defendant also told an uncle that the defendant could not do anything with the victim and felt like punching the victim in the head as hard as the defendant could. *Collum v. State*, 281 Ga. 719, 642 S.E.2d 640 (2007).

Evidence supported the defendant's convictions of malice murder, felony murder, and cruelty to children with regard to the death of the defendant's 15-month-old child; although the defendant claimed to have not noticed anything wrong with the child until a codefendant said that the child was having difficulty breathing, the evidence authorized the jury to find that the victim was beaten so severely that the victim's pancreas and duodenum were ruptured, that two to four hours was the maximum time that occurred between the injuries and the victim's death, that the victim would have begun vomiting immediately after the fatal injuries were inflicted, and that the victim would have

been in extreme pain. *Jackson v. State*, 281 Ga. 705, 642 S.E.2d 656 (2007).

Evidence supported the defendant's convictions of felony murder while in the commission of cruelty to children in the first degree and making a false statement to a government agency after a 23-month-old child whom the defendant had been baby-sitting died from severe aspiration pneumonia due to brain swelling and bleeding on the surface of the brain caused by multiple blows to the child's head and face; the defendant was the only adult with the child during the afternoon and early evening in question, the child had appeared uninjured and was walking when the child visited a store earlier in the day, the child had "pattern injury" contusions indicating that hair had been pulled out, a medical examiner testified that the child's brain swelling would have prevented the child from performing normal functions such as walking, talking, or waking, and the defendant told several conflicting stories about how the child had been injured. *Banta v. State*, 282 Ga. 392, 651 S.E.2d 21 (2007).

There was sufficient evidence to support a conviction of felony murder, with cruelty to a child in the first degree as the underlying felony. The defendant was the child's sole caregiver from 9:30 a.m. to 3:30 p.m. on October 30, the date that the child's parent came to pick up the child and found the child unresponsive; a neighbor denied the defendant's claim that the neighbor had said that the child's other parent had shaken the child the day before; and a forensic pathologist testified that had the injuries been inflicted before 7:00 a.m. on October 30, the child would not have been acting normally when the child was dropped off at the defendant's home as testified by the child's relatives. *Bostic v. State*, 284 Ga. 864, 672 S.E.2d 630 (2009).

Sufficient evidence was presented to convict a defendant of malice murder and cruelty to children under O.C.G.A. § 16-5-70(b) because the defendant testified that the defendant shook the five-year-old victim after the victim spit up dinner and in so doing, struck the victim's head against the railing of a bunk bed; the victim died a few days later of

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massive head trauma and intracranial bleeding. Wright v. State, 285 Ga. 57, 673 S.E.2d 249 (2009).

Evidence that a defendant was the only person home with defendant's 17-month-old son when the son became unresponsive, along with the defendant's admission that the defendant had shaken defendant's son to make the son stop crying and shaken the son again to try to wake the son up was sufficient to support the defendant's convictions for involuntary manslaughter and child cruelty. Lewis v. State, 304 Ga. App. 831, 698 S.E.2d 365 (2010).

Evidence was sufficient to enable a rational trier of fact to find defendants guilty of felony cruelty to children since both defendants repeatedly beat the defendants' eight-year-old son with a foot long glue stick, then forced the child into a wooden box, beating the boy about the head as the defendants did so, and when numerous medical experts testified that the cause of the child's death was either blunt force trauma or asphyxiation. Smith v. State, 288 Ga. 348, 703 S.E.2d 629 (2010).

**Placing infant in plastic bag sufficient for conviction.** — Determination of a defendant's intent to cause the particular harm, or the wanton and willful doing of an act with an awareness of a plain and strong likelihood that such harm might result, sufficient for conviction of the crime of cruelty to children is peculiarly a question for the jury; likewise, the determination of what is cruel or excessive physical or mental pain is a jury issue. The evidence was sufficient to support a conviction for cruelty where the jury could find that an infant was born alive and that defendant placed the child into plastic bags, thus causing the infant to suffocate; this evidence could support a jury finding that defendant maliciously caused the infant excessive physical or mental pain. Ferguson v. State, 267 Ga. App. 374, 599 S.E.2d 335 (2004).

**Biting and kicking children.** — Evidence was sufficient to support a conviction of cruelty to children, O.C.G.A. § 16-5-70(b), because defendant admitted

that defendant bit and kicked the child victim because defendant was angry and that defendant ripped hair from the child's scalp in a fit of rage; defendant's testimony that the child's injuries were accidental did not warrant a reversal of the conviction. Kennedy v. State, 272 Ga. App. 347, 612 S.E.2d 532 (2005).

**Biting a child.** — Despite the defendant's challenge to the sufficiency of the evidence, specifically, that no evidence showed the malice element of a cruelty-to-children offense, and that the evidence failed to show the defendant harmed the police officer to support an obstruction offense, convictions on said offenses were upheld on appeal as: (1) the severity of the bite marks inflicted on the child victim allowed the court to infer malice; (2) actual harm to the officer was not an essential element of an obstruction charge; and (3) the defendant's act of swinging at the officer's face during an effort to resist arrest supported an obstruction. Sampson v. State, 283 Ga. App. 92, 640 S.E.2d 673 (2006).

**Neglect in supervising sufficient.** — There was sufficient evidence to support a conviction of second-degree cruelty to children based on the defendant's failure to supervise the children; the defendant admitted that the children had been out of the house unsupervised several times on the day they were found drowned, a neighbor saw the children playing outside unsupervised on the afternoon they drowned, and witnesses testified to the defendant's chronic neglect in supervising the children. Kain v. State, 287 Ga. App. 45, 650 S.E.2d 749 (2007), cert. dismissed, 2008 Ga. LEXIS 125 (Ga. 2008).

**Children do not need adult language to describe offense.** — Evidence was sufficient to support convictions of child molestation and cruelty to children under O.C.G.A. §§ 16-6-4 and 16-5-70. From the testimony of the four-year-old victim, the victim's parent, and an interviewer, the jury was authorized to find that the victim used the word "tutu" to refer to the child's vaginal area, where the child said the defendant touched the child; it was completely unreasonable to require witnesses to describe the acts constituting the commission of a crime in statutory or

technical language in order to prove the commission of such acts. *Brookshire v. State*, 288 Ga. App. 766, 655 S.E.2d 332 (2007).

**Defense of involuntary intoxication not proved.** — Evidence was sufficient to convict a defendant on a charge of cruelty to children since the defendant failed to carry the initial burden of establishing by a preponderance of the evidence that the defendant was involuntarily intoxicated at the time the crime was committed, and there was at least some evidence before the jury of each element of cruelty to children that the state was required to prove. *Stewart v. State*, 291 Ga. App. 846, 663 S.E.2d 278 (2008).

**Juvenile guilty of cruelty to children.** — Juvenile court properly denied a juvenile's motion for a new trial with regard to the juvenile's delinquency adjudication finding the juvenile guilty for aggravated assault, criminal property damage, cruelty to children, and reckless conduct arising from the shooting of a BB gun at a passing car. The juvenile was the only Caucasian identified in the group of youth; the juvenile admitted to hiding the BB gun; the juvenile did not dispute that the juvenile encouraged another youth to shoot the gun; and the judge was the final arbiter of the credibility and witness issues and had the province to reject the testimony of the juvenile and a parent that the juvenile did not shoot the gun. *In the Interest of A.A.*, 293 Ga. App. 827, 668 S.E.2d 323 (2008).

#### Merger with Other Offenses

**Merger of charges** against defendant for cruelty to children and contributing to the deprivation of a minor was not required because, although based on similar facts, each charge required proof of a fact not required to prove the other. *Porter v. State*, 243 Ga. App. 498, 532 S.E.2d 407 (2000).

Crimes of rape and cruelty to children did not merge as a matter of fact, as they constituted separate offenses and proof of separate elements; therefore, because the offenses did not merge, defendant was not punished twice for the same conduct. *Currington v. State*, 270 Ga. App. 381, 606 S.E.2d 619 (2004).

#### No merger of nonhomicide counts.

— Defendant's convictions of involuntary manslaughter while in the commission of a simple battery, aggravated assault, aggravated battery, cruelty to children, and reckless conduct were not mutually exclusive, and the trial court did not err in not merging the nonhomicide counts upon sentencing. *Waits v. State*, 282 Ga. 1, 644 S.E.2d 127 (2007).

**Conviction for cruelty to children merged with felony murder.** — Judgment convicting a defendant of cruelty to a child in the first degree and the sentence entered thereon were vacated because the crime should have merged for sentencing purposes with the defendant's felony murder conviction based on the underlying felony of cruelty to a child in the second degree; the state agreed that the crimes merged in fact, and an examination of the evidence in the context of the trial court's instructions to the jury indicated that the judgment and sentence had to be vacated. *White v. State*, 281 Ga. 276, 637 S.E.2d 645 (2006).

**Convictions for aggravated battery and cruelty to children did not merge** since the evidence established that the victim was subjected to multiple injuries in addition to a broken arm, and that none of the injuries were relevant to defendant's aggravated battery conviction, which was predicated upon the victim's broken arm. *Mashburn v. State*, 244 Ga. App. 524, 536 S.E.2d 208 (2000).

Aggravated battery and cruelty to children each requires proof of at least one additional element which the other does not, and the two crimes are not so closely related that multiple convictions are prohibited under O.C.G.A. § 16-1-6 and O.C.G.A. § 16-1-7; accordingly, even if the same conduct establishes the commission of both aggravated battery and cruelty to children, the two crimes do not merge, and thus a defendant was properly convicted of both crimes (overruling *Jones v. State*, 276 Ga. App. 762 (624 SE2d 291) (2005); *Etchinson v. State*, 245 Ga. App. 449 (538 SE2d 87) (2000); and *Harmon v. State*, 208 Ga. App. 271 (430 SE2d 399) (1993)). *Waits v. State*, 282 Ga. 1, 644 S.E.2d 127 (2007).

**Battery lesser included offense of cruelty to children.** — When the evi-

**Merger with Other Offenses (Cont'd)**

dence was sufficient to establish that defendant repeatedly struck defendant's nine-year-old child on the back, buttocks, and legs with defendant's hand, leaving several visible, handprint-shaped bruises, battery was a lesser included offense of cruelty to children. *Bennett v. State*, 244 Ga. App. 149, 534 S.E.2d 881 (2000).

**Reckless conduct was not lesser included offense of cruelty to children.**

— Trial court did not err in not charging reckless conduct as a lesser included offense of cruelty to children under O.C.G.A. § 16-5-70; if the jury believed the defendant's testimony, there was no conscious disregard of a substantial and unjustifiable risk, and the state's evidence was that the defendant maliciously caused the child's suffering. *Banta v. State*, 282 Ga. 392, 651 S.E.2d 21 (2007).

**Cruelty to children merged with felony murder.** — Conviction and sentence for cruelty to children merged with conviction and sentence for felony murder. *Grayer v. State*, 282 Ga. 224, 647 S.E.2d 264 (2007).

**No merger with malice murder.** — Offense of cruelty to children requires proof that the victim was younger than eighteen, whereas the offense of malice murder only requires proof that the victim was a human being. Accordingly, to prove cruelty to children, at least one fact — the age of the victim — had to be established in addition to the facts used to establish malice murder, and the offense of cruelty to children therefore was not included as a matter of fact in the offense of malice murder. *McCartney v. State*, 262 Ga. 156, 414 S.E.2d 227 (1992), overruled on other grounds, 287 Ga. 881, 700 S.E.2d 394 (2010).

In a prosecution for malice murder, the trial court did not err in refusing to give an instruction on cruelty to children as an included offense. *Loren v. State*, 268 Ga. 792, 493 S.E.2d 175 (1997).

When the defendant was convicted of malice murder, felony murder, and cruelty to children, and there was a single victim, it was error to sentence the defendant to multiple life terms on the malice murder and felony murder counts; because the

victim's age was an element of the crime of cruelty to children that was not included in malice murder, the underlying cruelty to children conviction did not merge into malice murder as a matter of fact. *Collum v. State*, 281 Ga. 719, 642 S.E.2d 640 (2007).

Although both malice murder and cruelty to children required a malicious intent, O.C.G.A. §§ 16-5-1(a) and 16-5-70(b), the fact that such intent supported an element in each crime did not warrant merging of the sentences when other mutually exclusive elements of the crimes remained, and the other elements of the two offenses had to be compared; malice murder, but not cruelty to children, required proof that defendant caused the death of another human being, O.C.G.A. § 16-5-1(a), and cruelty to children, but not malice murder, required proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain, O.C.G.A. § 16-5-70(b). Each crime required proof of at least one additional element which the other did not and the crimes of malice murder and cruelty to children were not so closely related that multiple convictions were prohibited under other provisions of O.C.G.A. §§ 16-1-6 and 16-1-7; accordingly, even if the same conduct established the commission of both malice murder and cruelty to children, the two crimes did not merge. *Linson v. State*, 287 Ga. 881, 700 S.E.2d 394 (2010).

**Cruelty to children can be lesser included crime of aggravated assault with deadly weapon.** — Cruelty to children, which requires only "maliciously [causing] the child cruel or excessive physical ... pain," can be a lesser included crime under an indictment for aggravated assault with a deadly weapon. *Williams v. State*, 144 Ga. App. 130, 240 S.E.2d 890 (1977).

**Cruelty to children invoking felony-murder rule.** See *Holt v. State*, 247 Ga. 648, 278 S.E.2d 390 (1981).

Cruelty to children may constitute the underlying felony in a felony murder prosecution. *Estes v. State*, 251 Ga. 347, 305 S.E.2d 778 (1983).

**Convictions for involuntary manslaughter and cruelty to children**

were not inconsistent because the jury could have found from the evidence both that the defendant maliciously caused the victim excessive pain, and that defendant's actions caused the victim's death, though defendant may not have intended to kill the victim. *Sanders v. State*, 245 Ga. App. 561, 538 S.E.2d 470 (2000).

**Verdicts of involuntary manslaughter and felony murder not mutually exclusive.** — Verdicts convicting defendants of involuntary manslaughter under O.C.G.A. § 16-5-3 and felony murder were not mutually exclusive since the evidence authorized the jury to logically conclude that defendants had committed several acts of child abuse, some of which may have been non-felony acts of abuse that inadvertently led to or contributed to the child's death and others that may have constituted felony cruelty to children, under O.C.G.A. § 16-5-70(b), which would have served as the underlying basis for the felony murder conviction. *Smith v. State*, 288 Ga. 348, 703 S.E.2d 629 (2010).

**Aggravated assault charge.** — Cruelty to children merged into count alleging aggravated assault, where both counts alleged the same facts, i.e., that defendant shot defendant's daughter. *Cranford v. State*, 186 Ga. App. 862, 369 S.E.2d 50 (1988).

Because separate cruelty to children and aggravated assault counts were based upon acts committed by the defendant on the day preceding the death of the victim, neither of those convictions merged into the felony murder count also filed against the defendant and, accordingly, separate sentences for those crimes were authorized. *Christian v. State*, 281 Ga. 474, 640 S.E.2d 21 (2007).

**Cruelty to children conviction did not merge with aggravated assault or false imprisonment.** — Defendant's cruelty to children in the first degree charge did not merge with the aggravated assault or false imprisonment charge because neither aggravated assault nor false imprisonment required proof that the victim suffered cruel or excessive physical or mental pain. *Kirt v. State*, No. A10A1933, 2011 Ga. App. LEXIS 247 (Mar. 22, 2011).

**Conviction for cruelty to children did not merge with the rape convic-**

**tion** since the evidence supporting the rape conviction was not the same evidence that supported the cruelty to children conviction. *Brown v. State*, 190 Ga. App. 678, 379 S.E.2d 598, cert. denied, 190 Ga. App. 897, 379 S.E.2d 598 (1989).

Lesser offense of cruelty to children did not merge into the greater offenses of rape and aggravated child molestation, where the facts that the victim was threatened and terrorized, that the victim screamed in pain, and that the victim continued to experience pain and discomfort and would suffer forever from the venereal diseases the victim contracted from defendant were not needed to prove the elements of rape and aggravated child molestation. *Ranalli v. State*, 197 Ga. App. 360, 398 S.E.2d 420 (1990).

Defendant's convictions for rape and cruelty to a child did not merge for sentencing purposes, as additional evidence, beyond that necessary to prove rape, existed, specifically, that the rapes caused the victim cruel and excessive physical and mental pain; moreover, after the rapes, the victim was upset, fearful, did not feel safe at home, and cried repeatedly when recounting the episodes to a counselor. *Barber v. State*, 283 Ga. App. 129, 640 S.E.2d 696 (2006).

Trial court did not err in declining to merge the defendant's convictions of cruelty to a child and rape for purposes of sentencing because each required proof of a fact that the other did not; specifically, the offense of cruelty to a child required, among other things, a showing that the defendant maliciously caused cruel or excessive mental pain to a child while the offense of rape required, among other things, a showing that the defendant had carnal knowledge of the victim forcibly and against her will. *Pendley v. State*, No. A10A2301, 2011 Ga. App. LEXIS 283 (Mar. 25, 2011).

**Multiple cruelty to children charges merged.** — In a trial in which defendant was convicted of three counts of cruelty to children in violation of O.C.G.A. § 16-5-70(b), the trial court erred in failing to merge those counts for sentencing; the criminal conduct constituted a single course of conduct, defendant's failure to obtain medical treatment for the child for

**Merger with Other Offenses (Cont'd)**

three days despite the child's two broken legs and broken arm, and there was no evidence of legislative intent to allow multiple punishments for the same course of conduct. *Withrow v. State*, 275 Ga. App. 110, 619 S.E.2d 714 (2005).

**Use of fighting words not lesser included offense.** — Offense of use of fighting words is not included in the offense of cruelty to children as a matter of law. *Shuler v. State*, 195 Ga. App. 849, 395 S.E.2d 26 (1990).

Evidence authorized a jury charge on the offense of "fighting words," where defendant schoolteacher was indicted for battery and cruelty to children, and the proof tracked the indictment which set forth words defendant said to a student which would fall within the perimeter of that forbidden by the "fighting words" statute. *Shuler v. State*, 195 Ga. App. 849, 395 S.E.2d 26 (1990).

**Murder conviction upheld, despite lesser-charge acquittal.** — In a trial for the murder of a five-year-old child, the felony murder conviction need not be set aside because a finding of not guilty of cruelty to children is allegedly inconsistent with a finding of guilty of felony murder, when the underlying felony is cruelty to children, where there is no doubt that the evidence showed the elements of the underlying felony, cruelty to a child, and that the jury was authorized to find the defendant guilty of a felony murder. *Robinson v. State*, 257 Ga. 194, 357 S.E.2d 74 (1987).

**Acquittal of defendant on a child molestation charge did not require an acquittal on the cruelty to children charge.** *Chastain v. State*, 239 Ga. App. 602, 521 S.E.2d 657 (1999).

**Multiple conviction for cruelty to children.** — In a trial in which defendant's convictions for five counts of cruelty to children consisted of one count for injuring girlfriend's infant child and one count for each day that defendant did not obtain medical care for the child, the trial court, pursuant to O.C.G.A. § 16-5-70(b), erred in failing to merge for sentencing purposes the four cruelty to children counts that were related to each day that

defendant failed to obtain medical treatment for the injured child; the criminal conduct constituted a single course of conduct spanning four days, not a separate offense for each day. *McKee v. State*, 275 Ga. App. 646, 621 S.E.2d 611 (2005).

Because the inmate's 28 U.S.C. § 2254 petition was filed on March 19, 2009, some eight years after the one-year limitations period expired, the inmate's petition was clearly time-barred, and the inmate could not rely on the doctrine of equitable tolling to excuse the inmate from the untimely filing because: (1) the filing in state court could not serve to toll a limitations period that had already expired, nor could it reset the one-year period for the filing of a 28 U.S.C. § 2254 petition; (2) the inmate did not meet the first prong of the equitable tolling test, as the inmate had not established that the inmate pursued the inmate's rights diligently in the eight years between the inmate's conviction and first post-conviction filing in the state court, or in the nine years between the inmate's conviction and this habeas petition; (3) although it was true that a Georgia court may resentence a defendant at any time when the sentence was void, the inmate's sentence was not illegal or void; and (4) the inmate's argument that the two cruelty to children charges under O.C.G.A. § 16-5-70(b) should have merged was without merit because the first charge against the inmate was complete when the inmate bit the child, and the second arose when the inmate failed to provide the child with medical care, which meant defendant's sentence was not illegal or void. *Edwards v. Owens*, No. 7:09-CV-36 (HL), 2010 U.S. Dist. LEXIS 12138 (M.D. Ga. Feb. 11, 2010).

**Rule of lenity did not apply to multiple convictions.** — In a criminal trial on charges that the defendant allowed the repeated rapes of the defendant's 11-year-old child, the rule of lenity did not require that the defendant's felony convictions for being a party to rape and cruelty to children should be subsumed by the misdemeanor conviction for contributing to the deprivation of children because different facts were necessary to prove the offenses; the rape conviction required proof under O.C.G.A. §§ 16-2-20 and

16-6-1(a)(1) that the defendant took affirmative steps to aid the rapist, the cruelty to children conviction required proof under O.C.G.A. § 16-5-70(b) that the defendant caused excessive mental pain to the child, and the conviction for contributing to the deprivation of a minor required proof under O.C.G.A. §§ 15-11-2(8)(A) and 16-12-1(b)(3) that the defendant failed to provide the child with proper care necessary for the child's health, which the state proved by showing that the defendant failed to seek prenatal care for the child even though the defendant knew that the child was pregnant. *Johnson v. State*, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

### Jury Issues and Instructions

**Failure to charge on self-defense held reversible error.** — Defendant's sole defense, self-defense, would have negated an element of the offense of child cruelty, malice, and it was error not to charge the jury accordingly. *Stiles v. State*, 242 Ga. App. 484, 529 S.E.2d 913 (2000).

**Reckless conduct charge was not warranted in a prosecution for cruelty to children in the first degree** since the evidence showed that defendant intended actions and intended to cause pain to the victim. *Allen v. State*, 247 Ga. App. 10, 543 S.E.2d 45 (2000).

When the evidence shows either the commission of the completed offense as charged or the commission of no offense, the trial court is not required to charge the jury on a lesser included offense. Therefore, since the jury could either believe the defendant's testimony that an infant was already dead when the defendant put the infant in a plastic bag, thus indicating that neither the crime of cruelty to children nor the crime of reckless conduct was committed, or that the child was alive, thus proving the crime of cruelty to children under O.C.G.A. § 16-5-70, the trial court was not required to give the jury a charge on reckless conduct in the defendant's trial for cruelty. *Ferguson v. State*, 267 Ga. App. 374, 599 S.E.2d 335 (2004).

With regard to defendant's convictions on two counts of cruelty to children in the first degree and one count of aggravated

battery, the trial court did not err in failing to charge the jury on reckless conduct as a lesser included offense of each of the indicted offenses as defendant admitted to beating the three-year-old victim with a belt once or twice a day for doing bad things and did so intentionally. It was inconsequential that defendant intended the beatings to constitute a form of discipline, as opposed to abuse, because every person is presumed to intend the natural and probable consequences of the person's conduct, particularly if that conduct is unlawful and dangerous to the safety or lives of others. *Glover v. State*, 292 Ga. App. 22, 663 S.E.2d 772 (2008).

**Sufficiency of charge.** — When there is no demurrer to the accusation charging the defendant with ill treating a named minor child contrary to law, and the court gives in the charge the exact language of the statute and then immediately gives in the exact language of the accusation the particular charge set out in it, the instructions, in the absence of request, sufficiently present the issue which they are to try and no reversible error appears when the charge is considered as a whole. *Roseberry v. State*, 78 Ga. App. 324, 50 S.E.2d 771 (1948).

Trial court did not err in charging the entire language of O.C.G.A. § 16-5-70(b) as the jury was also given an instruction which confined the elements of the crime charged to the material allegations in the indictment. *Hendrix v. State*, 230 Ga. App. 604, 497 S.E.2d 236 (1998).

Trial court did not commit reversible error by charging the jury on the entire code section of cruelty to children and failing to give limiting instruction in its recharge; the jury instructions, taken as a whole, did not mislead the jury or require defendant to defend against a charge of cruelty to children that was not alleged in the indictment. *Wiggins v. State*, 272 Ga. App. 414, 612 S.E.2d 598 (2005), aff'd in part and rev'd in part, 280 Ga. 268, 626 S.E.2d 118 (2006).

Trial court's instruction to jury was proper and there was no reasonable possibility that the jury was misled as to the elements and proof needed to convict a defendant of cruelty to children, in violation of O.C.G.A. § 16-5-70(b), where the

**Jury Issues and Instructions (Cont'd)**

defendant failed to seek medical treatment for the defendant's child's burns, as the count against the defendant charged the defendant with failing to do something and not with doing something, and the trial court's instructions made the distinction clear. *Gore v. State*, 277 Ga. App. 635, 627 S.E.2d 198 (2006).

Defendant's aggravated assault and cruelty to children convictions were upheld on appeal as: (1) the prosecutor's closing argument comments did not inject a personal opinion as to the veracity of the witnesses and the appeal to the jury was to make the community safer; (2) the trial court charged the jury fully on defendant's justification and self-defense claims, and thus, did not err in declining to instruct the jury on mistake of fact; and (3) the appeals court failed to see how jury charges on guilt by association, bare suspicion, or mere presence were appropriate. *Navarro v. State*, 279 Ga. App. 311, 630 S.E.2d 893 (2006).

**Failure to charge on defense of accident not error.** See *Fain v. State*, 165 Ga. App. 188, 300 S.E.2d 197 (1983).

**Defendant's testimony held insufficient to raise the defense of accident.** See *Grubbs v. State*, 167 Ga. App. 365, 306 S.E.2d 334 (1983).

**Relevant evidence.** — In a defendant's trial for cruelty to a child, a nurse's testimony as to her decision to report an incident to a child services agency was relevant to the child's care and future well-being; the trial court had wide discretion in determining relevancy and materiality and, when relevancy was doubtful, the evidence was properly admitted and the evidence's weight left for the jury's determination. *Revells v. State*, 283 Ga. App. 59, 640 S.E.2d 587 (2006).

**Defense of accident.** — Trial court was not required, *sua sponte*, to instruct the jury that the state had the burden to disprove a defense of accident beyond a reasonable doubt, and the trial court's instructions in defendant's trial on charges of felony murder and cruelty to children in the first degree were adequate in the absence of a request for an additional charge; however, the state supreme

court remanded the case so the trial court could hold a hearing on defendant's claim that defendant was denied effective assistance of trial counsel. *Shadron v. State*, 275 Ga. 767, 573 S.E.2d 73 (2002).

**Jury question.** — What is cruel and unreasonable treatment of child is primarily question for jury. *Crowe v. Constitution Publishing Co.*, 63 Ga. App. 497, 11 S.E.2d 513 (1940).

**Inconsistent statements of victim went to weight and was for jury consideration.** — There was sufficient evidence to support a defendant's conviction for child cruelty for causing the defendant's child cruel and excessive pain by failing to seek medical attention for the child and instructing the child to conceal the cause of the injuries, which resulted from the defendant's romantic friend burning the child repeatedly with a cigar. The fact that the child gave inconsistent statements by acknowledging what happened to officials but disavowing the same at trial was an issue of witness credibility and the weight of the evidence was for the jury to decide. *Freeman v. State*, 293 Ga. App. 490, 667 S.E.2d 652 (2008).

**Failure to instruct on child endangerment.** — Conviction for child endangerment was reversed because the trial court failed to instruct the jury on the offense. *Furlow v. State*, 276 Ga. App. 332, 623 S.E.2d 186 (2005).

**Failure to charge on involuntary manslaughter in child's death.** — When the defendant was charged with felony murder, with cruelty to a child in the first degree as the underlying felony, the trial court properly denied the defendant's request for a jury instruction on felony involuntary manslaughter under O.C.G.A. § 16-5-3(a) as a lesser included offense. Contrary to the defendant's argument, the state did not present any evidence that the child died as a result of lack of medical care; furthermore, because the defendant argued that it was the child's parent who shook the child and that the defendant only tried to revive the child, such an instruction was not necessary because the evidence showed either the charged crime or no crime. *Bostic v. State*, 284 Ga. 864, 672 S.E.2d 630 (2009).

**Failure to charge specifically on reasonable discipline not error.** — Im-

plicit in the definition of “cruelty to children” found in O.C.G.A. § 16-5-70 is an element of unreasonableness, and a failure on the court’s part to charge specifically on reasonable discipline was not error. *Allen v. State*, 174 Ga. App. 206, 329 S.E.2d 586 (1985).

**Failure to charge on simple battery.**

— Trial court did not err in refusing to charge on simple battery under O.C.G.A. § 16-5-23 as a lesser included offense of cruelty to children; there was no evidence to support the offense of simple battery because the defendant claimed that the child accidentally fell while the defendant was playing with the child. *Moore v. State*, 283 Ga. 151, 656 S.E.2d 796 (2008).

**Failure to charge on battery.** — Although the trial court should have given the defendant’s requested charge on battery, O.C.G.A. § 16-5-23.1, since the evidence authorized a finding that the defendant intentionally caused substantial physical harm and visible bodily harm to the victims by beating the victims with a bat and a belt, the failure to give the battery charge was harmless error in light of the overwhelming evidence of the commission of the greater offense, cruelty to children, O.C.G.A. § 16-5-70; the indictment alleged that the defendant unlawfully and maliciously caused the victims cruel and excessive physical and mental pain by striking the victims about the body with a belt and wooden bat. *Dinkler v. State*, 305 Ga. App. 444, 699 S.E.2d 541 (2010).

**Failure to charge on reckless conduct.** — When the defendants were charged with first-degree cruelty to children under O.C.G.A. § 16-5-70 on the ground that the defendants had caused the victim physical and mental pain by binding the victim’s arms and legs, the trial court properly refused to charge on the lesser included offense of reckless conduct under O.C.G.A. § 16-5-60(b). Reckless conduct involved bodily harm, not mental pain; furthermore, as the defendants claimed that the defendants had acted out of love to prevent the victim from using drugs, their theory of defense was one of justification, on which the trial court had instructed. *Hafez v. State*, 290 Ga. App. 800, 660 S.E.2d 787 (2008).

Trial court did not err in failing to charge the jury that malice was an essential element of either second-degree cruelty to children or family violence battery, as malice, prior to a 2004 amendment, was not an element of cruelty to children, and was not an element to the offense of family violence battery. *Breazeale v. State*, 290 Ga. App. 632, 660 S.E.2d 376 (2008).

**Failure to object to jury charge waived error.** — Appeals court rejected the defendant’s argument that the trial court erroneously instructed the jury on cruelty to children in the third degree because a proper charge would have required the jury to find that the defendant committed a forcible felony, battery, or family violence battery, as the defendant failed to object to the charge or reserve objections at the conclusion of the jury instructions, and hence, waived any error. *Amis v. State*, 277 Ga. App. 223, 626 S.E.2d 192 (2006).

**Denying request to recharge jury on affirmative defenses not reversible error.** — Because no abuse of discretion resulted from the trial court’s order denying defense counsel’s request that the court recharge the jury on the affirmative defenses of accident and reasonable discipline of a minor, but the court granted the jury’s request for a recharge as to the offenses of malice murder and felony murder, the defendant’s felony murder and cruelty to children convictions were affirmed. *Johnson v. State*, 281 Ga. 770, 642 S.E.2d 827 (2007).

**Jury instructions proper.** — Because the trial court properly instructed the jury on the law regarding the use of prior consistent statements and on the defense of accident, the appeals court lacked any reason to reverse the defendant’s aggravated battery and cruelty to children convictions. *Watkins v. State*, 290 Ga. App. 41, 658 S.E.2d 812 (2008).

**Cruel or excessive physical pain is jury question.** — Determination of what is cruel or excessive physical or mental pain is to be made by the jury. *Hopkins v. State*, 209 Ga. App. 376, 434 S.E.2d 74 (1993); *Sims v. State*, 234 Ga. App. 678, 507 S.E.2d 845 (1998).

“Cruel” and “excessive” are adjectives

**Jury Issues and Instructions (Cont'd)**

that inherently require a consideration of degree; the law does not set a bright line but leaves to the trier of fact, taking into account societal norms generally accepted, whether certain behavior inflicts "cruel" or "excessive" pain. *Sims v. State*, 234 Ga. App. 678, 507 S.E.2d 845 (1998).

**Defendant's intent is a question of fact** to be determined upon consideration of "words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted" under O.C.G.A. § 16-2-6, and the jury's finding is not to be set aside unless clearly erroneous. *McGahee v. State*, 170 Ga. App. 227, 316 S.E.2d 832 (1984).

**Good character charge erroneous.**

— In a prosecution for cruelty to children, a good character charge was erroneous as: 1) the charge failed to inform the jury that the defendant's good character was a substantive fact, and that evidence of good character had to be considered in connection with all other evidence; and 2) the charge failed to instruct the jury that good character in and of itself could be sufficient to create a reasonable doubt as to guilt. *Hobbs v. State*, 299 Ga. App. 521, 26, 27.

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Assault and Battery, § 28. 23 Am. Jur. 2d, Desertion and Nonsupport, §§ 1 et seq., 34 et seq. 42 Am. Jur. 2d, Infants, § 15 et seq. 59 Am. Jur. 2d, Parent and Child, §§ 10, 26, 27.

**Am. Jur. Trials.** — Public School Liability: Constitutional Tort Claims for Excessive Punishment and Failure to Supervise Students, 48 Am. Jur. Trials 587.

Trial Report: Third Party Suit Against Therapists for植ing False Memory of Childhood Molestation, 57 Am. Jur. Trials 313.

When Clergy Fail Their Flock: Litigating the Clergy Sexual Abuse Case, 91 Am. Jur. Trials 151.

682 S.E.2d 697 (2009).

**Inconsistent verdict not reversible error.** — Conviction for cruelty to children was not the result of reversible error, even though defendant was acquitted of rape, false imprisonment, and sexual battery; Georgia does not recognize the inconsistent verdict rule. *Wiggins v. State*, 272 Ga. App. 414, 612 S.E.2d 598 (2005), aff'd in part and rev'd in part, 280 Ga. 268, 626 S.E.2d 118 (2006).

**Verdict not inconsistent.** — Verdicts were not necessarily inconsistent where the defendant was acquitted of family violence battery but convicted of third-degree cruelty to children because: (1) the appellate court could not know, and should not speculate, why a jury acquitted a defendant on a predicate offense, but convicted on the compound offense; (2) the jury was authorized to believe an officer's testimony about a red mark under the victim's right eye that was caused by an altercation between the victim and the defendant which occurred in the presence of the victim's children; and (3) the victim's prior inconsistent statement was admissible as substantive evidence of the defendant's guilt. *Amis v. State*, 277 Ga. App. 223, 626 S.E.2d 192 (2006).

**RESEARCH REFERENCES**

**C.J.S.** — 43 C.J.S., Infants, § 115. 67A C.J.S., Parent and Child, § 165 et seq.

**ALR.** — Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 ALR2d 396.

Who has custody or control of child within terms of penal statute punishing cruelty or neglect by one having custody or control, 75 ALR3d 933.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient, 99 ALR3d 854.

Parents' criminal liability for failure to provide medical attention to their children, 118 ALR5th 253.

**16-5-71. Tattooing.**

(a) It shall be unlawful for any person to tattoo the body of any person under the age of 18, except that a physician or osteopath licensed under Chapter 34 of Title 43, or a technician acting under the direct supervision of such licensed physician or osteopath, and in compliance with Chapter 9 of Title 31 shall be authorized to mark or color the skin of any person under the age of 18 by pricking in coloring matter or by producing scars for medical or cosmetic purposes.

(b) Any person violating the provisions of subsection (a) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 16-5-71, enacted by Ga. L. 1987, p. 443, § 1; Ga. L. 1994, p. 446, § 1.)

**Cross references.** — Tattoo studios,  
§ 31-40-1 et seq.

**JUDICIAL DECISIONS**

**Tattooing the body of minor.** — Trial court did not abuse the court's discretion in denying the defendant's motion to sever the offenses of child molestation, O.C.G.A. § 16-6-4(a)(1), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), tattooing the body of a minor, O.C.G.A. § 16-5-71(a), and the defendant's motion for new trial on that basis because all of the sex offenses were similar and showed the defendant's common motive, plan, scheme, or

bent of mind to satisfy the defendant's sexual desires, and the circumstances surrounding the tattooing offenses would have been admissible at the trial of the sex offenses to show the defendant's lustful disposition and bent of mind; the case was not so complex as to impair the jury's ability to distinguish the evidence and apply the law intelligently as to each offense. *Boatright v. State*, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

**OPINIONS OF THE ATTORNEY GENERAL**

**Fingerprintable offense.** — Tattooing a person under the age of 16 is an offense for which those charged with its

violation are to be fingerprinted. 1987 Op. Att'y Gen. No. 87-21.

**16-5-71.1. Piercing of the body.**

(a) It shall be unlawful for any person to pierce the body, with the exception of the ear lobes, of any person under the age of 18 for the purpose of allowing the insertion of earrings, jewelry, or similar objects into the body, unless the prior written consent of a custodial parent or guardian of such minor is obtained; provided, however, that the prohibition contained in this subsection shall not apply if:

- (1) Such person has been furnished with proper identification showing that the individual is 18 years of age or older; and
- (2) The person reasonably believes such minor to be 18 years of age or older.

(b) Any person violating the provisions of subsection (a) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 16-5-71.1, enacted by Ga. L. 1996, p. 645, § 1.)

**Cross references.** — Tattooing studios, § 31-40-1 et seq.

#### JUDICIAL DECISIONS

**Age certification.** — Defendant's conviction of piercing the body of a person under the age of 18, O.C.G.A. § 16-5-71.1(a), was proper since the defendant did not verify that an individual

was, in fact, 18 years of age before the defendant pierced the individual's tongue. At the time, the individual was 17 years old. *Sparks v. State*, 292 Ga. App. 143, 664 S.E.2d 247 (2008).

#### 16-5-72. Reckless abandonment.

(a) A parent, guardian, or other person supervising the welfare of or having immediate charge or custody of a child under the age of one year commits the offense of reckless abandonment of a child when the person willfully and voluntarily physically abandons such child with the intention of severing all parental or custodial duties and responsibilities to such child and leaving such child in a condition which results in the death of said child.

(b) Any person who violates subsection (a) of this Code section shall be guilty of a felony and shall, upon conviction thereof, be punished by imprisonment for not less than ten nor more than 25 years. (Code 1981, § 16-5-72, enacted by Ga. L. 1989, p. 1605, § 1.)

**Law reviews.** — For note on 1989 enactment of this Code section, see 6 Georgia St. U.L. Rev. 209 (1989).

#### JUDICIAL DECISIONS

**Evidence sufficient to sustain conviction.** — Evidence that the death of a child occurred following the mother's placing the child in a trash bag after giving birth and then putting the bag on the

front porch was sufficient to support the finding of a violation of O.C.G.A. § 16-5-72. *In re B.L.M.*, 228 Ga. App. 664, 492 S.E.2d 700 (1997).

#### 16-5-73. Prohibition against presence of children during manufacture of methamphetamine; punishment.

(a) As used in this Code section, the term:

(1) "Chemical substance" means anhydrous ammonia, as defined in Code Section 16-11-111; ephedrine, pseudoephedrine, or phenylpropanolamine, as those terms are defined in Code Section

16-13-30.3; or any other chemical used in the manufacture of methamphetamine.

(2) "Child" means any individual who is under the age of 18 years.

(3) "Intent to manufacture" means but is not limited to the intent to manufacture methamphetamine, which may be demonstrated by a chemical substance's usage, quantity, or manner or method of storage, including but not limited to storing it in proximity to another chemical substance or equipment used to manufacture methamphetamine.

(4) "Methamphetamine" means methamphetamine, amphetamine, or any mixture containing either methamphetamine or amphetamine, as described in Code Section 16-13-26.

(5) "Serious injury" means an injury involving a broken bone, the loss of a member of the body, the loss of use of a member of the body, the substantial disfigurement of the body or of a member of the body, or an injury which is life threatening.

(b)(1) Any person who intentionally causes or permits a child to be present where any person is manufacturing methamphetamine or possessing a chemical substance with the intent to manufacture methamphetamine shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than two nor more than 15 years.

(2) Any person who violates paragraph (1) of this subsection wherein a child receives serious injury as a result of such violation shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five nor more than 20 years. (Code 1981, § 16-5-73, enacted by Ga. L. 2004, p. 57, § 4; Ga. L. 2005, p. 60, § 16/HB 95.)

**Editor's notes.** — Ga. L. 2004, p. 57, § 6, not codified by the General Assembly, provides that the amendment by that Act shall apply to all crimes which occur on or after July 1, 2004.

**Law reviews.** — For article on 2004 enactment of this Code section, see 21 Georgia St. U.L. Rev. 45 (2004).

## ARTICLE 6 FETICIDE

### 16-5-80. Feticide; voluntary manslaughter of an unborn child; penalties.

(a) For the purposes of this Code section, the term "unborn child" means a member of the species homo sapiens at any stage of development who is carried in the womb.

(b) A person commits the offense of feticide if he or she willfully and without legal justification causes the death of an unborn child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, or if he or she, when in the commission of a felony, causes the death of an unborn child.

(c) A person convicted of the offense of feticide shall be punished by imprisonment for life.

(d) A person commits the offense of voluntary manslaughter of an unborn child when such person causes the death of an unborn child under circumstances which would otherwise be feticide and if such person acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; provided, however, that, if there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as feticide.

(e) A person convicted of the offense of voluntary manslaughter of an unborn child shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than 20 years.

(f) Nothing in this Code section shall be construed to permit the prosecution of:

(1) Any person for conduct relating to an abortion for which the consent of the pregnant woman, or person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(2) Any person for any medical treatment of the pregnant woman or her unborn child; or

(3) Any woman with respect to her unborn child. (Code 1981, § 16-5-80, enacted by Ga. L. 1982, p. 2499, § 1; Ga. L. 2006, p. 643, § 2/SB 77.)

**Editor's notes.** — Ga. L. 2006, p. 643, § 5, not codified by the General Assembly, provides that the amendment by that Act shall apply to all offenses committed on or after July 1, 2006.

**Law reviews.** — For survey article on criminal law and procedure, see 34 Mercer

L. Rev. 89 (1982). For article on 2006 amendment of this Code section, see 23 Georgia St. U.L. Rev. 37 (2006).

For note, "Incubating for the State: The Precarious Autonomy of Persistently Vegetative and Brain-Dead Pregnant Women," see 22 Ga. L. Rev. 1103 (1988).

#### JUDICIAL DECISIONS

**Constitutionality.** — O.C.G.A. § 16-5-80 informs all of what actions the state prohibits with sufficient definiteness that ordinary people can understand and

thus is not unconstitutionally vague. *Brinkley v. State*, 253 Ga. 541, 322 S.E.2d 49 (1984).

O.C.G.A. § 16-5-80 is not unconstitutionally vague, since the case law of Georgia has long adopted the common-law understanding of "quick": when the fetus is so far developed as to be capable of movement within the mother's womb. *Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987).

O.C.G.A. § 16-5-80 is not unconstitutional either because there is no unlawful taking of a human life or because an unborn child is not a "person" within the meaning of the Fourteenth Amendment, a proposition that is simply immaterial in the present context to whether a state can prohibit the destruction of a fetus. *Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987).

O.C.G.A. § 16-5-80 does not violate equal protection by creating two classifications that are arbitrary and capricious; although O.C.G.A. § 16-12-140 punishes the offense of criminal abortion with imprisonment for not less than one year nor more than 10 years, while O.C.G.A. § 16-5-80 requires a life sentence, the distinction between the sentences required O.C.G.A. § 16-5-80 section and the abortion statute, O.C.G.A. § 16-12-140, is rationally related to legitimate governmental purposes. *Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987).

#### **Government not required to develop exculpatory evidence for de-**

**fense.** — In a case in which defendant was convicted of murdering defendant's girlfriend and an unborn child in violation of 18 U.S.C. § 1111, O.C.G.A. § 16-5-80, incorporated by 18 U.S.C. § 13, and 18 U.S.C. § 924(c)(1) and (j), defendant's argument that the defendant's due process rights were violated because the case investigators intentionally and calculatingly refused to develop information which might implicate other suspects was without merit. The government was not required to develop exculpatory evidence for the defense. *United States v. Natson*, No. 07-11433, 2008 U.S. App. LEXIS 11228 (11th Cir. May 6, 2008) (Unpublished).

**Merger with aggravated assault.** — Defendant's convictions for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) and feticide in violation of O.C.G.A. § 16-5-80(a) did not merge for sentencing purposes because the victim of the aggravated assault was the defendant's girlfriend, while the victim of the feticide was the girlfriend's unborn child; the merger doctrine does not apply if each of the charged crimes was committed against a different victim. *Carmichael v. State*, 305 Ga. App. 651, 700 S.E.2d 650 (2010).

Cited in *Billingsley v. State*, 183 Ga. App. 850, 360 S.E.2d 451 (1987); *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008).

## ARTICLE 7

### STALKING

**Law reviews.** — For review of 1998 legislation relating to crimes and offenses, see 15 Georgia St. U.L. Rev. 62 (1998).

For note, "Stalking the Stalker: Developing New Laws to Thwart Those Who Terrorize Others," see 27 Ga. L. Rev. 285

(1992). For note on 1993 enactment of this article, see 10 Georgia St. U.L. Rev. 95 (1993).

For comment, "Is Georgia's Stalking Law Unconstitutionally Vague?", see 45 Mercer L. Rev. 853 (1994).

#### **16-5-90. Stalking; psychological evaluation.**

(a)(1) A person commits the offense of stalking when he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person. For the

purpose of this article, the terms "computer" and "computer network" shall have the same meanings as set out in Code Section 16-9-92; the term "contact" shall mean any communication including without being limited to communication in person, by telephone, by mail, by broadcast, by computer, by computer network, or by any other electronic device; and the place or places that contact by telephone, mail, broadcast, computer, computer network, or any other electronic device is deemed to occur shall be the place or places where such communication is received. For the purpose of this article, the term "place or places" shall include any public or private property occupied by the victim other than the residence of the defendant. For the purposes of this article, the term "harassing and intimidating" means a knowing and willful course of conduct directed at a specific person which causes emotional distress by placing such person in reasonable fear for such person's safety or the safety of a member of his or her immediate family, by establishing a pattern of harassing and intimidating behavior, and which serves no legitimate purpose. This Code section shall not be construed to require that an overt threat of death or bodily injury has been made.

(2) A person commits the offense of stalking when such person, in violation of a bond to keep the peace posted pursuant to Code Section 17-6-110, standing order issued under Code Section 19-1-1, temporary restraining order, temporary protective order, permanent restraining order, permanent protective order, preliminary injunction, or permanent injunction or condition of pretrial release, condition of probation, or condition of parole in effect prohibiting the harassment or intimidation of another person, broadcasts or publishes, including electronic publication, the picture, name, address, or phone number of a person for whose benefit the bond, order, or condition was made and without such person's consent in such a manner that causes other persons to harass or intimidate such person and the person making the broadcast or publication knew or had reason to believe that such broadcast or publication would cause such person to be harassed or intimidated by others.

(b) Except as provided in subsection (c) of this Code section, a person who commits the offense of stalking is guilty of a misdemeanor.

(c) Upon the second conviction, and all subsequent convictions, for stalking, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one year nor more than ten years.

(d) Before sentencing a defendant for any conviction of stalking under this Code section or aggravated stalking under Code Section 16-5-91, the sentencing judge may require psychological evaluation of the offender and shall consider the entire criminal record of the offender. At the time of sentencing, the judge is authorized to issue a

permanent restraining order against the offender to protect the person stalked and the members of such person's immediate family, and the judge is authorized to require psychological treatment of the offender as a part of the sentence, or as a condition for suspension or stay of sentence, or for probation. (Code 1981, § 16-5-90, enacted by Ga. L. 1993, p. 1534, § 1; Ga. L. 1998, p. 885, § 1; Ga. L. 2000, p. 1283, § 1.)

**Editor's notes.** — Ga. L. 1998, p. 885, § 4, not codified by the General Assembly, provides that the 1998 amendment was applicable to conduct occurring or allegedly occurring on or after July 1, 1998.

**Law reviews.** — For annual survey article discussing tort law, see 51 Mercer

L. Rev. 461 (1999). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001). For article, "Family Violence and Military Procedures in Georgia: An Introduction for Non-Military Lawyers," see 7 Ga. St. B.J. 16 (2001).

## JUDICIAL DECISIONS

**Constitutionality.** — O.C.G.A. § 16-5-90 is not unconstitutionally vague or overbroad. *Johnson v. State*, 264 Ga. 590, 449 S.E.2d 94 (1994).

**Amendments.** — When defendant's indictment, under O.C.G.A. § 16-5-90(a), prohibiting aggravated stalking, referenced instances of defendant's stalking behavior against the victim occurring within a single week, these acts evinced a pattern of prohibited behavior criminalized by the amended version of § 16-5-90(a), so the amendment did not render defendant's indictment void. *Daker v. Williams*, 279 Ga. 782, 621 S.E.2d 449 (2005).

When O.C.G.A. §§ 16-5-90 and 16-5-91, regarding aggravated stalking, were amended without including a savings clause, before a final judgment was entered on defendant's convictions under the statutes, this did not invalidate those convictions because defendant was convicted of twice contacting the victim at the victim's home in violation of a condition of pretrial release, to harass and intimidate the victim, which was a crime both under the statutes' old version and under their amended version; under the amended statutes, aggravated stalking was committed when a person, "in violation of a condition of pretrial release contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person." *Daker v. Williams*, 279 Ga. 782, 621 S.E.2d 449 (2005).

**Jurisdiction.** — Family Violence Act, O.C.G.A. § 19-13-1 et seq., gave Georgia courts jurisdiction over a nonresident only if the act with which the nonresident was charged met the requirements of O.C.G.A. § 9-10-91(2), (3); further, the conduct giving rise to the offense occurred when the maker of the call spoke into the telephone; a parent's daily calls to Georgia from another state to speak to the parent's child or when the parent made the calls that allegedly threatened and harassed the other parent did not confer jurisdiction in Georgia. *Anderson v. Deas*, 279 Ga. App. 892, 632 S.E.2d 682 (2006).

**Venue properly established.** — Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of aggravated stalking in violation of O.C.G.A. § 16-5-91(a) because the evidence authorized the jury to find that venue in Lowndes County was properly established; the victim and the victim's family resided in Lowndes County, and the victim's mother testified that the defendant had sent the letter to their residence and that the letter was retrieved from the mailbox at their residence. *Bowen v. State*, 304 Ga. App. 819, 697 S.E.2d 898 (2010).

**Statute does not create private cause of action.** — Although O.C.G.A. § 16-5-90 establishes the public policy of the state, nothing in its provisions creates a private cause of action in tort in favor of the victim. *Troncalli v. Jones*, 237 Ga. App.

10, 514 S.E.2d 478 (1999); Hopkinson v. Hopkinson, 239 Ga. App. 518, 521 S.E.2d 453 (1999).

**Sufficiency of indictment.** — Trial counsel was not ineffective in failing to file a motion to dismiss an indictment that charged the defendant with aggravated stalking in violation of O.C.G.A. § 16-5-91(a), although the language used did not mention that the defendant's actions were intended to "intimidate" the victim, as such was implicit in the indictment where acts in violation of that statute which were allegedly done unlawfully were inferred to have been done for the purpose of harassing and intimidating and the definition of "harassing and intimidating" was singular pursuant to O.C.G.A. § 16-5-90(a)(1). Phillips v. State, 278 Ga. App. 198, 628 S.E.2d 631 (2006).

**Harassing and intimidating conduct required.** — Defendant's single violation of a permanent protective order was insufficient to prove aggravated stalking in violation of O.C.G.A. § 16-5-91(a), which required a showing of a pattern of harassing and intimidating conduct as defined in the simple stalking statute, O.C.G.A. § 16-5-90(a)(1). State v. Burke, 287 Ga. 377, 695 S.E.2d 649 (2010).

**Attempt to commit stalking a crime.** — Stalking is not "in essence a common law assault"; while the crimes may overlap in some circumstances, the rationale for not punishing an attempted assault does not apply to an attempted stalking which is the attempt to follow, place under surveillance, or contact another person; reversing Rooks v. State, 217 Ga. App. 643, 458 S.E.2d 667 (1995). State v. Rooks, 266 Ga. 528, 468 S.E.2d 354 (1996).

**Evidence sufficient for conviction.** — See Hooper v. State, 223 Ga. App. 515, 478 S.E.2d 606 (1996); Hall v. State, 226 Ga. App. 380, 487 S.E.2d 41 (1997); Jerusheba v. State, 226 Ga. App. 696, 487 S.E.2d 465 (1997).

There was sufficient evidence to convict defendant of stalking; given defendant's history of violence toward the victim, the defendant's spouse, a jury could have found that defendant's actions at the health center, of following the victim in

defendant's vehicle after the victim left the center, yelling at the victim, impeding the victim's movement, forcing the victim into oncoming lanes of traffic, and, on several occasions, bumping the victim's car, were intended to, and did, harass or intimidate the victim. Johnson v. State, 260 Ga. App. 413, 579 S.E.2d 809 (2003).

Evidence was sufficient to support defendant's conviction on a charge of aggravated stalking, as the evidence showed that defendant, without consent, sought to harass and intimidate defendant's former love interest, and that in order to do so, defendant violated a judicial order to stay away from defendant's former love interest, defendant contacted the former love interest by continuously telephoning the former love interest, and defendant appeared at the former love interest's apartment uninvited. Stevens v. State, 261 Ga. App. 73, 581 S.E.2d 685 (2003).

Evidence was sufficient to support defendant's conviction for stalking, in violation of O.C.G.A. § 16-5-90(a)(1), because defendant admitted that defendant went to a former love interest's place of employment and home, and the love interest did not consent to either visit and was frightened by both; defendant's intent to harass or intimidate was inferred from the circumstances, as defendant had a prior physical abuse history with the victim, it was late and he intended to contact the victim when the victim was alone, and threatened to kill the victim and the victim's spouse. Thomas v. State, 276 Ga. App. 79, 622 S.E.2d 421 (2005).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal as to two aggravated stalking charges, despite claims that: (1) the state failed to prove the defendant acted for the purpose of harassing and intimidating the victim; and (2) the defendant lacked the requisite intent to commit the crimes, as the former argument attacked the credibility of the witnesses, which the appeals court did not weigh, and, regarding the latter argument, the intention with which an act was committed was a jury question. Chatham v. State, 280 Ga. App. 695, 634 S.E.2d 856 (2006).

Aggravated stalking conviction was upheld on appeal, supported by sufficient

evidence that the defendant continued to harass the victim and the victim's family, specifically, the victim's two daughters, despite a no contact order made part of the defendant's bond conditions, and that when coupled with a history of doing such, the defendant's actions harassed and intimidated the victims and placed them in fear for their safety. Hennessey v. State, 282 Ga. App. 857, 640 S.E.2d 362 (2006).

Appeals court rejected the defendant's claim that the state failed to show any intent to harass or intimidate the victim as the evidence demonstrated that the defendant violated an order prohibiting any contact with the victim by persistently calling the victim, sending the victim cards, showing up at the victim's home, and leaving the victim notes; moreover, given the history of these persistent, disturbing actions, and the defendant's refusal to leave the victim alone, a rational jury could have found beyond a reasonable doubt that such acts were intended to harass and intimidate the victim. Patterson v. State, 284 Ga. App. 780, 645 S.E.2d 38 (2007).

Evidence supported the defendant's stalking conviction because sufficient evidence showed that the defendant, over the victim's objection, followed and surveilled the victim while the victim was at work, with no valid reason for being anywhere near there, and because that caused the victim emotional distress and fear. Kilby v. State, 289 Ga. App. 457, 657 S.E.2d 567 (2008).

Testimony from a stalking victim that when the victim was contacted by the defendant by phone and realized that the defendant was not in jail the victim's heart dropped, and the victim became fearful of going outside because of threats the defendant made against the victim, established that the defendant was harassing and intimidating the victim as defined in O.C.G.A. § 16-5-90(a)(1). Davidson v. State, 295 Ga. App. 702, 673 S.E.2d 91 (2009).

There was sufficient evidence to support the defendant's conviction for stalking in violation of O.C.G.A. § 16-5-90(a)(1) as the defendant contacted the victim's employer to accuse the victim of making sexual suggestions, and the defendant

also contacted the police in connection with an alleged hit-and-run by the victim in order to intentionally send a message to the victim; the evidence showed that the defendant acted in that way with the intent to harass or intimidate the victim. Harvill v. State, 296 Ga. App. 453, 674 S.E.2d 659 (2009).

Convictions of arson, O.C.G.A. § 16-7-60(a), and stalking, O.C.G.A. § 16-5-90, were proper because the circumstantial evidence presented at trial included a kerosene-soaked, partially burned, mailing label addressed to the defendant found at the scene of a fire at the victim's home; the jury was entitled to infer from this evidence that the defendant left a virtual "calling card." The state also presented evidence of the defendant's escalating obsession with the victim and the threatening phone calls the defendant made to the victim shortly before the fire. Ransom v. State, 297 Ga. App. 902, 678 S.E.2d 574 (2009).

Evidence that defendant, the victim's eighth grade teacher, repeatedly attempted to communicate with the victim after the victim broke up with the defendant, including showing up at the victim's work and gym, leaving signs posted along the road the victim used, and sending the victim many text messages was sufficient to convict the defendant of stalking under O.C.G.A. § 16-5-90(b). Placanica v. State, 303 Ga. App. 302, 693 S.E.2d 571 (2010).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of aggravated stalking in violation of O.C.G.A. § 16-5-91(a) because evidence of the defendant's continuing unauthorized contacts with the victim and repeated violations of restraining orders established a pattern of harassing behavior; a permanent restraining order had been entered that prohibited the defendant from having any contact with the victim, but the defendant violated that order by sending a letter to the victim that caused the victim to fear for the victim's own family and that of the victim's family. Bowen v. State, 304 Ga. App. 819, 697 S.E.2d 898 (2010).

When the victim obtained a protective order against the defendant after the de-

fendant forced the victim into a house and ripped the engagement ring off the victim's finger, the victim's brake lines were also cut three times and the victim's tires were slashed; a surveillance video was played at trial and the victim identified the man bending over the tires as defendant; thus, the evidence was sufficient for the jury to convict the defendant of two counts of aggravated stalking under O.C.G.A. §§ 16-5-90(a) and 16-5-91 and criminal trespass to property. *Reed v. State*, No. A10A2097, 2011 Ga. App. LEXIS 252 (Mar. 23, 2011).

**Evidence insufficient for conviction.** — Evidence was insufficient to support a defendant juvenile's adjudication of delinquency for stalking as: (1) a truck in which the defendant juvenile was riding drove into a deputy sheriff's driveway and sat in front of the house for a minute or a minute and a half; (2) neither the deputy sheriff nor the deputy sheriff's spouse testified that they were afraid or that this caused them any emotional distress; and (3) there was no evidence that the deputy sheriff or the deputy sheriff's spouse were harassed or intimidated. *In the Interest of C.C.*, 280 Ga. App. 590, 634 S.E.2d 532 (2006).

Trial court erred in convicting the defendant of stalking because the state failed to establish a course of conduct or pattern of behavior required by O.C.G.A. § 16-5-90(a)(1); the defendant's act of following the victim in the victim's vehicle to a store and watching the victim going into and out of the store fell short of demonstrating the requisite pattern of harassing and intimidating behavior. *Autry v. State*, 306 Ga. App. 125, 701 S.E.2d 596 (2010).

**Summary judgment on stalking denied.** — Even though the appellee admitted to committing certain acts which satisfied some of the elements under O.C.G.A. § 16-5-90, based on a denial of the intent required under the statute, no abuse resulted in denying the appellant injunctive relief and setting the case for a bench trial. *Anderson v. Mergenhagen*, 283 Ga. App. 546, 642 S.E.2d 105 (2007).

**Evidence sufficient for protective order.** — Entry of a protective order in favor of a resident against a neighbor was supported by evidence that the neighbor

had blared loud music at the resident's home, put a hand in the resident's trousers or grabbed the resident's crotch and made lewd motions towards the resident, and once gestured in this way towards the resident's child and a visitor. *De Louis v. Sheppard*, 277 Ga. App. 768, 627 S.E.2d 846 (2006).

Protective order against a former wife was warranted under the Family Violence Act, O.C.G.A. § 19-13-1, because there was sufficient evidence that she committed the predicate act of stalking her former husband under O.C.G.A. § 16-5-90 by hiring a detective to follow him, by harassing him at his place of work, and by sending him threatening text messages. *Quinby v. Rausch*, 300 Ga. App. 424, 685 S.E.2d 395 (2009).

Evidence was sufficient under O.C.G.A. § 16-5-90 to support the entry of a stalking twelve-month protective order pursuant to O.C.G.A. § 16-5-94(d) against the defendant because the defendant contacted the victim via abusive emails numerous times and placed the victim under surveillance on several occasions without the victim's consent, and the frequency and nature of the defendant's contact and surveillance was such that the trial court could conclude that it was done for the purpose of harassing and intimidating the victim; there was also sufficient evidence that the contact and surveillance put the victim in reasonable fear for the victim's safety. *Thornton v. Hemphill*, 300 Ga. App. 647, 686 S.E.2d 263 (2009), cert. denied, No. S10C0413, 2010 Ga. LEXIS 342 (Ga. 2010).

Trial court did not err in granting a protective order under O.C.G.A. § 16-5-90(a)(1) against a foster parent who had placed a family under extensive surveillance through a combination of internet searches and third party observations of the family's home and contacted law enforcement, causing groundless investigations. The foster parent was not immune from liability under O.C.G.A. § 19-7-5(f) because the foster parent had not received any information that a child in the home had been subjected to abuse. *Owen v. Watts*, 307 Ga. App. 493, 705 S.E.2d 852 (2010).

**Evidence insufficient for protective order.** — Because a fire chief's actions

taken against certain fire department employees did not constitute stalking under O.C.G.A. § 16-5-90(a)(1), but were committed for the legitimate purpose of physical training and arose during legitimate training activities, the issuance of a permanent restraining order against the fire chief for those activities amounted to an abuse of discretion. Pilcher v. Stribling, 282 Ga. 166, 647 S.E.2d 8 (2007).

**Evidence insufficient for protective order protecting priest against parishioner.** — Trial court abused the court's discretion by granting a priest a stalking protective order against a former church organist as the priest never indicated fear for the priest's safety as a result of the former organist's disruptive and interfering behavior. Rather, the priest indicated weariness with regard to the former organist's behavior and that the behavior was interfering with the life of the parish, which was insufficient to justify the issuance of the protective order. Sinclair v. Daly, 295 Ga. App. 613, 672 S.E.2d 672 (2009).

**Determining another incident of stalking.** — Given that the defendant engaged for several years in a consistent pattern of abuse and harassment against defendant's daughter, a rational trier of fact could find that defendant's surveillance of her on another incident date evidenced yet another abusive, harassing act. Benton v. State, 256 Ga. App. 620, 568 S.E.2d 770 (2002).

**Revocation of the bond of a person charged with stalking** lies within the discretion of the trial judge; however, because a bond revocation involves the deprivation of one's liberty the decision must comport with at least minimal state and federal due process requirements. Hood v. Carsten, 267 Ga. 579, 481 S.E.2d 525 (1997).

**Protective orders.** — Publishing or discussing the former girlfriend's medical condition with others was not stalking since it did not threaten her or her family's safety; therefore, the prohibition in the protective order exceeded the statutory scope of authority. Collins v. Bazan, 256 Ga. App. 164, 568 S.E.2d 72 (2002).

Evidence that defendant, over the high school student's objections, repeatedly

placed the student under surveillance, took pictures of the student, and shouted at the student was sufficient to show defendant was stalking the student and justified the entry of a protective order against defendant. Johnson v. Smith, 260 Ga. App. 722, 580 S.E.2d 674 (2003).

Protective order based on the anti-stalking statute, O.C.G.A. § 16-5-90(a)(1), was not supported by sufficient evidence where statements made by the child off the record to the trial court could not be used to uphold the trial court's decision; similarly, a letter written to the trial court by the child constituted hearsay without probative value, and the testimony of an officer and the parent was rank hearsay that lacked any probative value. Allen v. Clerk, 273 Ga. App. 896, 616 S.E.2d 213 (2005).

**Violation of protective order.** — There was sufficient evidence to support convictions for stalking in violation of O.C.G.A. § 16-5-90 and aggravated stalking under O.C.G.A. § 16-5-91(a) because defendant contacted the defendant's love interest in violation of a temporary restraining order, with the requisite intent, by sending two letters that the victim received after the protection order was granted, and the state established that defendant's conduct was for the purpose of harassing and intimidating the love interest; a rational jury could have found beyond a reasonable doubt that such acts were intended to harass and intimidate and reasonably placed the victim in fear for the victim's safety. Maskivish v. State, 276 Ga. App. 701, 624 S.E.2d 160 (2005).

**Merger.** — In a trial in which defendant was convicted of two counts of stalking, in violation of O.C.G.A. § 16-5-90(a)(1), they did not merge because they were based on factually distinct acts that occurred in different places and at different times; defendant had parked at the victim's place of employment and then a short time later, parked at the victim's home. Thomas v. State, 276 Ga. App. 79, 622 S.E.2d 421 (2005).

**Jury instruction that omitted "intimidating."** — Jury instruction on the offense of aggravated stalking in violation of O.C.G.A. § 16-5-91(a), which omitted the word "intimidating" from the charge,

was not error because the trial court defined the term "harassing" in accordance with the statutory definition of O.C.G.A. § 16-5-90(a)(1), and accordingly, the jury was informed of that element by way of definition; the omission was inconsequential and the charge, viewed as a whole, was not likely to mislead or confuse the jury. Phillips v. State, 278 Ga. App. 198, 628 S.E.2d 631 (2006).

**Counsel not ineffective.** — Defendant's stalking convictions were upheld on appeal, given that trial counsel was not ineffective in failing to present the testimony from a second psychiatrist regarding the defendant's mental condition, as the defendant failed to show how testimony from a second psychiatrist would have aided the defense, and a request for recharge alone did not prove that the jury was confused on the issue of the defendant's mental condition or that counsel had not provided them with sufficient evidence concerning it. Albert v. State, 283 Ga. App. 79, 640 S.E.2d 670 (2006).

Defendant's ineffective assistance of counsel claim did not warrant a new trial in a prosecution for rape, kidnapping, aggravated stalking, and two counts of

stalking; because of the limited nature of a challenged witnesses' trial testimony, defense counsel made a strategic decision not to seek recusal of the trial judge, who was the brother of the challenged witness, and counsel discussed with the defendant the reasons for not seeking recusal. Pirkle v. State, 289 Ga. App. 450, 657 S.E.2d 560 (2008).

**Lack of record that oath was administered did not constitute reversible error.** — On appeal from a stalking conviction, because the record failed to show that the oath was not administered to the jury, no reversible error existed, and the appeals court had to presume that the jury was sworn. Benton v. State, 286 Ga. App. 736, 649 S.E.2d 793 (2007), cert. denied, 2007 Ga. LEXIS 753 (Ga. 2007).

**Cited** in Robinson v. State, 216 Ga. App. 816, 456 S.E.2d 68 (1995); Adkins v. State, 221 Ga. App. 460, 471 S.E.2d 896 (1996); Wilburn v. State, 223 Ga. App. 476, 477 S.E.2d 909 (1996); Daker v. State, 243 Ga. App. 848, 533 S.E.2d 393 (2000); Bogan v. State, 255 Ga. App. 413, 565 S.E.2d 588 (2002); Rawcliffe v. Rawcliffe, 283 Ga. App. 264, 641 S.E.2d 255 (2007); Louisyr v. State, 307 Ga. App. 724, 706 S.E.2d 114 (2011).

## RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of stalking statutes, 29 ALR5th 487.

### 16-5-91. Aggravated stalking.

(a) A person commits the offense of aggravated stalking when such person, in violation of a bond to keep the peace posted pursuant to Code Section 17-6-110, temporary restraining order, temporary protective order, permanent restraining order, permanent protective order, preliminary injunction, good behavior bond, or permanent injunction or condition of pretrial release, condition of probation, or condition of parole in effect prohibiting the behavior described in this subsection, follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person.

(b) Any person convicted of a violation of subsection (a) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten

years and by a fine of not more than \$10,000.00. The provisions of subsection (d) of Code Section 16-5-90 apply to sentencing for conviction of aggravated stalking. (Code 1981, § 16-5-91, enacted by Ga. L. 1993, p. 1534, § 1; Ga. L. 1995, p. 911, § 1; Ga. L. 1998, p. 885, § 2; Ga. L. 2002, p. 862, § 1.)

**Editor's notes.** — Ga. L. 1998, p. 885, § 4, not codified by the General Assembly, provides that the 1998 amendment was applicable to conduct occurring or allegedly occurring on or after July 1, 1998.

**Law reviews.** — For review of 1998

legislation relating to crimes and offenses, see 15 Georgia St. U.L. Rev. 62 (1998).

For note on the 1995 amendment of this Code section, see 12 Georgia St. U.L. Rev. 105 (1995).

## JUDICIAL DECISIONS

**Double jeopardy.** — State may not prosecute a defendant for aggravated stalking based upon the same set of facts previously used to prosecute the same defendant for violation of a domestic violence order. *Kinney v. State*, 223 Ga. App. 418, 477 S.E.2d 843 (1996).

When a defendant was indicted for aggravated stalking under O.C.G.A. § 16-5-91(a) in violation of a protective order issued under O.C.G.A. § 19-13-4, a criminal contempt proceeding based on the same incident could trigger the double jeopardy clause of the Fifth Amendment. The protective order violation contained no elements not contained in the criminal offense; furthermore, the protective order specifically enjoined the defendant from surveilling the subject of the order for the purpose of harassing and intimidating the subject as also proscribed by § 16-5-91(a). *Tanks v. State*, 292 Ga. App. 177, 663 S.E.2d 812 (2008).

Defendant's convictions for two counts of aggravated stalking based on the defendant following and contacting the victim did not merge for sentencing purposes because there was sufficient evidence from which the jury could find that the defendant, in violation of a protective order, both followed the victim to a hotel and then contacted the victim; the act of following was complete when the defendant arrived at the premises of the hotel because at that time the defendant violated the protective order by coming within 500 feet of a place where the victim was residing. *Louisyr v. State*, 307 Ga. App. 724, 706 S.E.2d 114 (2011).

**Sufficiency of indictment.** — Trial counsel was not ineffective in failing to file a motion to dismiss an indictment that charged the defendant with aggravated stalking in violation of O.C.G.A. § 16-5-91(a), although the language used did not mention that the defendant's actions were intended to "intimidate" the victim, as such was implicit in the indictment where acts in violation of that statute which were allegedly done unlawfully were inferred to have been done for the purpose of harassing and intimidating and the definition of "harassing and intimidating" was singular pursuant to O.C.G.A. § 16-5-90(a)(1). *Phillips v. State*, 278 Ga. App. 198, 628 S.E.2d 631 (2006).

As to the offense of aggravated stalking under O.C.G.A. § 16-5-91(a), the defendant unsuccessfully argued that because the indictment incorrectly alleged violation of a protective order, rather than a bond condition, the indictment was flawed; the type of prohibition was not material, only that defendant knew that a court order barred the defendant from following or contacting the victim. *Fields v. State*, 281 Ga. App. 733, 637 S.E.2d 136 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Indictment was sufficient because the indictment closely tracked the language of the aggravated stalking statute, O.C.G.A. § 16-5-91(a), and clearly informed the defendant that the defendant was charged with inappropriately affirmatively contacting the victim in violation of a prior order. *Gaston v. State*, 303 Ga. App. 502, 693 S.E.2d 841 (2010).

**Meaning of “contact.”** — Term “contact” is readily understood by people of ordinary intelligence as meaning to get in touch with or to communicate; indictment that tracked the contact language of O.C.G.A. § 16-5-91 was not void for vagueness. *Kinney v. State*, 223 Ga. App. 418, 477 S.E.2d 843 (1996).

**Construction of word “follow”.** — Given that the word “follow” in O.C.G.A. § 16-5-91 is not a term of art, but instead is a word of common understanding and meaning, the term includes a person going to a place to which he or she knows or believes another has gone and at which the other person may be found. *Louisyr v. State*, 307 Ga. App. 724, 706 S.E.2d 114 (2011).

**Acts constituting “contact.”** — Act of defendant in driving slowly by the victim’s home on a dead-end street where defendant had no business constituted “contact” within the meaning of O.C.G.A. § 16-5-91. *Wright v. State*, 232 Ga. App. 646, 502 S.E.2d 756 (1998).

There was sufficient evidence to support defendant’s convictions for stalking in violation of O.C.G.A. § 16-5-90 and aggravated stalking under O.C.G.A. § 16-5-91(a) because defendant contacted the defendant’s love interest in violation of a temporary restraining order, with the requisite intent, by sending two letters that the victim received after the protection order was granted, and the state established that defendant’s conduct was for the purpose of harassing and intimidating the defendant’s love interest; a rational jury could have found beyond a reasonable doubt that such acts were intended to harass and intimidate and reasonably placed the victim in fear for the victim’s safety. *Maskivish v. State*, 276 Ga. App. 701, 624 S.E.2d 160 (2005).

**Venue properly established.** — Trial court did not err in denying the defendant’s motion for a directed verdict after a jury found the defendant guilty of aggravated stalking in violation of O.C.G.A. § 16-5-91(a) because the evidence authorized the jury to find that venue in Lowndes County was properly established; the victim and the victim’s family resided in Lowndes County, and the victim’s mother testified that the defendant

had sent the letter to their residence and that the letter was retrieved from the mailbox at their residence. *Bowen v. State*, 304 Ga. App. 819, 697 S.E.2d 898 (2010).

**No requirement to prove actual notice of no contact order.** — State’s proof that a no contact order had been issued against the defendant regarding the victim was sufficient evidence to convict the defendant of aggravated stalking under O.C.G.A. § 16-5-91, as proof of actual notice of the no contact order was not required. *Revere v. State*, 277 Ga. App. 393, 626 S.E.2d 585 (2006).

**Single incident of stalking insufficient.** — Defendant’s single violation of a permanent protective order was insufficient to prove aggravated stalking in violation of O.C.G.A. § 16-5-91(a), which required a showing of a pattern of harassing and intimidating conduct as defined in the simple stalking statute, O.C.G.A. § 16-5-90(a)(1). *State v. Burke*, 287 Ga. 377, 695 S.E.2d 649 (2010).

**Single contact sufficient for conviction.** — Evidence was sufficient to prove that the defendant engaged in a pattern of harassing and intimidating behavior, which culminated in a violation of a protective order, because the jury was entitled to find from the evidence that the defendant arranged for a family friend to contact the victim, who was the defendant’s wife, since the defendant knew the defendant was prohibited from doing so, that the men planned for the friend to lure the victim to Georgia with a false offer of assistance, and that they agreed the friend would retrieve the victim from a domestic violence shelter for the purpose of driving her to a hotel; by its plain terms, O.C.G.A. § 16-5-91 prohibits even a single violation of a protective order, if that violation is part of a pattern of harassing and intimidating behavior. *Louisyr v. State*, 307 Ga. App. 724, 706 S.E.2d 114 (2011).

**Amendments.** — When O.C.G.A. §§ 16-5-90 and 16-5-91, regarding aggravated stalking, were amended without including a savings clause, before a final judgment was entered on defendant’s convictions under the statutes, this did not invalidate those convictions because defendant was convicted of twice contacting

the victim at home in violation of a condition of pretrial release, to harass and intimidate the victim, which was a crime both under the statutes' old version and under their amended version; under the amended statutes, aggravated stalking was committed when a person, "in violation of a condition of pretrial release contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person." *Daker v. Williams*, 279 Ga. 782, 621 S.E.2d 449 (2005).

**Phone contact.** may be sufficient prohibited contact to establish aggravated stalking. *Murden v. State*, 258 Ga. App. 585, 574 S.E.2d 657 (2002).

**Bond condition.** — Condition of a pretrial bond issued in a criminal matter providing that defendant stay away from his ex-wife and her residence was appropriate and reasonable under the facts and did not constitute an abuse of the court's discretion. *Camphor v. State*, 272 Ga. 408, 529 S.E.2d 121 (2000).

**Impact of which judge issues restraining order.** — Defendant's stalking convictions, based on violations of a permanent restraining order (PRO), were not invalid on grounds the PRO was issued by a magistrate judge, as the chief judge of the superior court, as authorized by O.C.G.A. § 15-1-9.1(b)(2), had requested magistrates to assist the superior court by hearing petitions under the Georgia Stalking Statute, O.C.G.A. § 16-5-94. *Seibert v. State*, 294 Ga. App. 202, 670 S.E.2d 109 (2008).

**Liability of neighbors for malicious prosecution on stalking offense.** — Neighbors of a homeowner were properly held liable for malicious prosecution because the neighbors instigated a homeowner's arrest on charges of aggravated stalking despite the homeowner's not having any deliberate contact with the neighbors and the neighbors' admission that the homeowner did not cause the neighbors fear by walking past the neighbors to the homeowner's children's bus stop. *Turnage v. Kasper*, 307 Ga. App. 172, 704 S.E.2d 842 (2010).

**Evidence sufficient for conviction.** — See *Hooper v. State*, 223 Ga. App. 515,

478 S.E.2d 606 (1996); *Littleton v. State*, 225 Ga. App. 900, 485 S.E.2d 230 (1997); *Fly v. State*, 229 Ga. App. 374, 494 S.E.2d 95 (1997), cert. denied, 525 U.S. 850, 119 S. Ct. 125, 142 L. Ed. 2d 101 (1998); *Jones v. State*, 239 Ga. App. 733, 521 S.E.2d 883 (1999); *Jagat v. State*, 240 Ga. App. 822, 525 S.E.2d 388 (1999); *Daker v. State*, 243 Ga. App. 848, 533 S.E.2d 393 (2000), cert. denied, 534 U.S. 1093, 122 S. Ct. 838, 151 L. Ed. 2d 717 (2002); *Davis v. State*, 244 Ga. App. 715, 536 S.E.2d 603 (2000).

Evidence showing that defendant entered his ex-girlfriend's home without permission, threatened her, cut her with a knife, fled, returned later, opened her front door, threatened her, left again, and then called the victim and made more threats, all while being subject to a probation condition which required him to stay away from the victim, was sufficient to support his convictions on two counts of aggravated stalking in violation of O.C.G.A. § 16-5-91(a). *Withers v. State*, 254 Ga. App. 833, 563 S.E.2d 912 (2002).

Evidence that the defendant caused his ex-wife great distress by repeatedly contacting and threatening her, including calling her at work and home and coming to her home and workplace carrying weapons, in violation of the defendant's probation, was sufficient to establish aggravated stalking in violation of O.C.G.A. § 16-5-91(a). *Murden v. State*, 258 Ga. App. 585, 574 S.E.2d 657 (2002).

Evidence was sufficient to convict defendant of aggravated stalking and aggravated battery as the victim, the defendant's spouse, had just parked at a supermarket when defendant ran a vehicle into the victim's vehicle, defendant then approached the victim, threatened to kill the victim, opened the door, grabbed and twisted the victim's wrist, and punched the victim's nose, breaking it; on the date of the incident, a permanent protective order was in effect prohibiting defendant from contacting the victim or the victim's family, or touching or damaging their property. *Johnson v. State*, 260 Ga. App. 413, 579 S.E.2d 809 (2003).

Evidence was sufficient to support defendant's conviction for aggravated stalking, as the evidence showed that defendant, without consent, engaged in conduct

which was intended to harass and intimidate defendant's former love interest, including the violation of a court order, continuously telephoning the former love interest, and showing up at the former love interest's apartment uninvited. Stevens v. State, 261 Ga. App. 73, 581 S.E.2d 685 (2003).

Because defendant contacted and threatened defendant's spouse and attacked a person who was protecting the spouse from defendant, the evidence was sufficient to convict defendant of aggravated stalking under O.C.G.A. § 16-5-91(a). Miller v. State, 273 Ga. App. 171, 614 S.E.2d 796 (2005), cert. denied, 2007 Ga. LEXIS 90 (Ga. 2007).

Defendant's convictions of aggravated stalking, burglary, aggravated assault, and false imprisonment, in violation of O.C.G.A. §§ 16-5-91, 16-7-1, 16-5-21, and 16-5-41, were supported by sufficient evidence because, despite the victim's recantation at trial, the victim stated to police earlier that defendant broke into the victim's apartment, scratched and damaged furniture and other property, tied the victim up, locked the victim in the bedroom for several hours, harmed the victim, threatened that defendant and defendant's friends were going to lock the victim in a basement for a few months, and defendant had been waiting for the victim to arrive home. Andrews v. State, 275 Ga. App. 426, 620 S.E.2d 629 (2005).

Evidence was sufficient to find the defendant guilty of aggravated stalking in violation of O.C.G.A. § 16-5-91(a) where the defendant had assaulted the defendant's love interest on numerous occasions and continued to show up at the victim's work place, which caused the victim to lose several jobs. Lloyd v. State, 280 Ga. 187, 625 S.E.2d 771 (2006).

Evidence sufficiently supported a conviction for aggravated stalking, in violation of O.C.G.A. § 16-5-91(a), based on consistent calls to the victim, who was the defendant's spouse, that were intended to "harass and intimidate" the spouse as those terms were defined in O.C.G.A. § 16-5-90(a)(1), prior conduct of threats and abusiveness during their marriage; the spouse had filed for divorce and obtained a restraining order against the

defendant, but the defendant continued to contact the spouse by leaving messages on the spouse's telephone at work which contained both loving messages as well as threats. Phillips v. State, 278 Ga. App. 198, 628 S.E.2d 631 (2006).

Defendant's aggravated stalking conviction was upheld on appeal, and a new trial was properly denied, as sufficient evidence of the defendant's contact with the victim, in violation of a protective order, and acts of harassment and intimidation supported the same; moreover, the failure to object to the state's of similar transaction evidence waived any consideration of the same on appeal. Kennedy v. State, 279 Ga. App. 415, 631 S.E.2d 462 (2006).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal as to two aggravated stalking charges, despite claims that: (1) the state failed to prove the defendant acted for the purpose of harassing and intimidating the victim; and (2) the defendant lacked the requisite intent to commit the crimes, as the former argument attacked the credibility of the witnesses, which the appeals court did not weigh, and, regarding the latter argument, the intention with which an act was committed was a jury question. Chatham v. State, 280 Ga. App. 695, 634 S.E.2d 856 (2006).

Aggravated stalking conviction was upheld on appeal, supported by sufficient evidence that the defendant continued to harass the victim and the victim's family, specifically, the victim's two daughters, despite a no contact order made part of the defendant's bond conditions, and that when coupled with a history of doing such, the defendant's actions harassed and intimidated the victims and placed them in fear for their safety. Hennessey v. State, 282 Ga. App. 857, 640 S.E.2d 362 (2006).

Because sufficient evidence existed that the defendant suddenly appeared in a public place and pointed a gun at a companion who was in the company of the defendant's wife, towards whom the defendant had expressed hostility in the past, the jury was authorized to find beyond a reasonable doubt that this purpose was to harass and intimidate the wife; hence, an aggravated stalking charge was supported by sufficient evidence. Ford v.

State, 283 Ga. App. 460, 641 S.E.2d 671 (2007).

Defendant's two aggravated stalking convictions were affirmed on appeal, given the sufficiency of the evidence demonstrating that the defendant made two harassing and threatening telephone calls to the victim that caused the victim to panic and feel afraid that the defendant was going to kidnap the defendant's son and hurt or kill the victim in the process; moreover, the admission of testimony from a state's witness on an ultimate issue was harmless, and the defendant waived any error to the introduction of an alleged autobiographical letter on authentication grounds. Shafer v. State, 285 Ga. App. 748, 647 S.E.2d 274 (2007), cert. denied, 2007 Ga. LEXIS 642 (Ga. 2007).

Evidence was sufficient to support an aggravated stalking conviction when, despite protective orders and a no-contact order, defendant continued to communicate with defendant's spouse, causing the spouse to fear for the spouse's safety, and although defendant claimed that defendant's intent was to rekindle the parties' marriage, not to intimidate and harass, intent was a question of fact for the jury. Holmes v. State, 291 Ga. App. 196, 661 S.E.2d 603 (2008).

Evidence that the defendant entered uninvited into his ex-wife's home, kicked open the bedroom door where his ex-wife was asleep with her boyfriend, laid across the victims, grabbed their throats, and threatened them, in violation of the terms of a condition of bond issued in a previous case, was sufficient to support convictions of aggravated stalking, O.C.G.A. § 16-5-91(a) and burglary, O.C.G.A. § 16-7-1(a). Bray v. State, 294 Ga. App. 562, 669 S.E.2d 509 (2008).

In a federal habeas corpus proceeding in which a state inmate had been convicted of stalking and aggravated stalking in violation of O.C.G.A. § 16-5-91(a), the inmate did not meet the burden of showing that there was insufficient evidence to support the conviction. There was sufficient evidence to support the conviction; the testimony presented would have permitted a reasonable trier of fact to conclude that the inmate was aware that a third party was under a court order to

refrain from contacting the victim, and the fact that the inmate might not have known the exact type of court order was not relevant. *Carlisle v. Conway*, No. 07-12885, 2008 U.S. App. LEXIS 22229 (11th Cir. Jan. 29, 2008) (Unpublished).

To convict a defendant of aggravated stalking, the state was only required to prove that the defendant's actions were done for the purpose of harassing or intimidating the victim, not that the victim actually felt either harassed or intimidated by that conduct. As the evidence allowed the jury to find that the defendant acted with the requisite intent, the evidence was sufficient to support the conviction. Hollis v. State, 295 Ga. App. 529, 672 S.E.2d 487 (2009).

Evidence was sufficient to convict a defendant of aggravated stalking under O.C.G.A. § 16-5-91(a) as the defendant was on probation for making a terroristic threat against the victim when the defendant, acting through a friend, called the victim via a three-way phone call, and the victim testified that the victim had not wanted to talk to the defendant, that during the conversation, the defendant had threatened the victim, and that when the victim realized that the defendant was no longer in jail, the victim's heart dropped and the victim was fearful of going outside. *Davidson v. State*, 295 Ga. App. 702, 673 S.E.2d 91 (2009).

Evidence supported the defendant's conviction of stalking the defendant's ex-spouse by putting a bizarre note, which the ex-spouse regarded as threatening, in the ex-spouse's mailbox and going onto the ex-spouse's property without permission, in violation of a restraining order. The fact that the ex-spouse had previously allowed the defendant on the property to visit their children did not alter the fact that on the occasions for which the defendant was prosecuted, the ex-spouse did not consent. *Crane v. State*, 297 Ga. App. 880, 678 S.E.2d 542 (2009).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of aggravated stalking in violation of O.C.G.A. § 16-5-91(a) because evidence of the defendant's continuing unauthorized contacts with the victim and repeated

violations of restraining orders established a pattern of harassing behavior; a permanent restraining order had been entered that prohibited the defendant from having any contact with the victim, but the defendant violated that order by sending a letter to the victim that caused the victim to fear for the victim's own safety and that of the victim's family. *Bowen v. State*, 304 Ga. App. 819, 697 S.E.2d 898 (2010).

Evidence was sufficient to support the defendant's convictions for aggravated stalking because, after the entry of a family violence protective order, the defendant purchased a knife with a large blade, followed the victim, who was the defendant's estranged spouse, and attempted to talk with the victim, appeared at a grocery store where the victim was, yelled at the victim, and stabbed and slashed the victim multiple times, resulting in the victim's death. The defendant then waited for the police, and stated that the defendant would not hurt anyone else, that the defendant came to do what the defendant needed to do, that no one got away with hurting the defendant, and that the victim, whom the defendant called by a derogatory term, deserved it because of what the victim did to the defendant in court. *Weaver v. State*, 288 Ga. 540, 705 S.E.2d 627 (2011).

**Evidence insufficient for conviction.** — Since the state's evidence failed to show that defendant made any contact with the victim or performed any act of an harassing or intimidating nature between the dates set forth in the indictment, the defendant's conviction for aggravated stalking was reversed. *Durant v. State*, 222 Ga. App. 872, 476 S.E.2d 641 (1996).

Because the evidence showed that the contact charged as the basis for an aggravated stalking offense against the defendant was initiated by the victim, and thus was with that victim's consent, the defendant's conviction of the offense had to be reversed as an element of the offense was that the charged contact had to be without the victim's consent. *Bragg v. State*, 285 Ga. App. 408, 646 S.E.2d 508 (2007).

Evidence did not support a conviction of aggravated stalking because the evidence did not establish that the defendant was

engaged in a pattern of intimidating and harassing behavior that placed the defendant's ex-spouse in reasonable fear for the ex-spouse's safety. Although the ex-spouse revoked the ex-spouse's consent for the defendant to enter the ex-spouse's home, the ex-spouse testified to feeling fear only for a moment when the defendant wrestled a hammer from the ex-spouse; the ex-spouse never called for help from the other adults in the home; and even after the other adults separated the pair and the defendant left the residence with the hammer, the ex-spouse broke free of the ex-spouse's friend and went after the defendant. *Wright v. State*, 292 Ga. App. 673, 665 S.E.2d 374 (2008).

**Evidence sufficient despite victim's later denial of incident.** — Evidence was sufficient to allow the jury to convict defendant of aggravated stalking in violation of O.C.G.A. § 16-5-91(a); although the victim testified at trial that the victim's struggle with defendant started because the victim attacked defendant with a knife, the jury was free to disbelieve this trial testimony and to believe instead the victim's prior inconsistent statement to a police officer who testified that, when the officer responded to a domestic violence call at the victim's residence, the victim, who was crying and upset and had facial bruises and a large ankle laceration, told the officer that defendant became angry and dragged the victim from a car, kicked the victim, and punched the victim in the face. *Peek v. State*, 259 Ga. App. 13, 576 S.E.2d 31 (2002).

**Evidence sufficient despite victim's consent to earlier contacts.** — Conviction of aggravated stalking under O.C.G.A. § 16-5-91 was supported by sufficient evidence despite the fact that the victim had previously permitted the defendant on the premises after the issuance of the no contact order; the victim's previous consent was immaterial where the defendant refused the victim's order to leave on the occasion at issue. *Revere v. State*, 277 Ga. App. 393, 626 S.E.2d 585 (2006).

**Evidence of knowledge of order was sufficient.** — In order to convict a defendant of aggravated stalking, O.C.G.A. § 16-5-91(a), based on assisting

a defendant stalk the victim, it was necessary to show that the defendant knew of a court order prohibiting the codefendant's contact with the victim, but not necessary to show that the defendant knew of the specific type of order which prohibited the contact; a conviction for aggravated stalking was authorized since sufficient evidence showed that the defendant knew of a bond condition prohibiting the defendant's contact with the victim and among other things, based on a witness's testimony that a discussion with the defendant about the restraining order occurred between the date the defendant's bond conditions were imposed and the date of the alleged stalking, it could have been inferred that the defendant had knowledge of the restraining order before the incident at issue. *State v. Carlisle*, 280 Ga. 770, 631 S.E.2d 347 (2006).

**Aggravated stalking did not merge with burglary.** — Trial court did not err by not merging a defendant's aggravated stalking count into a burglary count based upon the defendant's contention that under the actual evidence test, the same factual evidence was used to prove both crimes; as to prove the burglary count, the state had to prove that the defendant entered the victim's residence without authority and with the intent to commit aggravated stalking, and to prove the aggravated stalking count, the state had to prove that the defendant surveilled and contacted the victim in violation of a condition of probation for the purpose of harassing and intimidating the victim. As such, the burglary statute required that the state show entry into the residence, which was not required by the aggravated stalking statute, and, on the other hand, the aggravated stalking statute required that the state prove that the defendant actually contacted the victim, which was not required by the burglary statute that only required that the defendant contact the victim when the defendant entered the residence. *Williams v. State*, 293 Ga. App. 193, 666 S.E.2d 703 (2008).

**Jury instruction omitting "intimidating."** — Jury instruction on the offense of aggravated stalking in violation of O.C.G.A. § 16-5-91(a), which omitted the word "intimidating" from the charge, was

not error because the trial court defined the term "harassing" in accordance with the statutory definition of O.C.G.A. § 16-5-90(a)(1), and accordingly, the jury was informed of that element by way of definition; the omission was inconsequential and the charge, viewed as a whole, was not likely to mislead or confuse the jury. *Phillips v. State*, 278 Ga. App. 198, 628 S.E.2d 631 (2006).

**Jury instruction on harassing and intimidating not required.** — Words "harassing and intimidating," as used in O.C.G.A. § 16-5-91, are not words of art but rather are words of common understanding and meaning which require no definition themselves for understanding by the jury. Therefore, in an aggravated stalking prosecution, the defendant was not entitled to a jury charge that defined these terms. *Hollis v. State*, 295 Ga. App. 529, 672 S.E.2d 487 (2009).

**Jury instruction on lesser included offense of harrassing telephone calls unwarranted.** — In a prosecution on three counts of aggravated stalking, the defendant was not entitled to a jury charge on the lesser included offense of harassing telephone calls based on the fact that under the evidence presented the defendant was either guilty of the indicted offenses or was guilty of no offense whatsoever. *Patterson v. State*, 284 Ga. App. 780, 645 S.E.2d 38 (2007).

**Evidence of probation status properly admitted.** — Trial court did not admit improper character evidence at trial for aggravated stalking by allowing the state to introduce evidence that, at the time defendant threatened the victim at the victim's home and over the telephone, defendant was subject to a probation condition which required defendant to stay away from the victim, as such evidence was required to prove an element of the charge of aggravated stalking in violation of O.C.G.A. § 16-5-91(a). *Withers v. State*, 254 Ga. App. 833, 563 S.E.2d 912 (2002).

**Counsel not ineffective.** — Defendant's stalking convictions were upheld on appeal, given that trial counsel was not ineffective in failing to present the testimony from a second psychiatrist regarding the defendant's mental condition, as the defendant failed to show how testi-

mony from a second psychiatrist would have aided the defense, and a request for recharge alone did not prove that the jury was confused on the issue of the defendant's mental condition or that counsel had not provided them with sufficient evidence concerning it. *Albert v. State*, 283 Ga. App. 79, 640 S.E.2d 670 (2006).

In a prosecution on three counts of aggravated stalking, because the defendant failed to show that trial counsel's strategic decisions in declining to subpoena certain witnesses amounted to ineffectiveness, and the evidence did not support a lesser-included offense instruction, the defendant's ineffective assistance of counsel claims failed. *Patterson v. State*, 284 Ga. App. 780, 645 S.E.2d 38 (2007).

Defendant's ineffective assistance of counsel claim did not warrant a new trial in a prosecution for rape, kidnapping, aggravated stalking, and two counts of stalking; because of the limited nature of a challenged witnesses' trial testimony, defense counsel made a strategic decision not to seek recusal of the trial judge, who was the brother of the challenged witness, and counsel discussed with the defendant the reasons for not seeking recusal. *Pirkle v. State*, 289 Ga. App. 450, 657 S.E.2d 560 (2008).

**No fatal variance between indictment and evidence.** — Discrepancy in dates between indictment for aggravated stalking and evidence was not a fatal variance since the indictment clearly put defendant on notice that the alleged act was a violation of a protective order with which defendant had been served; moreover, the date in the indictment was not alleged to be material, and actions proven by the state were within the statute of limitations. *Holmes v. State*, 291 Ga. App. 196, 661 S.E.2d 603 (2008).

**Evidence insufficient to prove aggravated stalking.** — Defendant's contact with the victim was with the victim's consent since the victim testified that victim agreed to meet defendant and had a

friend follow her to the location of the meeting. *Bragg v. State*, 285 Ga. App. 408, 646 S.E.2d 508 (2007).

**Sentence imposed held proper.** — Because the sentence orally announced as to each of the three counts of aggravated stalking charged against the defendant was ten years, to be served concurrently, although originally to be served with six years and six months on probation, the sentence nevertheless remained ten years; hence, because the sentence as finally entered did not vary from that which was orally announced by the trial court and there was no increase in the defendant's sentence, no error in the sentence imposed resulted. *Patterson v. State*, 284 Ga. App. 780, 645 S.E.2d 38 (2007).

**Violation was grounds for revocation of supervised release.** — District court did not err in revoking under Fed. R. Crim. P. 32.1 the supervised release that was imposed upon defendant following defendant's conviction for being a felon in possession of firearms in violation of 18 U.S.C. §§ 922(g) and 924(a); admission of alleged hearsay at the revocation hearing was harmless error under Fed. R. Crim. P. 52(a) because other uncontested evidence established that defendant committed aggravated stalking of defendant's ex-spouse in violation of O.C.G.A. § 16-5-91(a) and that the defendant left the jurisdiction without the permission of the court or the defendant's probation officer. *United States v. Spence*, 2005 U.S. App. LEXIS 20940 (11th Cir. Sept. 26, 2005) (Unpublished).

**Cited in** *Bryson v. State*, 228 Ga. App. 84, 491 S.E.2d 184 (1997); *Reeves v. State*, 233 Ga. App. 802, 505 S.E.2d 540 (1998); *Bogan v. State*, 255 Ga. App. 413, 565 S.E.2d 588 (2002); *Holmes v. Achor Ctr., Inc.*, 260 Ga. App. 882, 581 S.E.2d 390 (2003); *Johnson v. State*, 264 Ga. App. 889, 592 S.E.2d 507 (2003); *Newsome v. State*, 289 Ga. App. 590, 657 S.E.2d 540 (2008); *Presley v. State*, 307 Ga. App. 528, 705 S.E.2d 870 (2011).

## 16-5-92. Applicability.

The provisions of Code Sections 16-5-90 and 16-5-91 shall not apply to persons engaged in activities protected by the Constitution of the

United States or of this state or to persons or employees of such persons lawfully engaged in bona fide business activity or lawfully engaged in the practice of a profession. (Code 1981, § 16-5-92, enacted by Ga. L. 1993, p. 1534, § 1.)

#### JUDICIAL DECISIONS

**Jury charge properly denied.** — Defendant charged with stalking could not have returned to a romantic partner's house lawfully because a court had barred the defendant from doing so without a

police escort; thus, it was proper to deny the defendant's request to charge under O.C.G.A. § 16-5-92. *Hayles v. State*, 287 Ga. App. 601, 651 S.E.2d 860 (2007).

#### 16-5-93. Right of victim to notification of release or escape of stalker.

(a) The victim of stalking or aggravated stalking shall be entitled to notice of the release from custody of the person arrested for and charged with the offense of stalking or aggravated stalking and to notice of any hearing on the issue of bail for such person. No such notice shall be required unless the victim provides a landline telephone number other than a pocket pager or electronic communication device number to which such notice can be directed.

(b) The law enforcement agency, prosecutor, or court directly involved with the victim at the outset of a criminal prosecution for the offense of stalking or aggravated stalking shall advise the victim of his or her right to notice and of the requirement of the victim's providing a landline telephone number other than a pocket pager or electronic communication device number to which the notice of custodial release or bail hearing can be directed. Such victim shall transmit the telephone number described in this subsection to the court and custodian of the person charged with stalking or aggravated stalking.

(c) Upon receipt of the telephone number, the custodian of the person charged with stalking or aggravated stalking shall take reasonable and necessary steps under the circumstances to notify the victim of the person's release from custody. Such notice shall, at a minimum, include:

(1) Prior to the person's release, placing a telephone call to the number provided by the victim and giving notice to the victim or any person answering the telephone who appears to be *sui juris* or by leaving an appropriate message on a telephone answering machine; and

(2) Following the person's release, if the custodian is unable to notify the victim by the method provided in paragraph (1) of this subsection, telephoning the number provided by the victim no less than two times in no less than 15 minute intervals within one hour of

custodial release and giving notice to the victim or to any person answering the telephone who appears to be sui juris or by leaving an appropriate message on a telephone answering machine.

(d) Upon receipt of the telephone number, the court conducting a hearing on the issue of bail shall take reasonable and necessary steps under the circumstances to notify the victim of any scheduled hearing on the issue of bail. Such notice shall, at a minimum, include placing a telephone call to the number provided by the victim prior to any scheduled hearing on the issue of bail.

(e) Notwithstanding any other provision of this Code section, a scheduled bail hearing or the release of the person charged with stalking or aggravated stalking shall not be delayed solely for the purpose of effectuating notice pursuant to this Code section for a period of more than 30 minutes.

(f) Upon the person's release or escape from custody after conviction and service of all or a portion of a sentence, notification to the victim shall be provided by the State Board of Pardons and Paroles as set forth in Code Sections 42-9-46 and 42-9-47.

(g) This Code section shall not apply to a custodian who is transferring a person charged with stalking or aggravated stalking to another custodian in this state.

(h) As used in this Code section, the term "custodian" means a warden, sheriff, jailer, deputy sheriff, police officer, officer or employee of the Department of Juvenile Justice, or any other law enforcement officer having actual custody of an inmate.

(i) A custodian or his or her employing agency shall not be liable in damages for a failure to provide the notice required by this Code section, but the custodian shall be subject to appropriate disciplinary action including termination for such failure. (Code 1981, § 16-5-93, enacted by Ga. L. 1993, p. 1534, § 1; Ga. L. 1997, p. 1453, § 1.)

#### **16-5-94. Restraining orders; protective orders.**

(a) A person who is not a minor who alleges stalking by another person may seek a restraining order by filing a petition alleging conduct constituting stalking as defined in Code Section 16-5-90. A person who is not a minor may also seek relief on behalf of a minor by filing such a petition.

(b) Jurisdiction for such a petition shall be the same as for family violence petitions as set out in Code Section 19-13-2.

(c) Upon the filing of a verified petition in which the petitioner alleges with specific facts that probable cause exists to establish that

stalking by the respondent has occurred in the past and may occur in the future, the court may order such temporary relief ex parte as it deems necessary to protect the petitioner or a minor of the household from stalking. If the court issues an ex parte order, a copy of the order shall be immediately furnished to the petitioner.

(d) The court may grant a protective order or approve a consent agreement to bring about a cessation of conduct constituting stalking. Orders or agreements may:

- (1) Direct a party to refrain from such conduct;
- (2) Order a party to refrain from harassing or interfering with the other;
- (3) Award costs and attorney's fees to either party; and
- (4) Order either or all parties to receive appropriate psychiatric or psychological services as a further measure to prevent the recurrence of stalking.

(e) The provisions of subsections (c) and (d) of Code Section 19-13-3, subsections (b), (c), and (d) of Code Section 19-13-4, and Code Section 19-13-5, relating to family violence petitions, shall apply to petitions filed pursuant to this Code section, except that the clerk of court may provide forms for petitions and pleadings to persons alleging conduct constituting stalking and to any other person designated by the superior court pursuant to this Code section as authorized to advise persons alleging conduct constituting stalking on filling out and filing such petitions and pleadings. (Code 1981, § 16-5-94, enacted by Ga. L. 1998, p. 885, § 3; Ga. L. 1999, p. 81, § 16.)

**Cross references.** — Confidentiality of address of registered electors; term of request; procedure, § 21-2-225.1.

**Editor's notes.** — Ga. L. 1998, p. 885, § 4, not codified by the General Assembly, provides that this Code section is applica-

ble to conduct occurring or allegedly occurring on or after July 1, 1998.

**Law reviews.** — For review of 1998 legislation relating to crimes and offenses, see 15 Georgia St. U.L. Rev. 62 (1998).

## JUDICIAL DECISIONS

**Verification.** — O.C.G.A. § 16-5-94(c) requires only that a stalking petition be verified before a temporary protective order may be issued, not that the petition itself be signed; where a verification signed by plaintiff accompanied a stalking petition, verifying that the contents of the petition were true and correct, defendant's argument that the petition was somehow

defective was without merit. *McKlin v. Ivory*, 266 Ga. App. 298, 596 S.E.2d 673 (2004).

**Stalking.** — Publishing or discussing the former love interest's medical condition with others was not stalking since it did not threaten the love interest or the love interest's family's safety; therefore, the prohibition in the protective order

exceeded the statutory scope of authority. *Collins v. Bazan*, 256 Ga. App. 164, 568 S.E.2d 72 (2002).

Even though the appellee admitted to committing certain acts which satisfied some of the elements under O.C.G.A. § 16-5-90, based on a denial of the intent required under the statute, no abuse resulted in denying the appellant injunctive relief and setting the case for a bench trial. *Anderson v. Mergenhagen*, 283 Ga. App. 546, 642 S.E.2d 105 (2007).

**Protective order upheld.** — Issuance of the protective order underlying the appellant prisoner's conviction for aggravated stalking under the family violence act when the prisoner and the victim had never been married, were not living in the same house, and did not have children together, did not affect the court's jurisdiction since the order expressly provided that its violation would subject the prisoner to prosecution for aggravated stalking; the superior court judge had the authority to issue a protective order under the stalking statute, O.C.G.A. § 16-5-94, or the Georgia Family Violence Act, specifically O.C.G.A. § 19-13-2. *Giles v. State*, 257 Ga. App. 65, 570 S.E.2d 375 (2002).

Evidence that defendant, over the high school student's objections, repeatedly placed the student under surveillance, took pictures of the student, and shouted at the student was sufficient to show defendant was stalking the student and justified the entry of a protective order against defendant. *Johnson v. Smith*, 260 Ga. App. 722, 580 S.E.2d 674 (2003).

Evidence was sufficient under O.C.G.A. § 16-5-90 to support the entry of a stalking twelve-month protective order pursuant to O.C.G.A. § 16-5-94(d) against the defendant because the defendant contacted the victim via abusive emails numerous times and placed the victim under surveillance on several occasions without the victim's consent, and the frequency and nature of the defendant's contact and surveillance was such that the trial court could conclude that it was done for the purpose of harassing and intimidating the victim; there was also sufficient evidence that the contact and surveillance put the victim in reasonable fear for the victim's

safety. *Thornton v. Hemphill*, 300 Ga. App. 647, 686 S.E.2d 263 (2009), cert. denied, No. S10C0413, 2010 Ga. LEXIS 342 (Ga. 2010).

Trial court did not abuse the court's discretion in finding that the evidence supported the grant of a stalking protective order under O.C.G.A. § 16-5-94(d) against a neighbor who, among other conduct, discharged a weapon near the victims' house, attempted to run the victim off the road, and repeatedly drove by or stopped in front of the victims' house and stared at them. *Garnsey v. Buice*, 306 Ga. App. 565, 703 S.E.2d 28 (2010).

**Evidence insufficient for protective order.** — Because a fire chief's actions taken against certain fire department employees did not constitute stalking under O.C.G.A. § 16-5-90(a)(1), but were committed for the legitimate purpose of physical training, and arose during legitimate training activities, the issuance of a permanent restraining order against the fire chief for those activities amounted to an abuse of discretion. *Pilcher v. Stribling*, 282 Ga. 166, 647 S.E.2d 8 (2007).

**Evidence insufficient for protective order protecting priest against parishioner.** — Trial court abused the court's discretion by granting a priest a stalking protective order against a former church organist as the priest never indicated fear for the priest's safety as a result of the former organist's disruptive and interfering behavior. Rather, the priest indicated weariness with regard to the former organist's behavior and that the behavior was interfering with the life of the parish, which was insufficient to justify the issuance of the protective order. *Sinclair v. Daly*, 295 Ga. App. 613, 672 S.E.2d 672 (2009).

**Stalker who sent emails into Georgia from South Carolina not subject to jurisdiction.** — Trial court erred in denying a South Carolina resident's motion to set aside a stalking permanent protective order issued against the resident. The Georgia court did not have personal jurisdiction over the nonresident under O.C.G.A. § 9-10-91 for stalking because the resident did not, in sending harassing emails from South Carolina, engage in conduct in Georgia. *Huggins v.*

Boyd, 304 Ga. App. 563, 697 S.E.2d 253 (2010).

**Attorney's fees and mental health evaluation.** — Trial court did not abuse its discretion in awarding a resident \$4,000.00 in attorney fees and requiring the neighbor to undergo a mental health evaluation as part of a protective order entered in favor of the resident against the neighbor. *De Louis v. Sheppard*, 277 Ga. App. 768, 627 S.E.2d 846 (2006).

**Judge who issues restraining or-**

**der.** — Defendant's stalking convictions, based on violations of a permanent restraining order (PRO), were not invalid on grounds the PRO was issued by a magistrate judge, as the chief judge of superior court, as authorized by O.C.G.A. § 15-1-9.1(b)(2), had requested magistrates to assist the superior court by hearing petitions under the Georgia Stalking Statute, O.C.G.A. § 16-5-94. *Seibert v. State*, 294 Ga. App. 202, 670 S.E.2d 109 (2008).

## 16-5-95. Offense of violating family violence order; penalty.

(a) A person commits the offense of violating a family violence order when the person knowingly and in a nonviolent manner violates the terms of a family violence temporary restraining order, temporary protective order, permanent restraining order, or permanent protective order issued against that person pursuant to Article 1 of Chapter 13 of Title 19, which:

- (1) Excludes, evicts, or excludes and evicts the person from a residence or household;
- (2) Directs the person to stay away from a residence, workplace, or school;
- (3) Restrains the person from approaching within a specified distance of another person; or
- (4) Restricts the person from having any contact, direct or indirect, by telephone, pager, facsimile, e-mail, or any other means of communication with another person, except as specified in the order.

(b) Any person convicted of a violation of subsection (a) of this Code section shall be guilty of a misdemeanor.

(c) Nothing contained in this Code section shall prohibit a prosecution for the offense of stalking or aggravated stalking that arose out of the same course of conduct; provided, however, that, for purposes of sentencing, a violation of this Code section shall be merged with a violation of any provision of Code Section 16-5-90 or 16-5-91 that arose out of the same course of conduct. (Code 1981, § 16-5-95, enacted by Ga. L. 2003, p. 652, § 1.)

## JUDICIAL DECISIONS

**Charging instrument defective.** — Trial court's denial of a defendant's general demurrer to a charge against the defendant of violation of a family violence

order, in violation of O.C.G.A. § 16-5-95(a), was error as the accusation failed to state any specific acts that violated any specific terms of a family vio-

lence order, such that the accusation failed to set out the essential elements of the crime or to apprise the defendant properly of the charge pursuant to O.C.G.A. § 17-7-71(c). Newsome v. State, 296 Ga. App. 490, 675 S.E.2d 229 (2009).

**16-5-96. Publication of second or subsequent conviction of stalking or aggravated stalking; cost of publication; good faith publications immune from liability.**

(a) The clerk of the court in which a person is convicted of a second or subsequent violation of Code Section 16-5-90 or 16-5-91 shall cause to be published a notice of conviction for such person. Such notice of conviction shall be published in the manner of legal notices in the legal organ of the county in which such person resides or, in the case of nonresidents, in the legal organ of the county in which the person was convicted. Such notice of conviction shall be one column wide by two inches long and shall contain the photograph taken by the arresting law enforcement agency at the time of arrest; the name and address of the convicted person; the date, time, and place of arrest; and the disposition of the case and shall be published once in the legal organ of the appropriate county in the second week following such conviction or as soon thereafter as publication may be made.

(b) The convicted person for which a notice of conviction is published pursuant to this Code section shall be assessed \$25.00 for the cost of publication of such notice and such assessment shall be imposed at the time of conviction in addition to any other fine imposed.

(c) The clerk of the court, the publisher of any legal organ which publishes a notice of conviction, and any other person involved in the publication of an erroneous notice of conviction shall be immune from civil or criminal liability for such erroneous publication, provided that such publication was made in good faith. (Code 1981, § 16-5-96, enacted by Ga. L. 2004, p. 621, § 3B; Ga. L. 2005, p. 60, § 16/HB 95.)

**Editor's notes.** — Ga. L. 2004, p. 621, § 9(b), not codified by the General Assembly, provides that this Code section shall apply to offenses committed on or after July 1, 2004.

**ARTICLE 8**  
**PROTECTION OF ELDER PERSONS**

**Editor's notes.** — Ga. L. 2000, p. 1085, § 1, not codified by the General Assembly, provides: "This Act shall be known and

may be cited as the 'Georgia Protection of Elder Persons Act of 2000'."

**16-5-100. Cruelty to a person 65 years of age or older.**

(a) A guardian or other person supervising the welfare of or having immediate charge or custody of a person who is 65 years of age or older commits the offense of cruelty to a person who is 65 years of age or older when the person willfully deprives a person who is 65 years of age or older of health care, shelter, or necessary sustenance to the extent that the health or well-being of a person who is 65 years of age or older is jeopardized.

(b) The provisions of this Code section shall not apply to a physician nor any person acting under a physician's direction nor to a hospital, skilled nursing facility, hospice, nor any agent or employee thereof who is in good faith following a course of treatment developed in accordance with accepted medical standards or who is acting in good faith in accordance with a living will, a durable power of attorney for health care, an advance directive for health care, an order not to resuscitate, or the instructions of the patient or the patient's lawful surrogate decision maker, nor shall the provisions of this Code section require any physician, any institution licensed in accordance with Chapter 7 of Title 31 or any employee or agent thereof to provide health care services or shelter to any person in the absence of another legal obligation to do so.

(b.1) The provisions of this Code section shall not apply to a guardian or other person supervising the welfare of or having immediate charge or control of a person who is 65 years of age or older who in good faith provides treatment by spiritual means alone through prayer for the person's physical or mental condition, in lieu of medical treatment, in accordance with the practices of and written notarized consent of the person.

(c) A person convicted of the offense of cruelty to a person who is 65 years of age or older as provided in this Code section shall be punished by imprisonment for not less than one nor more than 20 years. (Code 1981, § 16-5-100, enacted by Ga. L. 2000, p. 1085, § 2; Ga. L. 2002, p. 648, § 1; Ga. L. 2007, p. 133, § 6/HB 24.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2002, subsection (c), as added by Ga. L. 2002, p. 648, § 1, was redesignated as subsection (b.1).

**Editor's notes.** — Ga. L. 2007, p. 133, § 1, not codified by the General Assembly, provides: "(a) The General Assembly has long recognized the right of the individual to control all aspects of his or her personal care and medical treatment, including the right to insist upon medical treatment, decline medical treatment, or direct that medical treatment be withdrawn. In order

to secure these rights, the General Assembly has adopted and amended statutes recognizing the living will and health care agency and provided statutory forms for both documents.

"(b) The General Assembly has determined that the statutory forms for the living will and durable power of attorney for health care are confusing and inconsistent and that the statutes providing for the living will and health care agency contain conflicting concepts, inconsistent and out-of-date terminology, and confus-

ing and inconsistent requirements for execution. In addition, there is a commendable trend among the states to combine the concepts of the living will and health care agency into a single legal document.

(c) The General Assembly recognizes that a significant number of individuals representing the academic, medical, legislative, and legal communities, state officials, ethics scholars, and advocacy groups worked together to develop the advance directive for health care contained in this Act, and the collective intent was to create a form that uses understandable and everyday language in order to encourage more citizens of this state to execute advance directives for health care.

(d) The General Assembly finds that

the clear expression of an individual's decisions regarding health care, whether made by the individual or an agent appointed by the individual, is of critical importance not only to citizens but also to the health care and legal communities, third parties, and families. In furtherance of these purposes, the General Assembly enacts a new Chapter 32 of Title 31, setting forth general principles governing the expression of decisions regarding health care and the appointment of a health care agent, as well as a form of advance directive for health care."

**Law reviews.** — For note on 2000 enactment of O.C.G.A. § 16-5-100, see 17 Georgia St. U.L. Rev. 93 (2000).

## JUDICIAL DECISIONS

**Relevant evidence.** — In a prosecution under O.C.G.A. § 16-5-100(a) for cruelty to a person 65 years of age or older, evidence of the condition of defendant's home, in which the cruelty occurred, and its residents, as well as defendant's reaction to the love interest's requests for help in caring for the victim, were relevant to defendant's culpability, so the children's physical appearance and the violence toward the girlfriend were relevant and did not impermissibly place defendant's character in evidence. *Wood v. State*, 279 Ga. 667, 620 S.E.2d 348 (2005), cert. denied, 546 U.S. 1217, 126 S. Ct. 1434, 164 L. Ed. 2d 137 (2006).

In a prosecution under O.C.G.A. § 16-5-100(a) for cruelty to a person 65 years of age or older, when the victim, for whom defendant was obligated to provide care, died from neglect, pre-autopsy photographs of the victim's injuries from not being moved from the bed were admissible. *Wood v. State*, 279 Ga. 667, 620 S.E.2d 348 (2005), cert. denied, 546 U.S. 1217, 126 S. Ct. 1434, 164 L. Ed. 2d 137 (2006).

**Purpose.** — O.C.G.A. § 16-5-100(a) was enacted to protect susceptible elderly persons from abusive physical and financial exploitation, and in furthering this goal, the statute imposes criminal liability upon a person having supervision or "immediate charge or custody" of an elderly person who willfully fails to provide

health care and sustenance to the elderly person; in doing so, the statute does not simply encourage care of a dependent elderly person, it mandates adequate care for the dependent elderly. *Wood v. State*, 279 Ga. 667, 620 S.E.2d 348 (2005), cert. denied, 546 U.S. 1217, 126 S. Ct. 1434, 164 L. Ed. 2d 137 (2006).

**Sufficient evidence.** — When defendant (1) actively participated in the decision to bring the defendant's love interest's parent into the home from a nursing home, knowing the care the parent required, (2) was an adult member of the household, (3) received a financial benefit from moving the defendant's love interest's mother into the defendant's home, in the form of the parent's Social Security check, (4) participated in the procedure of discharging the parent from the nursing home, and (5) was instructed on how to move the parent in and out of a wheelchair, O.C.G.A. § 16-5-100(a) imposed a duty on the defendant to care for the parent, and defendant could be held criminally liable for failing to perform that duty. *Wood v. State*, 279 Ga. 667, 620 S.E.2d 348 (2005), cert. denied, 546 U.S. 1217, 126 S. Ct. 1434, 164 L. Ed. 2d 137 (2006).

Because the evidence presented against the defendant sufficiently showed that the defendant's mother was in such a debilitated state of being, having been denied

food and water for a significant amount of time, having to urinate in a bowl in the living room, was disallowed access to a phone, was not allowed medical care, and found to have had a severe leg infection, that evidence supported the defendant's

conviction for cruelty to an elderly person. *Bone v. State*, 283 Ga. App. 323, 641 S.E.2d 545 (2006), cert. dismissed, 2007 Ga. LEXIS 311 (Ga. 2007); cert. denied, 128 S. Ct. 1711, 170 L. Ed. 2d 520 (2008).

## ARTICLE 9

### NOTICE OF CONVICTION AND RELEASE FROM CONFINEMENT OF SEX OFFENDERS

#### **16-5-110. Publication of notice; information required; assessment for cost; immunity.**

(a) When a person who has been convicted of a crime for which that person is required to register under Code Section 42-1-12 makes his or her first report to a sheriff after such person's release from confinement, placement on probation, or upon establishing residency in the county, the sheriff shall cause to be published a notice of conviction and release from confinement of such person. Such notice shall be one column wide by two inches long and shall contain the photograph taken by the arresting law enforcement agency at the time of arrest; the name and address of the convicted person; if available, the date, time, and place of arrest; and the disposition of the case. The notice shall be published at or near the time the person registers with the sheriff at least once, and, at the sheriff's option, may be published more than once, in the legal organ of the appropriate county. The notice shall include the address of the Georgia Bureau of Investigation website for additional information regarding the sexual offender registry.

(b) The convicted person for which a notice of conviction and release from confinement is published pursuant to subsection (a) of this Code section shall be assessed \$25.00 for the cost of publication of such notice, and such assessment shall be imposed at the time of reporting to the sheriff's office.

(c) The sheriff, the publisher of any legal organ which publishes a notice of conviction and release from confinement, and any other person involved in the publication of an erroneous notice of conviction and release from confinement shall be immune from civil or criminal liability for such erroneous publication, provided that such publication was made in good faith. (Code 1981, § 16-5-110, enacted by Ga. L. 2005, p. 467, § 1/HB 188; Ga. L. 2006, p. 72, § 16/SB 465; Ga. L. 2006, p. 379, § 7/HB 1059; Ga. L. 2007, p. 47, § 16/SB 103.)

**Code Commission notes.** — The amendment of this Code section by Ga. L. 2006, p. 72, § 16, irreconcilably conflicted

with and was treated as superseded by Ga. L. 2006, p. 379, § 7. See *County of Butts v. Strahan*, 151 Ga. 417 (1921).

**Editor's notes.** — Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides that: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear

an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

**Law reviews.** — For article on 2006 amendment of this Code section, see 23 Georgia St. U.L. Rev. 11 (2006).

## CHAPTER 6

## SEXUAL OFFENSES

| Sec.  | Sec.  |
|---|---|
| 16-6-1. Rape.   |   |
| 16-6-2. Sodomy; aggravated sodomy; medical expenses.  | erty; in rem action; intervention; court authority; civil proceedings; liberal construction.                    |
| 16-6-3. Statutory rape.   | 16-6-13.3. Proceeds from pimping; forfeiture; distribution.   |
| 16-6-4. Child molestation; aggravated child molestation.  | 16-6-14. Pandering by compulsion.   |
| 16-6-5. Enticing a child for indecent purposes.   | 16-6-15. Solicitation of sodomy.  |
| 16-6-5.1. Sexual assault by persons with supervisory or disciplinary authority; sexual assault by practitioner of psychotherapy against patient; consent not a defense; penalty upon conviction for sexual assault. | 16-6-16. Masturbation for hire.   |
| 16-6-6. Bestiality.   | 16-6-17. Giving massages in place used for lewdness, prostitution, assignation, or masturbation for hire.       |
| 16-6-7. Necrophilia.  | 16-6-18. Fornication.   |
| 16-6-8. Public indecency.   | 16-6-19. Adultery.  |
| 16-6-9. Prostitution.   | 16-6-20. Bigamy.  |
| 16-6-10. Keeping a place of prostitution.   | 16-6-21. Marrying a bigamist.   |
| 16-6-11. Pimping.   | 16-6-22. Incest.  |
| 16-6-12. Pandering.   | 16-6-22.1. Sexual battery.  |
| 16-6-13. Penalties for violating Code Sections 16-6-9 through 16-6-12.  | 16-6-22.2. Aggravated sexual battery.   |
| 16-6-13.1. Testing for sexually transmitted diseases required.  | 16-6-23. Publication of name or identity of female raped or assaulted with intent to commit rape.               |
| 16-6-13.2. Defined terms; prosecution; forfeiture and seizure of prop-  | 16-6-24. Adoption of ordinances by counties and municipalities which proscribe loitering or related activities. |
|   | 16-6-25. Harboring, concealing, or withholding information concerning a sexual offender; penalties.             |

**Cross references.** — Actions for childhood sexual abuse, § 9-3-33.1. Sexual assault protocol, Ch. 24, T. 15. Obscenity and related offenses, § 16-12-80 et seq.

**Law reviews.** — For article surveying legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979). For annual survey of criminal law and procedure, see 35 Mercer L. Rev. 103 (1983). For article, "Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the

Judicial System," see 8 Georgia St. U.L. Rev. 539 (1992).

For note on the 1994 amendments of Code Sections 16-6-1 to 16-6-2, 16-6-4, 16-6-22.2 of this chapter, see 11 Georgia St. U.L. Rev. 159 (1994). For note, "A Modern Day Arthur Dimmesdale: Public Notification When Sex Offenders Are Released into the Community," see 12 Georgia St. U. L. Rev. 1187 (1995). For note on civil commitment and the right to treatment of sexually violent predators, see 32 Ga. L. Rev. 1261 (1998).

**JUDICIAL DECISIONS**

**Admissible evidence.** — In crimes involving sexual offenses, evidence of similar previous transactions is admissible to show the lustful disposition of the defendant and to corroborate the testimony of the victim as to the act charged. *Felts v. State*, 154 Ga. App. 571, 269 S.E.2d 73

(1980); *Phelps v. State*, 158 Ga. App. 219, 279 S.E.2d 513 (1981); *Green v. State*, 177 Ga. App. 591, 340 S.E.2d 195 (1986).

**Cited** in *Giles v. State*, 143 Ga. App. 558, 239 S.E.2d 168 (1977); *City of Atlanta v. McCary*, 245 Ga. 582, 266 S.E.2d 193 (1980).

**RESEARCH REFERENCES**

**Am. Jur. Proof of Facts.** — Defense to Charges of Sex Offense, 24 POF2d 515.

Damages for Sexual Assault, 15 POF3d 259.

Sexual Organ Injuries: Male Genitalia, 70 POF3d 229.

**Am. Jur. Trials.** — Representing Sex Offenders and the "Chemical Castration Defense," 34 Am. Jur. Trials 1.

When Clergy Fail Their Flock: Litigating the Clergy Sexual Abuse Case, 91 Am. Jur. Trials 151.

**ALR.** — Subsequent marriage as bar to prosecution for rape, 9 ALR 339.

Civil liability for carnal knowledge with actual consent of girl under age of consent, 79 ALR 1229.

Former acquittal or conviction under indictment or other information for rape or other sexual offense which does not allege that female was under age of consent as bar to subsequent prosecution under indictment or information which alleges that she was under age of consent; and vice versa, 119 ALR 1205.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses, 167 ALR 565; 77 ALR2d 841.

Indecent proposal to woman as assault, 12 ALR2d 971.

Statutes relating to sexual psychopaths, 24 ALR2d 350.

Validity and construction of statute or ordinances forbidding treatment in health clubs or massage salons by persons of the opposite sex, 51 ALR3d 936.

Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 ALR3d 245.

What constitutes offense of "sexual battery," 87 ALR3d 1250.

Remoteness in time of other similar offenses committed by accused as affect-

ing admissibility of evidence thereof in prosecution for sex offense, 88 ALR3d 8.

Time element as affecting admissibility of statement or complaint made by victim of sex crime as *res gestae*, spontaneous exclamation, or excited utterance, 89 ALR3d 102.

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge, 92 ALR3d 866.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix, 2 ALR4th 330.

Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases, 2 ALR4th 500.

Entrapment defense in sex offense prosecutions, 12 ALR4th 413.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 ALR4th 310.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation — post-New York Times cases, 57 ALR4th 404.

Conviction of rape or related sexual offenses on basis of intercourse accomplished under the pretext of, or in the course of, medical treatment, 65 ALR4th 1064.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons, 71 ALR4th 448.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 ALR4th 469.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids, 75 ALR4th 897.

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense, 81 ALR4th 1076.

Denial or restriction of visitation rights to parent charged with sexually abusing child, 1 ALR5th 776.

Propriety of publishing identity of sexual assault victim, 40 ALR5th 787.

Sufficiency of allegations or evidence of victim's mental injury or emotional distress to support charge of aggravated degree of rape, sodomy, or other sexual offense, 44 ALR5th 651.

### 16-6-1. Rape.

(a) A person commits the offense of rape when he has carnal knowledge of:

- (1) A female forcibly and against her will; or
- (2) A female who is less than ten years of age.

Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. The fact that the person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape.

(b) A person convicted of the offense of rape shall be punished by death, by imprisonment for life without parole, by imprisonment for life, or by a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by probation for life. Any person convicted under this Code section shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.

(c) When evidence relating to an allegation of rape is collected in the course of a medical examination of the person who is the victim of the alleged crime, the Georgia Crime Victims Emergency Fund, as provided for in Chapter 15 of Title 17, shall be responsible for the cost of the medical examination to the extent that expense is incurred for the limited purpose of collecting evidence. (Laws 1833, Cobb's 1851 Digest, p. 787; Code 1863, §§ 4248, 4249; Ga. L. 1866, p. 151, § 1; Code 1868, §§ 4283, 4284; Code 1873, §§ 4349, 4350; Code 1882, §§ 4349, 4350; Penal Code 1895, §§ 93, 94; Penal Code 1910, §§ 93, 94; Code 1933, §§ 26-1301, 26-1302; Ga. L. 1960, p. 266, § 1; Code 1933, § 26-2001, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1978, p. 3, § 1; Ga. L. 1994, p. 1959, § 5; Ga. L. 1996, p. 1115, § 1; Ga. L. 1997, p. 6, § 2; Ga. L. 1999, p. 666, § 1; Ga. L. 2006, p. 379, § 8/HB 1059; Ga. L. 2011, p. 214, § 1/HB 503.)

The 2011 amendment, effective July 1, 2011, substituted "Georgia Crime Vic-

tims Emergency Fund, as provided for in Chapter 15 of Title 17," for "law enforce-

ment agency investigating the alleged crime" in the middle of subsection (c).

**Cross references.** — Actions for childhood sexual abuse, § 9-3-33.1. Jurisdiction of the Court of Appeals over certain crimes, § 15-3-3. Time limitation on prosecutions for crimes punishable by death or life imprisonment, § 17-3-1. Televising testimony of child who is victim of offense under this Code section, § 17-8-55. Development of rape prevention and personal safety education program, § 20-2-314. Admissibility of evidence relating to the past sexual behavior of the complaining witness in a prosecution for rape, § 24-2-3. Visitation with minors by convicted sexual offenders while imprisoned, § 42-5-56. Damages may be recovered, § 51-1-14.

**Editor's notes.** — *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977), held that imposition of the death penalty for rape where the victim is not killed is in violation of the Eighth Amendment. *Eberhardt v. Georgia*, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 (1977), citing *Coker*, held the death penalty for kidnapping where the victim is not killed to be in violation of the Eighth Amendment. The Supreme Court of Georgia, in *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977) held that the rationale of *Coker* must be applied also to kidnapping.

Ga. L. 1994, p. 1959, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Sentence Reform Act of 1994'."

Ga. L. 1994, p. 1959, § 2, not codified by the General Assembly, provides: "The General Assembly declares and finds:

"(1) That persons who are convicted of certain serious violent felonies shall serve minimum terms of imprisonment which shall not be suspended, probated, stayed, deferred, or otherwise withheld by the sentencing judge; and

"(2) That sentences ordered by courts in cases of certain serious violent felonies shall be served in their entirety and shall not be reduced by parole or by any earned time, early release, work release, or other such sentence-reducing measures administered by the Department of Corrections."

Ga. L. 1994, p. 1959, § 16, not codified by the General Assembly, provides: "The

provisions of this Act shall apply only to those offenses committed on or after the effective date of this Act; provided, however, that any conviction occurring prior to, on, or after the effective date of this Act shall be deemed a 'conviction' for the purposes of this Act and shall be counted in determining the appropriate sentence to be imposed for any offense committed on or after the effective date of this Act."

Ga. L. 1994, p. 1959, § 17, not codified by the General Assembly, provides for severability.

Ga. L. 1994, p. 1959, § 18, not codified by the General Assembly, provides: "This Act shall become effective on January 1, 1995, upon ratification by the voters of this state at the 1994 November general election of that proposed amendment to Article IV, Section II, Paragraph II of the Constitution authorizing the General Assembly to provide for mandatory minimum sentences and sentences of life without possibility of parole in certain cases and providing restrictions on the authority of the State Board of Pardons and Paroles to grant paroles...." That amendment was ratified by the voters on November 8, 1994, so the amendment to this Code section by this Act became effective on January 1, 1995.

Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: "The General Assembly declares and finds: (1) That the 'Sentence Reform Act of 1994,' approved April 20, 1994 (Ga. L. 1994, p. 1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated, deferred, or withheld by the sentencing court; (2) That in *State v. Allmond*, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the 'Sentence Reform Act of 1994,' that the provisions of the First Offender Act would still be available to the sentencing court, which would mean that a person who committed a serious violent felony could be sentenced to less than the minimum mandatory ten-year sentence; and (3) That, contrary to the decision in *State v. Allmond*, it is the expressed intent of the General Assembly that persons who commit a serious violent felony specified

in the ‘Sentence Reform Act of 1994’ shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment.”

Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides that: “The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

“(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

“(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

“(3) Providing for community and public notification concerning the presence of sexual offenders;

“(4) Collecting data relative to sexual offenses and sexual offenders;

“(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

“(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

“The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender’s presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender.”

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides that: “The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.”

**Law reviews.** — For article, “The Demise of the Corroboration Requirement — Its History in Georgia Rape Law,” see 26 Emory L.J. 805 (1977). For article, “The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws,” see 20 Georgia St. U.L. Rev. 565 (2004). For article on 2006 amendment of this Code section, see 23 Georgia St. U.L. Rev. 11 (2006).

For note proposing Blood Grouping Test Act to expand admissible guidance in paternity proceedings, see 1 Mercer L. Rev. 266 (1950). For note on 1999 amendment to this Code section, see 16 Georgia St. U.L. Rev. 99 (1999).

For comment on *Lynn v. State*, 231 Ga. 559, 203 S.E.2d 221 (1974), appearing below, see 8 Ga. L. Rev. 973 (1974).

## JUDICIAL DECISIONS

## ANALYSIS

GENERAL CONSIDERATION  
MERGER AND OTHER OFFENSES  
JURY INSTRUCTIONS  
SUFFICIENCY OF EVIDENCE  
SENTENCE  
DEATH PENALTY

**General Consideration**

**Editor's notes.** — Many of the cases noted below were decided prior to the amendments to the length of sentence specified in subsection (b).

**Constitutionality.** — See *Coker v. State*, 234 Ga. 555, 216 S.E.2d 782 (1975), sentenced vacated, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977).

Statutory scheme governing punishment for a first-time rape conviction, O.C.G.A. §§ 16-6-1(b) and 17-10-6.1, gave the defendant fair notice that the defendant could be sentenced either to life imprisonment, eligible for parole after 30 years, or a minimum of 25 years without parole, with any additional years likewise not subject to any possibility of parole. Therefore, the statutes were not unconstitutionally vague. *Merritt v. State*, 286 Ga. 650, 690 S.E.2d 835 (2010).

**Former Code 1933, § 26-2001 was not violative of the equal protection clause of U.S. Const., amend. 14.** *Lamar v. State*, 243 Ga. 401, 254 S.E.2d 353, appeal dismissed, 444 U.S. 803, 100 S. Ct. 23, 62 L. Ed. 2d 16 (1979) (see O.C.G.A. § 16-6-1).

**Distinction made between male and female** in former Code 1933, § 26-2001 was reasonable. *Lamar v. State*, 243 Ga. 401, 254 S.E.2d 353, appeal dismissed, 444 U.S. 803, 100 S. Ct. 23, 62 L. Ed. 2d 16 (1979) (see O.C.G.A. § 16-6-1).

Difference between male and female recognized by former Code 1933, § 26-2001 was a physiological reality, and the objective serves a public purpose in preventing sexual attacks upon women, with the resulting physical injury, psychological trauma, and possible pregnancy. *Lamar v. State*, 243 Ga. 401, 254 S.E.2d 353, appeal dismissed, 444 U.S. 803, 100

S. Ct. 23, 62 L. Ed. 2d 16 (1979) (see O.C.G.A. § 16-6-1).

**Intent was not an element** of the crime of rape in Georgia under former Code 1933, § 26-2001. *Collins v. Francis*, 728 F.2d 1322 (11th Cir.), cert. denied, 469 U.S. 963, 105 S. Ct. 361, 83 L. Ed. 2d 297 (1984) (see O.C.G.A. § 16-6-1).

**Force and penetration are essential elements** of rape. *Henning v. State*, 153 Ga. App. 465, 265 S.E.2d 372 (1980).

If the state desires to convict a defendant of forcible rape, even though the victim is under 14 years of age, it must prove the element of force by acts of force. *Henning v. State*, 153 Ga. App. 465, 265 S.E.2d 372 (1980).

**Intimidation may substitute for force.** — Lack of resistance, induced by fear, is not legally cognizable consent, but constitutes force. *Walker v. State*, 157 Ga. App. 728, 278 S.E.2d 487 (1981).

Amount of evidence to prove force against a child is minimal, since physical force is not required, and intimidation may substitute for force. *House v. State*, 236 Ga. App. 405, 512 S.E.2d 287 (1999).

When the victim of numerous episodes of severe sexual abuse was a seven-year-old girl, whose prolonged exposure to sexual abuse resulted in observable physical injuries, whose outcries to her mother were ignored and who was warned not to tell anyone about her father's abuse, the jury was authorized to determine that, from the victim's perspective, further resistance was futile and that the defendant possessed the element of force beyond a reasonable doubt. *House v. State*, 236 Ga. App. 405, 512 S.E.2d 287 (1999).

State must prove the element of force as a factual matter in forcible rape cases rather than presuming force as a matter of law based on the victim's age, but the

quantum of evidence to prove force against a child is minimal, since physical force is not required and intimidation may substitute for force. Furthermore, force for purposes of forcible rape may be proved by direct or circumstantial evidence. *Pollard v. State*, 260 Ga. App. 540, 580 S.E.2d 337 (2003).

**"Forcibly" and "against her will" are not synonymous.** *Hill v. State*, 246 Ga. 402, 271 S.E.2d 802 (1980), cert. denied, 451 U.S. 923, 101 S. Ct. 2001, 68 L. Ed. 2d 313 (1981).

Fact that a victim is under the age of consent may supply the "against her will" element in a forcible rape prosecution under O.C.G.A. § 16-6-1, but the same fact cannot supply the element of force as a matter of law. *State v. Collins*, 270 Ga. 42, 508 S.E.2d 390 (1998) superseded by statute as stated in, *State v. Lyons*, 256 Ga. App. 377, 568 S.E.2d 533 (2002).

Terms "forcibly" and "against her will" are two separate elements of proving rape. *House v. State*, 236 Ga. App. 405, 512 S.E.2d 287 (1999).

Terms "forcibly" and "against her will," as used in O.C.G.A. § 16-6-1(a), are two separate elements of proving rape; the term "against her will" means without consent while the term "forcibly" means acts of physical force, threats of death or physical bodily harm, or mental coercion, such as intimidation. *Pollard v. State*, 260 Ga. App. 540, 580 S.E.2d 337 (2003).

**"Against her will" is synonymous with "without her consent."** *Hardy v. State*, 159 Ga. App. 854, 285 S.E.2d 547 (1981).

**"Carnal knowledge."** — Evidence sufficiently supported the defendant's rape conviction because it showed that the defendant penetrated the defendant's former girlfriend's sex organ with the defendant's male sex organ despite the fact that the victim told the defendant not to do so; that is, the defendant had "carnal knowledge" of the defendant's former girlfriend forcibly and against the victim's will, which was sufficient to sustain the defendant's rape conviction. *Walker v. State*, 270 Ga. App. 733, 607 S.E.2d 912 (2004).

**Phrase "any penetration" requires no definition.** — Language of statute

that "any penetration of the female sex organ by the male sex organ" constitutes carnal knowledge is a sufficient and proper standard for submission to jury, because "any penetration" is a phrase in common usage and therefore required no further definition. *Jackson v. State*, 157 Ga. App. 604, 278 S.E.2d 5 (1981).

**Element of force negates any possible mistake as to consent.** — Consent to sexual intercourse obtained through a present and immediate fear of bodily injury to the female involved is the equivalent of no consent at all, and an act of intercourse consummated under such circumstances cannot be said to have been committed with the consent of the female. *Jackson v. State*, 225 Ga. 553, 170 S.E.2d 281 (1969); *Lamar v. State*, 243 Ga. 401, 254 S.E.2d 353, appeal dismissed, 444 U.S. 803, 100 S. Ct. 23, 62 L. Ed. 2d 16 (1979).

Force is an element of the crime of rape, but it may be exerted not only by physical violence but also by threats of serious bodily harm which overpower the female and cause her to yield against her will. *McNeal v. State*, 228 Ga. 633, 187 S.E.2d 271 (1972).

**Consent induced by force or fear and intimidation** does not amount to consent in law and does not prevent intercourse from constituting rape. *Thomas v. State*, 159 Ga. App. 249, 283 S.E.2d 37 (1981).

**Reasonableness of victim's fear is not an issue.** — Defendant is not required to "read the victim's mind" or understand her internal thought processes; he is only required not to impose sex upon her without her free consent. Whether he did so is a question of intent, which the jury determines according to the reasonableness of her testimony as to lack of consent, not the reasonableness of her fear. *Clark v. State*, 197 Ga. App. 318, 398 S.E.2d 377 (1990), aff'd, 261 Ga. 311, 404 S.E.2d 787 (1991).

Lack of consent negates any "consent" and renders the act rape. To suggest the state must prove the victim's fear was "reasonable" amounts to no more than saying a person must, and is deemed to, consent to any sex act so long as she "reasonably" ought not to be afraid. *Clark*

**General Consideration (Cont'd)**

v. State, 197 Ga. App. 318, 398 S.E.2d 377 (1990), aff'd, 261 Ga. 311, 404 S.E.2d 787 (1991).

**Slight penetration sufficient.** — Penetration of the female sexual organ by the sexual organ of the male which is necessary to constitute rape need be only slight. It is not necessary that the vagina shall be entered or the hymen ruptured; the entering of the anterior of the organ, known as the vulva or labia, is sufficient. Hall v. State, 29 Ga. App. 383, 115 S.E. 278 (1923); Lee v. State, 197 Ga. 123, 28 S.E.2d 465 (1943); Addison v. State, 198 Ga. 249, 31 S.E.2d 393 (1944); Long v. State, 84 Ga. App. 638, 66 S.E.2d 837 (1951); Payne v. State, 231 Ga. 755, 204 S.E.2d 128 (1974); Jackson v. State, 157 Ga. App. 604, 278 S.E.2d 5 (1981).

**Vaginal trauma and physical injury** are not necessarily constituent elements of criminal offense of rape. Searcy v. State, 158 Ga. App. 328, 280 S.E.2d 161 (1981).

**Penetration may be proved by indirect or circumstantial evidence.** Payne v. State, 231 Ga. 755, 204 S.E.2d 128 (1974).

**Lack of consent** is a necessary element of the offense of rape. Evans v. State, 191 Ga. App. 364, 381 S.E.2d 760 (1989).

**Rape is not proved if female consents.** — Crime of rape is not proved if the evidence shows that the female at any time consented to the act of sexual intercourse. Jackson v. State, 225 Ga. 553, 170 S.E.2d 281 (1969).

**Evidence of lack of consent.** — After defendant kidnapped his wife, drove her to an isolated area, and with a gun close at hand, he, in his words, "made love" to her, the jury was authorized to conclude that she did not "consent" to this act of sexual intercourse. Childs v. State, 257 Ga. 243, 357 S.E.2d 48, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Jury could conclude that a victim was unable to give consent to defendant to sexual intercourse because the 31-year-old victim was mentally retarded and deaf, could not communicate other than with about five signs, functioned like a two-year-old or less, and was non-responsive when called to the witness

stand. Page v. State, 271 Ga. App. 541, 610 S.E.2d 171 (2005).

**Evidence rebutting consent.** — Rule is well settled that, in a prosecution for rape, the fact of the woman's having made a complaint soon after the assault took place is admissible in evidence for the purpose of rebutting the idea that the female consented to the criminal act. Watson v. State, 235 Ga. 461, 219 S.E.2d 763 (1975).

**Intercourse nonconsensual as matter of law.** — Victim's age, 12 years old, indicated that, as a matter of law, the intercourse was nonconsensual and "against her will." Hill v. State, 246 Ga. 402, 271 S.E.2d 802 (1980), cert. denied, 451 U.S. 923, 101 S. Ct. 2001, 68 L. Ed. 2d 313 (1981) (now age 10).

**Relevancy of victim's age in forcible rape case.** — Considerations of "consent" and "force" and "against her will" are irrelevant in a statutory rape case, and the age of the victim is irrelevant in a forcible rape case except insofar as it may show her incapable of giving consent and thereby supply the "against her will" element. Hill v. State, 246 Ga. 402, 271 S.E.2d 802 (1980), cert. denied, 451 U.S. 923, 101 S. Ct. 2001, 68 L. Ed. 2d 313 (1981).

Intimidation may substitute for physical force to satisfy the "force" element in a forcible rape case in which the victim is under the age of consent. State v. Collins, 270 Ga. 42, 508 S.E.2d 390 (1998) superseded by statute as stated in, State v. Lyons, 256 Ga. App. 377, 568 S.E.2d 533 (2002).

Element of force is shown in a case involving a victim under the age of consent if the defendant's words or acts were sufficient to instill in the victim a reasonable apprehension of bodily harm, violence, or other dangerous consequences to herself or others. State v. Collins, 270 Ga. 42, 508 S.E.2d 390 (1998) superseded by statute as stated in, State v. Lyons, 256 Ga. App. 377, 568 S.E.2d 533 (2002).

General demurrer properly sustained when state alleged carnal knowledge with a female whose "overall cognitive age equivalence" was less than ten years of age. O.C.G.A. § 16-6-1(a)(2)'s reference to "ten years of age" is determined based on

date of birth to date of crime. *State v. Lyons*, 256 Ga. App. 377, 568 S.E.2d 533 (2002).

**Sexual intercourse with woman whose will is temporarily lost is rape.**

— Sexual intercourse with a woman whose will is temporarily lost from intoxication, or unconsciousness arising from use of drugs or other cause, or sleep, is rape. *Paul v. State*, 144 Ga. App. 106, 240 S.E.2d 600 (1977); *Johnson v. State*, 186 Ga. App. 891, 369 S.E.2d 48, cert. denied, 186 Ga. App. 918, 369 S.E.2d 48 (1988).

**Rape of comatose victim.** — When the defendant had sexual relations with the victim as she lay comatose in her hospital bed, his actions constituted rape even though the defendant and the victim had enjoyed a sexual relationship prior to her injury, and it is reasonable to assume she would have consented had she been capable of doing so. *Brown v. State*, 174 Ga. App. 913, 331 S.E.2d 891 (1985).

**Victim must be living human being.**

— For a defendant to be guilty of rape, the victim must have been a person, a living human being; if dead before the act, the act is not rape. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

**Rape of dead victim.** — When the defendant has used an offensive weapon first to kill his victim and then to rape her, so that the victim is dead when the rape actually is consummated, the rape occurred nonetheless forcibly and against her will. *Lipham v. State*, 257 Ga. 808, 364 S.E.2d 840, cert. denied, 488 U.S. 873, 109 S. Ct. 191, 102 L. Ed. 2d 160 (1988), but see *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

**Battered person syndrome defense.**

— During a defendant's trial for being a party to rape and other offenses arising out of the repeated rapes of the defendant's 11-year-old child, the defendant's motion for a new trial on the ground that the defendant received ineffective assistance of counsel was properly denied because the defendant did not show that but

for the failure of trial counsel to present a battered person defense, the outcome of the trial might have been different; the defendant failed to provide trial counsel with information indicating a possibility that the defendant suffered from that syndrome, and even if such information had been provided, the trial court might not have allowed the defense because it was a defense of justification and the defendant denied knowing about the rapes. *Johnson v. State*, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

**No implicit marital exclusion exists** within O.C.G.A. § 16-6-1 that makes it legally impossible for a husband to be guilty of raping his wife. *Warren v. State*, 255 Ga. 151, 336 S.E.2d 221 (1985) (decided prior to 1996 amendment).

**Proof of emission is not an essential element** of the crime of rape. *Spraggins v. State*, 255 Ga. 195, 336 S.E.2d 227 (1985), cert. denied, 476 U.S. 1120, 106 S. Ct. 1982, 90 L. Ed. 2d 664 (1986).

Crime of rape is completed when, forcibly and against the will of the victim, the defendant penetrates the female sex organ with his male sex organ. Ejaculation is not an element of rape, and it is not necessary that the examining physician find semen in the victim's body. *Skipper v. State*, 257 Ga. 802, 364 S.E.2d 835 (1988).

**It is not necessary that examining physician find semen in victim's body.** *Perry v. State*, 154 Ga. App. 385, 268 S.E.2d 747 (1980).

**General Assembly has removed corroboration requirement** which was specifically a part of the previous rape statute. *Baker v. State*, 245 Ga. 657, 266 S.E.2d 477 (1980).

**Corroboration no longer necessary.**

— Former Code 1933, § 26-2001 as amended by Ga. L. 1978, p. 3, § 1 eliminated the requirement of corroboration of the victim's testimony in a rape case. *Stallworth v. State*, 150 Ga. App. 766, 258 S.E.2d 611 (1979) (see O.C.G.A. § 16-6-1).

Former Code 1933, § 26-2001 did not require "emission" of sperm as a constituent element of rape; nor is it the law that the victim's testimony must be corroborated or supported by additional evidence to support a finding of rape. *Neal v. State*, 152 Ga. App. 395, 263 S.E.2d 185 (1979) (see O.C.G.A. § 16-6-1).

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There is no longer any requirement of corroboration of the victim's testimony in a rape case. *Hanvey v. State*, 186 Ga. App. 690, 368 S.E.2d 357, cert. denied, 186 Ga. App. 918, 369 S.E.2d 48 (1988).

Testimony of the victim alone is sufficient to affirm the conviction of rape. *Greulich v. State*, 263 Ga. App. 552, 588 S.E.2d 450 (2003).

Defendant's conviction for rape did not have to be reversed because the state did not introduce scientific evidence to corroborate the victim's testimony that defendant raped the victim. *Warren v. State*, 265 Ga. App. 109, 592 S.E.2d 879 (2004).

**Term "rape" does not also include the offense of statutory rape.** *Grayer v. State*, 176 Ga. App. 248, 335 S.E.2d 483 (1985).

**Indictment sufficient for statutory rape charge.** — Even though an indictment listed only the statute for forcible rape, because it alleged facts relevant to statutory rape, defendant was put on notice that he was being charged with the latter offense and was not prejudiced. *Brown v. State*, 228 Ga. App. 748, 492 S.E.2d 555 (1997).

Indictment charging the defendant with child molestation, sexual exploitation of children, aggravated child molestation, and statutory rape was not defective for alleging a broad range of dates extending past the victim's sixteenth birthday because the indictment alleged that the defendant committed the crimes when the victim was under the age of 16 even though the exact dates were not known, and the victim testified that the victim had sexual intercourse with the defendant in 2003 and 2004; therefore, the indictment was not subject to a general demurrer. *Wilder v. State*, 304 Ga. App. 891, 698 S.E.2d 374 (2010).

**Indictment filed within statute of limitations; thus, no ex post facto violation.** — With regard to a defendant's conviction for forcible rape of the defendant's child during the time the child was 13 through 15 years of age, the trial court correctly concluded that the state had 15 years from the victim's 16th birthday on January 12, 1995, or until January 12,

2010, to prosecute the case; therefore, no ex post facto violation occurred since the indictment was filed on January 8, 2008. *Duke v. State*, 298 Ga. App. 719, 681 S.E.2d 174 (2009), cert. denied, No. S09C1866, 2010 Ga. LEXIS 31 (Ga. 2010).

With regard to a defendant's conviction for rape of a minor relative, the trial court did not err by denying the defendant's motion for a new trial on the ground that the applicable statute of limitations ran on the rape offenses before the defendant was charged because in applying the 1996 amendment to O.C.G.A. § 17-3-1 and the tolling provisions of O.C.G.A. § 17-3-2.1, the limitation period for the defendant's crime ran 15 years from December 13, 1995, when the crimes were first reported to authorities. Thus, because the state had until December 13, 2010 to indict the defendant, the January 7, 2008, indictment was timely and no ex post facto violation arose because the original seven-year limitation period had not expired at the time. *Flournoy v. State*, 299 Ga. App. 377, 682 S.E.2d 632 (2009).

**Indictment sufficiently alleged element of force.** — With regard to a defendant's conviction for rape of a minor relative, the trial court did not err by denying the defendant's motion for a new trial on the ground that the indictments were factually flawed because the indictments did not specifically allege the required element of force in charging rape because by alleging "unlawful" carnal knowledge during 1992 to 1995, the indictment asserted a charge of forcible rape under the law in effect prior to the 1996 amendment, therefore, the indictment did establish cognizable charges. Additionally, the defendant filed no special demurrers as to the form of the indictment and, thus, waived any argument in that regard. *Flournoy v. State*, 299 Ga. App. 377, 682 S.E.2d 632 (2009).

**Sodomy was not an included offense of rape.** — Defendant's convictions for anal and oral sodomy were not merged into his rape conviction, since each of the three offenses contains at least one element not contained in the others. Even though it was anatomically impossible for the three offenses to merge as a matter of fact, the matter was properly submitted for resolution to the jury, which resolved

the matter against the defendant. *Johnson v. State*, 195 Ga. App. 723, 394 S.E.2d 586 (1990).

**Similar transaction.** — Defendants nonviolent sexual encounter with a minor is not similar to an alleged rape of an adult and admission of the evidence was reversible error. *Perry v. State*, 263 Ga. App. 670, 588 S.E.2d 838 (2003).

Trial court properly allowed the admission of similar transaction evidence from another rape victim who identified the defendant as the man who raped her under similar circumstances four years earlier since the prior victim's testimony was reliable under the totality of the circumstances. *Jennings v. State*, 277 Ga. App. 159, 626 S.E.2d 155 (2006).

Similar transaction evidence was properly admitted against defendant charged with rape and false imprisonment as the state showed sufficient evidence of a proper purpose for the admission, specifically, that both sex offenses involved attacks by force against other persons for the purpose of forcing sexual intercourse upon them, and that both incidents occurred behind a shopping center where defendant drove after promising to take the victims home. *Ingram v. State*, 280 Ga. App. 467, 634 S.E.2d 430 (2006), cert. denied, 2007 Ga. LEXIS 868 (Ga. 2007).

**Difference in required activity between rape and incest.** — Defendant's argument that the evidence introduced was not sufficient to support defendant's conviction for incest had to be rejected, as defendant's reliance on rape cases to argue defendant's point was in error; the rape statute required proof that penetration had occurred, whereas the incest statute, by contrast, only required proof that sexual intercourse had taken place and the state introduced such proof. *Little v. State*, 262 Ga. App. 377, 585 S.E.2d 677 (2003).

Offense of burglary is separate and distinct from the sexual offenses committed subsequent to the unlawful entry upon the premises; therefore, the offenses do not merge, even though the evidence utilized to establish the sexual offenses may also be relied upon to establish the felonious intent necessary to prove the burglary. *Palmer v. State*, 174 Ga. App. 720, 331 S.E.2d 77 (1985).

**Admissibility of proof of similar offenses committed by accused.** — Proof of similar offenses committed by the accused in the same locality, about the same time, and where similar methods were employed by the accused in the commission of such offenses, is admissible on his trial for the purpose of identifying him as the guilty party and for the purpose of showing motive, plan, scheme, bent of mind, and course of conduct. *Burnett v. State*, 236 Ga. 597, 225 S.E.2d 28 (1976).

Eleven-year lapse of time between defendant's similar prior sex offense and the one on trial did not itself render evidence of the prior offense inadmissible. It was one of the more important factors in considering admissibility; once it crossed that threshold, it thereafter affects the weight and credibility of the testimony. *Hill v. State*, 183 Ga. App. 404, 359 S.E.2d 190 (1987).

In a rape prosecution, similar transaction testimony from the defendant's prior rape victims was properly admitted as the testimony was probative of the defendant's course of conduct, intent, modus operandi, and lustful disposition, and corroborated the victim's testimony that the defendant claimed to have previously raped persons that "nobody would believe." *Sanders v. State*, 297 Ga. App. 897, 678 S.E.2d 579 (2009).

**Victim's prior sexual intercourse with other men.** — Victim of an alleged rape may not be cross-examined as to specific acts of prior sexual intercourse with men other than the accused. *Thomas v. State*, 234 Ga. 635, 217 S.E.2d 152 (1975).

**Proof of present consent in rape trial differs from proof of consent to other crimes.** In other crimes the proffered evidence and inference it supports must logically relate within a particular factual context. For example, it is well established that evidence of victim's general character for violence, or testimony concerning specific acts against another, is impermissible. In rape cases, however, proof of prior consent without regard to identity of persons or similarity of circumstances may be admitted to allow jury to weigh, or calculate as it were, the probability of consent with respect to an entire

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class of "unchaste" women when the court finds that evidence "supports an inference that accused could have reasonably believed that complaining witness consented to conduct complained of." *Hardy v. State*, 159 Ga. App. 854, 285 S.E.2d 547 (1981).

Victim's testimony that when she was 13, defendant forced his penis inside her vagina against her will was sufficient to support rape conviction. *Edmonson v. State*, 219 Ga. App. 323, 464 S.E.2d 839 (1995), overruled on other grounds, *Collins v. State*, 229 Ga. App. 658, 495 S.E.2d 59 (1997).

Force is a necessary element of the offense of common-law or forcible rape against an under-age victim. *Collins v. State*, 229 Ga. App. 658, 495 S.E.2d 59 (1998), aff'd, 270 Ga. 42, 508 S.E.2d 390 (1998).

**Pertinence and admissibility of evidence of complainant's lack of chastity.** See *Hardy v. State*, 159 Ga. App. 854, 285 S.E.2d 547 (1981).

**Admissibility of evidence of defendant's abusive treatment of former girlfriend.** — Defendant's testimony elicited in prosecution for rape in regard to an incident with a former girlfriend in which he had "pushed her across the face" was relevant, even though it incidentally referred to criminal conduct, and was admissible as it showed defendant's identity, bent of mind, and course of conduct. *Jackson v. State*, 157 Ga. App. 604, 278 S.E.2d 5 (1981).

**Defendant's incriminating statement to victim is admissible.** — Victim was properly allowed to testify, at defendant's trial for rape and aggravated sodomy, that, during the course of her ordeal, defendant had made the incriminating admission to her that "there's been ten others, ten other women, and you're not the only one." *Copeland v. State*, 177 Ga. App. 773, 341 S.E.2d 302 (1986).

**When defendant's identity as perpetrator of two separate rape offenses was in dispute**, the jury's acquittal of defendant on the earlier charge resolved the "identity" factor in his favor and the state could not relitigate the is-

sue; admission of evidence of the prior offense at his later trial on the subsequent offense was reversible error. *Lucas v. State*, 178 Ga. App. 150, 342 S.E.2d 377 (1986).

**Reversible error to admit physician's opinion as to "rape."** — Allowing any question and answer of a physician who examined the victim of an alleged rape which would involve the physician's opinion stated in his report that "this is rape" constituted reversible error. *Nichols v. State*, 177 Ga. App. 689, 340 S.E.2d 654 (1986).

**Victim's testimony based on nonvisual senses.** — Victim need not actually see her assailant penetrate her in order to allege the element of carnal knowledge of the victim; the victim may also give testimony predicated upon information gathered by other senses. *Hanvey v. State*, 186 Ga. App. 690, 368 S.E.2d 357, cert. denied, 186 Ga. App. 918, 368 S.E.2d 357 (1988).

**Testimony of prior incidents.** — In a trial for rape and incest the trial court did not err in permitting the victim to testify as to two prior incidents in which defendant, her father, made sexual advances toward her. *Hall v. State*, 186 Ga. App. 830, 368 S.E.2d 787 (1988).

**Victim's reluctance to actually name aggressor's sex organ** did not disallow a finding that that is what she meant by use of the word "something," and the jury could reasonably infer that the "something" defendant assaulted the victim with was his sexual organ. *Richie v. State*, 183 Ga. App. 248, 358 S.E.2d 648 (1987).

**Proof when victim murdered by assailant.** — Rape can be proven although victim is unable to testify because subsequently murdered by assailant. *Durham v. State*, 243 Ga. 408, 254 S.E.2d 359 (1979).

**Jury consideration of delay in reporting alleged rape.** — Delay in reporting an alleged rape is one circumstance that the jury must consider in determining the credibility of the prosecutrix. That delay may be explained, however, with the decision on credibility left to the jury. *Watson v. State*, 235 Ga. 461, 219 S.E.2d 763 (1975).

**If there is substantial step toward rape**, crime would become attempted

rape. *Bissell v. State*, 153 Ga. App. 564, 266 S.E.2d 238 (1980).

**Assault, or assault and battery, is necessarily involved in every case of rape.** *Hardy v. State*, 159 Ga. App. 854, 285 S.E.2d 547 (1981).

**Construed with O.C.G.A. § 16-5-23.** — Offense of rape necessarily includes contact of insulting or provoking nature under O.C.G.A. § 16-5-23. *Hardy v. State*, 159 Ga. App. 854, 285 S.E.2d 547 (1981).

**Construction with O.C.G.A. § 42-1-12.** — O.C.G.A. § 42-1-12(a)(7) clearly provides that convictions for rape and crimes relating to rape require registration as a sex offender, and the statute is not unconstitutionally vague. *Jenkins v. State*, 284 Ga. 642, 670 S.E.2d 425 (2008).

**Adultery is not included in offense of rape.** *Hill v. State*, 183 Ga. App. 404, 359 S.E.2d 190 (1987).

**Rape and incestuous adultery are different** in nature of wrong done and in facts constituting them. Neither includes the other, and the defendant may be convicted of either, with or without allegation of proof of some fact essential to the other. *Mosley v. State*, 65 Ga. App. 800, 16 S.E.2d 504 (1941).

Carnal knowledge of the female is a fact common to both rape and incestuous adultery. If it is with force and against her will the crime is rape, whether the female be under or over the age of consent and whether she be the defendant's daughter or not. The fact that she is his daughter is immaterial. If she is his daughter and under the age of consent, and the force, if any, used by the defendant was mere authority or influence, the crime is incestuous adultery, and the fact that the force used cannot be said to be that violence which constitutes rape is immaterial. *Mosley v. State*, 65 Ga. App. 800, 16 S.E.2d 504 (1941).

**Included offenses.** — Neither rape nor incest is included in the other as a matter of law. *Kirby v. State*, 187 Ga. App. 88, 369 S.E.2d 274 (1988).

**Denial of defendant's motion for a directed verdict of acquittal** was proper where defendant's argument that the DNA also matched 500 to 1000 others and where the sufficiency of the corroboration of an accomplice's testimony were

jury questions. *Robinson v. State*, 259 Ga. App. 555, 578 S.E.2d 214 (2003).

**Denial of severance upheld where similar modus operandi between crimes.** — When a rape and a rape and kidnapping charge were tried jointly, the evidence showed a similar modus operandi, and there was no abuse of the trial court's discretion in denying defendant's motion for severance of the offenses. *Davis v. State*, 180 Ga. App. 190, 348 S.E.2d 730 (1986).

**Evidentiary effect of defendant's statement admitting intercourse.** — When in a rape case the accused makes a statement which admits the intercourse but falls short of admitting that the intercourse was accomplished by means of force and against the will of the victim or prosecutrix, the statement is insufficient to amount to a confession of rape since force is an essential element of the crime of rape. *Jackson v. State*, 225 Ga. 553, 170 S.E.2d 281 (1969).

**Conspiracy.** — When the defendant admits intercourse, and the statement in question clearly makes out a case of conspiracy between the defendant and other individuals charged with the same crime; and when, from all reasonable inferences and deductions which may be drawn from the statement it is apparent that all the participants in the crime were exercising and using force or threats of force upon the victim, the defendant, being a participant in the conspiracy, is equally chargeable under the facts related in the statement with the force exerted upon the victim by means of threats of violence and bodily harm visited upon her by his coconspirators even though he himself may not have admitted in his statement to have personally exerted any such force and violence upon the victim. *Jackson v. State*, 225 Ga. 553, 170 S.E.2d 281 (1969).

**Conviction for multiple offenses.** — Evidence authorized the jury to find that more than one instance of sexual intercourse with the victim occurred, permitting conviction for each offense (rape and incest) based on separate occasions. *Kirby v. State*, 187 Ga. App. 88, 369 S.E.2d 274 (1988).

**Cited** in *Bearden v. State*, 122 Ga. App. 25, 176 S.E.2d 243 (1970); *Holland v.*

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State, 127 Ga. App. 145, 193 S.E.2d 56 (1972); Farmer v. Caldwell, 476 F.2d 22 (5th Cir. 1973); Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974); Lowe v. State, 133 Ga. App. 420, 210 S.E.2d 869 (1974); Core v. State, 238 Ga. 448, 233 S.E.2d 200 (1977); Printup v. State, 142 Ga. App. 42, 234 S.E.2d 840 (1977); Eberheart v. State, 239 Ga. 407, 238 S.E.2d 1 (1977); Hooks v. State, 239 Ga. 408, 238 S.E.2d 1 (1977); Johns v. State, 239 Ga. 681, 238 S.E.2d 372 (1977); Coker v. State, 239 Ga. 408, 238 S.E.2d 690 (1977); Waye v. State, 239 Ga. 871, 238 S.E.2d 923 (1977); Holland v. State, 143 Ga. App. 817, 240 S.E.2d 161 (1977); Haney v. State, 144 Ga. App. 885, 242 S.E.2d 757 (1978); Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978); Lamar v. State, 243 Ga. 401, 254 S.E.2d 353 (1979); Tucker v. State, 243 Ga. 683, 256 S.E.2d 365 (1979); Powers v. State, 150 Ga. App. 25, 256 S.E.2d 637 (1979); Groves v. State, 152 Ga. App. 606, 263 S.E.2d 501 (1979); Clark v. State, 152 Ga. App. 627, 263 S.E.2d 512 (1979); Mathis v. State, 153 Ga. App. 587, 266 S.E.2d 275 (1980); Hudson v. State, 157 Ga. App. 71, 276 S.E.2d 122 (1981); Miller v. State, 162 Ga. App. 730, 292 S.E.2d 102 (1982); Rozier v. State, 165 Ga. App. 178, 300 S.E.2d 194 (1983); Green v. State, 165 Ga. App. 205, 300 S.E.2d 208 (1983); Jones v. State, 169 Ga. App. 4, 311 S.E.2d 485 (1983); Shepherd v. State, 173 Ga. App. 499, 326 S.E.2d 596 (1985); Yeck v. State, 174 Ga. App. 710, 331 S.E.2d 76 (1985); Gilbert v. State, 176 Ga. App. 561, 336 S.E.2d 828 (1985); Milner v. State, 180 Ga. App. 97, 348 S.E.2d 509 (1986); Ford v. State, 180 Ga. App. 807, 350 S.E.2d 816 (1986); Gunder v. State, 183 Ga. App. 122, 358 S.E.2d 284 (1987); Daniel v. State, 200 Ga. App. 79, 406 S.E.2d 806 (1991); Green v. State, 249 Ga. App. 546, 547 S.E.2d 569 (2001); Moore v. State, 261 Ga. App. 752, 583 S.E.2d 588 (2003); Dawson v. State, 260 Ga. App. 824, 581 S.E.2d 371 (2003); State v. Scott, 265 Ga. App. 387, 593 S.E.2d 923 (2004); Brown v. State, 280 Ga. App. 767, 634 S.E.2d 875 (2006); Melton v. State, 282 Ga. App. 685, 639 S.E.2d 411 (2006); Rivera v. State, 282 Ga. 355, 647 S.E.2d 70 (2007); Hyde v. State, 291 Ga.

App. 662, 662 S.E.2d 764 (2008); Jennings v. State, 292 Ga. App. 149, 664 S.E.2d 248 (2008); Greene v. State, 295 Ga. App. 803, 673 S.E.2d 292 (2009); Green v. Nelson, 595 F.3d 1245 (11th Cir. 2010).

**Merger and Other Offenses**

**Burglary and rape not included offenses.**—Jury's verdicts of acquittal for a burglary charge and conviction for a rape charge were not inconsistent or repugnant, since a verdict of acquittal upon a burglary charge does not necessarily include a finding against a fact essential for a rape conviction. Smith v. State, 173 Ga. App. 625, 327 S.E.2d 584 (1985).

**Conviction for cruelty to children did not merge with the rape conviction** since the evidence supporting the rape conviction was not the same evidence that supported the cruelty to children conviction. Brown v. State, 190 Ga. App. 678, 379 S.E.2d 598, cert. denied, 190 Ga. App. 897, 379 S.E.2d 598 (1989).

Lesser offense of cruelty to children did not merge into the greater offenses of rape and aggravated child molestation, where the facts that the victim was threatened and terrorized, that she screamed in pain, and that she continued to experience pain and discomfort and would suffer from the venereal diseases she contracted from defendant forever were not needed to prove the elements of rape and aggravated child molestation. Ranalli v. State, 197 Ga. App. 360, 398 S.E.2d 420 (1990).

Crimes of rape and cruelty to children did not merge as a matter of fact, as they constituted separate offenses and proof of separate elements; therefore, because the offenses did not merge, defendant was not punished twice for the same conduct. Currlington v. State, 270 Ga. App. 381, 606 S.E.2d 619 (2004).

Defendant's convictions for rape and cruelty to a child did not merge for sentencing purposes, as additional evidence, beyond that necessary to prove rape, existed, specifically, that the rapes caused the victim cruel and excessive physical and mental pain; moreover, after the rapes, the victim was upset, fearful, did not feel safe at home, and cried repeatedly when recounting the episodes to a conse-

lor. Barber v. State, 283 Ga. App. 129, 640 S.E.2d 696 (2006).

Trial court did not err in declining to merge the defendant's convictions of cruelty to a child and rape for purposes of sentencing because each required proof of a fact that the other did not; specifically, the offense of cruelty to a child required, among other things, a showing that the defendant maliciously caused cruel or excessive mental pain to a child while the offense of rape required, among other things, a showing that the defendant had carnal knowledge of the victim forcibly and against her will. Pendley v. State, No. A10A2301, 2011 Ga. App. LEXIS 283 (Mar. 25, 2011).

**False imprisonment convictions and rape convictions did not merge,** where a rational trier of fact could reasonably have concluded from the evidence that the confinement and detention of the victim far exceeded that which was immediately associated with the acts of sexual intercourse. Moua v. State, 200 Ga. App. 49, 406 S.E.2d 557 (1991).

**Proof of rape and kidnapping with bodily injury.** — Separate offenses of rape and kidnapping with bodily injury were shown where the evidence used to prove the kidnapping was the asportation of the victim from one room to another and bruises she suffered in her struggle with defendant before the subsequent intercourse which supported the rape charge. Roberson v. State, 219 Ga. App. 160, 464 S.E.2d 262 (1995).

**When lesser offenses should be included in charge in rape case.** — In all cases where defendant is charged with rape, and where evidence under any view thereof would authorize conviction for lesser offense necessarily involved in graver charge, the jury should be instructed that he may be convicted of the lesser offense. Where all evidence shows either completed offense as charged, or no offense, such evidence will not support verdict for one of the lesser grades of the offense, and court should not charge on lesser grades. Hardy v. State, 159 Ga. App. 854, 285 S.E.2d 547 (1981).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 in failing to

argue at trial and on appeal that the inmate's statutory rape and incest convictions should have merged into the inmate's rape conviction as a matter of fact since all of the crimes arose out of the same incident, as the crimes of statutory rape and incest were not established by proof of the same or less than all the facts required to establish the crime of rape; the inmate's convictions of statutory rape under O.C.G.A. § 16-6-3 and incest under O.C.G.A. § 16-6-22 were not included pursuant to O.C.G.A. § 16-1-6(1) in the rape conviction under O.C.G.A. § 16-6-1, as statutory rape, which required evidence as to the victim's age and that the victim was not the inmate's spouse, and incest, which required proof of the victim's relation to the inmate, had elements not required for rape. Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006).

**Guilty verdict on rape charge is inconsistent with not guilty verdict on aggravated assault charge.** Martin v. State, 157 Ga. App. 304, 277 S.E.2d 300, cert. denied, 454 U.S. 833, 102 S. Ct. 133, 70 L. Ed. 2d 112 (1981).

**Statutory rape not lesser included offense of forcible rape.** — Since statutory rape requires proof of an element — age — that forcible rape does not, it cannot be a lesser included offense of forcible rape. Hill v. State, 246 Ga. 402, 271 S.E.2d 802 (1980), cert. denied, 451 U.S. 923, 101 S. Ct. 2001, 68 L. Ed. 2d 313 (1981).

**Sexual battery as lesser included offense.** — As the defendant agreed at the charge conference, under the facts of the case, no evidence supported a charge on sexual battery as a lesser included offense of rape; the evidence concerning the rape was obviously conflicting as the first victim testified that the defendant raped the victim but the defendant testified that the defendant did nothing wrong, thus a lesser included offense charge was not warranted. Quenga v. State, 270 Ga. App. 141, 605 S.E.2d 860 (2004).

**Statutory rape count merged into rape count.** — Where evidence showed that offense of statutory rape as alleged was included in the offense of rape as alleged, the statutory rape count merged into the rape count. Wofford v. State, 226 Ga. App. 487, 486 S.E.2d 697 (1997).

**Merger and Other Offenses (Cont'd)**

**Rape, aggravated sodomy, and child molestation.** — Jury's verdict of not guilty of rape was not repugnant to and inconsistent with the verdicts of guilty for aggravated sodomy and child molestation. The elements of each of the three crimes charged are different, and the conduct related to each, as evidenced in this case, was also different, distinct, and separate. Hill v. State, 183 Ga. App. 654, 360 S.E.2d 4 (1987).

**Double jeopardy not involved in rape and child molestation verdicts.**

— Double jeopardy was not involved by a jury verdict finding the defendant guilty of rape and child molestation based on the same conduct where the trial court merged the two counts and entered a judgment of conviction and a sentence only on the rape count. Mackey v. State, 235 Ga. App. 209, 509 S.E.2d 68 (1998).

**Conviction of aggravated assault.**

— When, after completing the act of forcible intercourse (rape), defendant drew his gun again, pulled back the hammer, and threatened to shoot both victims if they did not obey his further commands, this second drawing of the deadly weapon was subsequent to, and separate from, the completed offense of rape against the first victim; thus, the evidence regarding the use of force during the incident was not "used up" in the offense of rape, and defendant could properly be convicted of aggravated assault. Ellis v. State, 181 Ga. App. 826, 354 S.E.2d 15 (1987).

**When defendant was guilty of rape and armed robbery.** — When the evidence in a rape, robbery, and murder case showed that the defendant took some \$480.00 from the victim at gunpoint; a gynecologist testified that he found motile sperm in the victim's vagina and cervix, and lacerations indicating forced sexual intercourse; and when the defendant admitted having intercourse with the victim but claimed she consented, the defendant was properly found guilty of rape and armed robbery by the jury as the jury was authorized to do so beyond a reasonable doubt. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980).

**Statutory rape established as factually included offense.** — Defendant was properly convicted of statutory rape, even though the indictment only charged the defendant with forcible rape. While statutory rape was not included, as a matter of law, within the offense of forcible rape, the facts alleged in the indictment—that the defendant had sexual intercourse with a victim under 16—and the evidence presented at trial to establish the charged offense were sufficient to establish the lesser offense. Hill v. State, 295 Ga. App. 360, 671 S.E.2d 853 (2008).

**Child molestation and incest do not merge.** — Defendant's child molestation in violation of O.C.G.A. § 16-6-4, rape in violation of O.C.G.A. § 16-6-1, and incest in violation of O.C.G.A. § 16-6-22 charges did not merge as a matter of law or fact because they were separate legal offenses and because the victim's testimony and other evidence showed that the victim suffered well over two separate acts of sexual intercourse and additional instances involving oral and anal sex with the defendant. Allen v. State, 281 Ga. App. 294, 635 S.E.2d 884 (2006).

**Kidnapping, aggravated assault and rape did not merge.** — Kidnapping, aggravated assault, and rape were separate offenses, completed individually, and did not merge as a matter of fact; thus, the trial court did not err in refusing to merge the kidnapping counts into the aggravated assault and rape counts for purposes of sentencing. Dasher v. State, 281 Ga. App. 326, 636 S.E.2d 83 (2006).

**No merger of aggravated assault with rape.** — Defendant's conviction for aggravated assault with intent to rape did not merge into the defendant's rape conviction as the defendant's fondling the victim while threatening to kill the victim were separate and distinct acts of force and intimidation beyond that necessary to accomplish the rape. Williams v. State, 295 Ga. App. 9, 670 S.E.2d 828 (2008).

**Aggravated assault merged with rape.** — Because the requirement under the rape statute, O.C.G.A. § 16-6-1, that defendant have forcible carnal knowledge of the victim against the victim's will was not a fact required under the aggravated assault statute, O.C.G.A. § 16-5-21, the

aggravated assault with intent to rape charge merged with the rape charge; therefore, the trial court erred in sentencing defendant separately for aggravated assault. *Johnson v. State*, 298 Ga. App. 639, 680 S.E.2d 675 (2009).

**Trial court did not err in refusing to merge a kidnapping charge** into a rape charge when the evidence authorized the jury to find that defendant, armed with a pistol, forced his way into the victim's car and drove off with the victim to a secluded area where he raped and beat her and moved to another location and again raped and abused the victim and then drove away with her car and the property in the car, leaving the naked victim behind. *Clark v. State*, 166 Ga. App. 366, 304 S.E.2d 494 (1983).

**No merger with sexual battery.** — Since the evidence established that both sexual battery and rape occurred, and evidence of neither offense was necessary to prove the other, there was no merger, and the trial court did not err in sentencing defendant for both convictions. *Trotter v. State*, 248 Ga. App. 156, 546 S.E.2d 286 (2001).

**Merger of rape and aggravated child molestation.** — Trial court erred in failing to merge the defendant's rape and aggravated child molestation counts at sentencing; accordingly, although the state properly prosecuted the defendant for both offenses, the trial court should have only convicted and sentenced the defendant for the rape. Defendant's separate conviction and sentence for aggravated child molestation was to be vacated. *Lay v. State*, 264 Ga. App. 483, 591 S.E.2d 427 (2003).

**Merger of child molestation and statutory rape.** — Trial court did not err in refusing to merge a child molestation count with a statutory rape count because the evidence showed that the defendant had sexual intercourse with the victim on multiple occasions, and since the victim reported at least two separate acts of sexual intercourse, it could not be said that the convictions were based on the same conduct; therefore, a conviction and sentence could be authorized on both the child molestation charge and the statutory rape charge. *Wilder v. State*, 304 Ga.

App. 891, 698 S.E.2d 374 (2010).

**Merger of rape and incest.** — Contrary to the defendant's argument, the trial court did not err in failing to merge a conviction for incest, O.C.G.A. § 16-6-22, in one count into a conviction for rape, O.C.G.A. § 16-6-1, in another count, despite the fact that both counts were based on the same act of sexual intercourse because the defendant's conduct established the commission of more than one crime; to establish the crime of rape, the state proved that the defendant had carnal knowledge of the victim, forcibly and against the victim's will, but to establish incest, it was also necessary to prove that the victim had a certain relation to the defendant. Thus, incest was not established by proof of the same or less than all the facts required to establish proof of rape. *Dew v. State*, 292 Ga. App. 631, 665 S.E.2d 715 (2008).

#### Jury Instructions

**Court is authorized to charge that female under 14 cannot consent** when the indictment contains no allegation as to age. *McFall v. State*, 235 Ga. 105, 218 S.E.2d 839 (1975), cert. denied, 424 U.S. 969, 96 S. Ct. 1468, 47 L. Ed. 2d 737 (1976).

**Charge to jury on rape and child molestation.** — When the defendant was on trial for the rape of a 13-year-old female, it was correct for the trial court to have charged the jury to first consider whether the defendant was guilty of rape and to consider his guilt or innocence of child molestation only if the jury found him not guilty of rape. *Lamar v. State*, 243 Ga. 401, 254 S.E.2d 353, appeal dismissed, 444 U.S. 803, 100 S. Ct. 23, 62 L. Ed. 2d 16 (1979).

**Continuing circumstances involving force.** — When the trial court charged the jury: "If the actual sexual intercourse took place or occurred in a continuing state of circumstances involving force or threats of bodily harm sufficient to create force and the male actually had intercourse with the female in that set of circumstances and he as a reasonable person knew of this ongoing situation and as an or as a reasonable person should have known of the ongoing situ-

**Jury Instructions (Cont'd)**

tion and the force or threats of force involved he would be chargeable with the use of force," and defendant contended the state was thereby relieved of the state's absolute burden of persuasion as to the essential element of force, it was held that the portion of the charge at issue did not create a conclusive and mandatory presumption which would relieve the state of the burden of persuasion on the element of force as contended by the defendant, since when considering this excerpt, the charge as a whole had to be considered. Williamson v. State, 186 Ga. App. 589, 367 S.E.2d 863 (1988).

**Refusal of lesser charge of child molestation held reversible error.** — Trial court committed reversible error by refusing to give defendant's request to charge the lesser offense of child molestation, where although the evidence was sufficient to support a conviction for rape, a rational trier of fact could have found that defendant was not guilty of rape but guilty of the lesser offense. Parker v. State, 256 Ga. 543, 350 S.E.2d 570 (1986), cert. denied, 480 U.S. 940, 107 S. Ct. 1592, 94 L. Ed. 2d 781 (1987).

**Charge as to state's burden of proof.** — Trial court correctly charged the jury as to the rape count of the indictment and its lesser included offenses of statutory rape and sexual battery and properly instructed the jury as to the state's burden to prove the defendant's guilt beyond a reasonable doubt, substantially in accordance with the pattern charge because there was no objectionable summary of the reasonable doubt standard as an honest belief, and while the best practice would not have been to employ the word "believe" in the court's charge, the trial court did not improperly summarize the burden of proof or otherwise confuse the jury in doing so; the trial court made no attempt to summarize the court's reasonable doubt charge as an honestly held belief or to otherwise explain it, and twice after giving the charge, the trial court made reference to the court's reasonable doubt charge as initially given by instructing the jury that the jury could convict the defendant of rape and child molestation if

the jury believed beyond a reasonable doubt that the defendant was guilty thereof. Alexander v. State, 308 Ga. App. 245, 707 S.E.2d 156 (2011).

**Erroneous charge.** — Charge which permitted the jury to find the defendant guilty of forcible rape pursuant to former Code 1933, § 26-2001 (see O.C.G.A. § 16-6-1), under a definition of statutory rape pursuant to former Code 1933, § 26-2018 (see O.C.G.A. § 16-6-3) and to impose a sentence of life imprisonment which could not be imposed for statutory rape was error. Robinson v. State, 232 Ga. 123, 205 S.E.2d 210 (1974).

It was erroneous to charge on child molestation as lesser included offense when indictment does not allege that the victim is under the age of sixteen. Heggs v. State, 246 Ga. App. 354, 540 S.E.2d 643 (2000).

**Charge which failed to define the elements of rape,** and which was compounded by gratuitous references to irrelevant matters such as whether "an actual theft occurred" and "criminal negligence," was substantially in error, was harmful as a matter of law, and deprived defendant of his right to a fair trial. Phelps v. State, 192 Ga. App. 193, 384 S.E.2d 260 (1989).

**Refusal to give a requested charge** that "in all cases there exists the presumption that no crime has been committed," is not error when the victim's testimony, if believed by the jury, was sufficient direct evidence to establish a corpus for the offenses of rape, burglary, and aggravated sodomy alleged, and the trial court charged the jury the general charge on the presumption of innocence. Smith v. State, 180 Ga. App. 422, 349 S.E.2d 279 (1986).

**No objection when defendant requested instruction.** — Trial court did not err by convicting defendant of statutory rape though the indictment cited only rape as defendant requested the statutory rape charge and, therefore, could not complain of a purported error that defendant created. Freeman v. State, 291 Ga. App. 651, 662 S.E.2d 750 (2008).

**Right to limiting instructions as to testimony on psychological effect on victim waived.** — Trial court did not err by failing to give curative or limiting in-

strictions to the jury concerning testimony by the victim of the psychological effect of the offense between the time of the offense and trial since there was no objection during this testimony, and defendant's counsel proceeded through cross-examination of the victim, an out-of-court evidentiary hearing, and a recess at the conclusion of the victim's testimony before raising an objection to the testimony of the victim as to the psychological effect this incident had upon her. By failing to object contemporaneously with the testimony, and by proceeding to cross-examine the witness, trial counsel waived the error. *Smith v. State*, 180 Ga. App. 422, 349 S.E.2d 279 (1986).

**Withdrawn charge request properly not honored.** — Trial court did not err by failing to charge the jury that child molestation was a lesser included offense of rape since defendant subsequently withdrew his written request for such a charge. *Brady v. State*, 206 Ga. App. 497, 426 S.E.2d 15 (1992).

**"Against the will" element was proper.** — Even though defendant's indictment on rape charges under O.C.G.A. § 16-6-1 failed to allege the victim's age, because the evidence clearly showed that the victim was under 16, the evidence removed the state's requirement to prove that the rape was against the victim's will. *Taylor v. State*, 264 Ga. App. 665, 592 S.E.2d 148 (2003).

**Victim's capacity to consent.** — Trial court's order limiting the defendant's recross-examination and the trial court's charge to the jury on the victim's capacity to consent did not warrant reversal of the defendant's rape conviction, as: (1) the information elicited by the defendant's counsel on recross would have been cumulative of evidence already received; and (2) the Court of Appeals of Georgia had previously upheld a similar charge with identical language to the charge given herein. *Hopson v. State*, 281 Ga. App. 520, 636 S.E.2d 702 (2006).

With regard to a defendant's convictions for rape, two counts of kidnapping, three counts of child molestation, and aggravated assault, because the evidence of the defendant's guilt in the rape of one minor victim was overwhelming, and because

the defendant's defense of mistaken identity did not place the element of force at issue, the trial court's erroneous jury instruction that provided that sexual acts directed towards children were presumed under the law to be forcible and against the will of the child was harmless. *Stover v. State*, 293 Ga. App. 210, 666 S.E.2d 602 (2008).

#### **Good character charge erroneous.**

— In a prosecution for rape, a good character charge was erroneous as: 1) the charge failed to inform the jury that the defendant's good character was a substantive fact, and that evidence of good character had to be considered in connection with all other evidence; and 2) the charge failed to instruct the jury that good character in and of itself could be sufficient to create a reasonable doubt as to guilt. *Hobbs v. State*, 299 Ga. App. 521, 682 S.E.2d 697 (2009).

#### **Sufficiency of Evidence**

**Proof of force.** — Defendant's threat to the nine year old victim that she "would get a spanking" if she told anybody was sufficient to prove force in a prosecution for rape. *Johnson v. State*, 216 Ga. App. 858, 456 S.E.2d 251 (1995).

Victim's testimony that when she was 13, defendant forced his penis inside her vagina against her will was sufficient to support rape conviction. *Edmonson v. State*, 219 Ga. App. 323, 464 S.E.2d 839 (1995), overruled on other grounds, *Collins v. State*, 229 Ga. App. 658, 495 S.E.2d 59 (1997).

Victim's testimony that defendant started exploiting her sexually when she was under five years old, and that she did not tell her mother because she was afraid of what defendant might do, and that defendant told her that if she told anyone, she and her mother would be out on the street was sufficient to show force required to support forcible rape conviction. *Gibbins v. State*, 229 Ga. App. 896, 495 S.E.2d 46 (1998).

Rational trier of fact could reasonably have found that the defendant had forcible sexual intercourse with the victim where the ten-year-old victim testified that she did not want the defendant to put his penis in her vagina and that she did

**Sufficiency of Evidence (Cont'd)**

not ask him to do it and, further, that she had to ask him to stop more than once before he stopped. *Casey v. State*, 237 Ga. App. 461, 515 S.E.2d 429 (1999).

Victim's statement that she was aware that defendant had previously "stuck a dude in the neck with a screwdriver" was relevant and material to one of the required elements of rape and the fact that it may have incidentally placed defendant's character in issue did not make it inadmissible. *Johnson v. State*, 238 Ga. App. 677, 520 S.E.2d 221 (1999).

Evidence was sufficient to support the charge that defendant had carnal knowledge of the victim forcibly under O.C.G.A. § 16-6-1(a)(1) since the victim testified that defendant threatened to whip the victim if the victim told anyone; thus, the victim's lack of resistance was induced by fear amounting to force. *Jenkins v. State*, 259 Ga. App. 87, 576 S.E.2d 68 (2003).

Contrary to defendant's argument, the state adequately proved the element of force required to convict defendant of rape under O.C.G.A. § 16-6-1(a), where the victim, defendant's foster child, who was five years old at the time of the crime, testified that defendant penetrated the child, which hurt the child, and that the child did not tell the child's secret because defendant told the child that if the child did, the child would not see the child's family again. *Pollard v. State*, 260 Ga. App. 540, 580 S.E.2d 337 (2003).

Sufficient evidence of force supported the rape conviction under O.C.G.A. § 16-6-1(a)(1); there was evidence that defendant told the child that the child would be spanked or punished if the child told anyone about the sexual offenses, the child was physically punished when the child's sibling reported the sexual abuse, and the child testified that the child was made to have sex with the parent and that defendant ordered the child to take the child's clothes off. *Zepp v. State*, 276 Ga. App. 466, 623 S.E.2d 569 (2005), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Trial court properly denied the defendant's motion for a directed verdict of acquittal, and the defendant's rape convic-

tion was upheld on appeal, given the victim's testimony at trial that the defendant's sexual organ penetrated the victim's after telling the defendant to stop was sufficient in and of itself, and no evidence was presented that directly contradicted this statement; hence, the jury had the right to accept the victim's testimony depicting non-consensual, forcible intercourse, as satisfying the requirements of O.C.G.A. § 16-6-1. *Scott v. State*, 281 Ga. App. 106, 635 S.E.2d 582 (2006).

There was sufficient evidence to convict the defendant of rape under O.C.G.A. § 16-6-1(a)(1); the victim was age 12 at the time and was unable to give legal consent, and the victim's testimony about the victim's fear of the defendant and the pain the victim felt during the rape constituted force sufficient to convict the defendant of rape. *Hutchens v. State*, 281 Ga. App. 610, 636 S.E.2d 773 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

At trial, when the victim testified that the defendant held a gun to the victim's head and forced the victim to have sex with the defendant against the victim's will, such testimony was sufficient, in and of itself, to sustain the defendant's conviction of rape. *Harris v. State*, 283 Ga. App. 374, 641 S.E.2d 619 (2007).

Sufficient evidence existed to establish that an act was committed forcibly against defendant's step-daughter by him based on the child's testimony that defendant would take off the child's clothes, that it felt nasty when defendant was touching her, and that the child did not immediately tell the mother about defendant's acts because the child did not want to be hurt; additional testimony included the child stating that she ran away from home once to avoid defendant's actions and, during an interview with a social worker, the child pointed to scars and marks on the child's body caused by defendant. *Stroud v. State*, 284 Ga. App. 604, 644 S.E.2d 467 (2007), cert. denied, 2007 Ga. LEXIS 506 (Ga. 2007).

Trial court did not err by denying a defendant's motion for a directed verdict of acquittal on a rape charge as the victim testified that the first time the victim had intercourse with the defendant, the defen-

dant grabbed the victim's hands and threw the victim on the couch; that the victim was scared and crying; and that the defendant warned the victim that the victim would be run out of the apartment if the victim told a parent. Such evidence was sufficient to prove the element of force necessary to support the rape conviction. *Mora v. State*, 295 Ga. App. 641, 673 S.E.2d 23 (2009).

Conviction of rape, O.C.G.A. § 16-6-1(a)(1), was supported by sufficient evidence because the victim, the defendant's daughter, specifically testified that the defendant forced the daughter to have sex with the defendant against the daughter's will, which testimony, although conclusory, sufficed to show the element of force; the state also proved force by circumstantial evidence by establishing that, for four years, the defendant had forced the daughter to suffer multiple acts of child molestation, despite the daughter's demands that the defendant stop and despite the daughter's repeated efforts to pull or get away from the defendant. When the daughter finally told the daughter's mother of the abuse, the mother disbelieved the daughter and accused the daughter of lying, and, since the victim's outcry regarding the prior molestation was ignored, the jury was authorized to find that, from the victim's perspective, resistance in a subsequent incident would have been futile. *Bradberry v. State*, 297 Ga. App. 679, 678 S.E.2d 131 (2009).

Evidence was more than sufficient to authorize a jury's verdict that the defendant was guilty beyond a reasonable doubt of rape because the victim's testimony that "it hurt" when the defendant pushed his penis in her vagina and that he threatened to put her family out of his house if she told her parents or if she refused sexual contact was more than sufficient evidence of force; the jury was authorized to consider that the victim failed to initially disclose the incidents because she was fearful of the defendant and that the defendant yelled at the victim when she moved during intercourse as additional evidence of his forcible acts, and the victim's testimony, together with her immediate and consistent outcry to her father, law enforcement, and an emer-

gency room pediatrician, provided the jury with ample evidence of penetration. *Matlock v. State*, 302 Ga. App. 173, 690 S.E.2d 489 (2010).

State was not required to prove that a rape victim was physically injured in order to establish that sex with a defendant was forcible and nonconsensual in violation of O.C.G.A. § 16-6-1(a)(1). The victim's testimony about the forcible nature of the defendant's conduct was sufficient, and the victim made an immediate outcry. *Watson v. State*, 304 Ga. App. 128, 695 S.E.2d 416 (2010).

State properly showed the elements of force and lack of consent in prosecuting a defendant for the repeated rape of the defendant's daughter under O.C.G.A. § 16-6-1(a) by demonstrating that the victim had initially resisted, that the defendant had threatened the victim and made the victim financially dependent, and that an earlier outcry had resulted in dismissed charges. *Williams v. State*, 304 Ga. App. 592, 696 S.E.2d 512 (2010).

**Substantial degree of violence and vigorous resistance not required.** — Even though the act was not accompanied by an overwhelming show of force, nor by a substantial degree of violence or resisted by the victim vigorously with great outcry, the juvenile court was warranted in finding defendant guilty of rape beyond a reasonable doubt. *J.B. v. State*, 171 Ga. App. 373, 319 S.E.2d 465 (1984).

**Circumstantial evidence of intent.** — When a defendant was charged with assault with intent to commit rape but did not actually have carnal knowledge of the victim as defined by O.C.G.A. § 16-6-1 there was evidence, although circumstantial insofar as intent is concerned, sufficient to establish that the defendant assaulted the victim with intent to commit rape. *Butler v. State*, 194 Ga. App. 895, 392 S.E.2d 324 (1990).

**Acquittal for aggravated assault not inconsistent.** — When the jury found that defendant raped the victim, but was unable to find that he committed aggravated assault, there was no inconsistency in the verdict. *Cowart v. State*, 177 Ga. App. 107, 338 S.E.2d 534 (1985).

Defendant's rape conviction was proper, even though defendant was acquitted of

**Sufficiency of Evidence (Cont'd)**

kidnapping with bodily injury, false imprisonment, and aggravated assault, as Georgia did not recognize the inconsistent verdict rule; further, the convictions were not necessarily inconsistent as the jury could have found that defendant raped the victim, but did not commit the other crimes. Stevenson v. State, 272 Ga. App. 335, 612 S.E.2d 521 (2005).

**Victim's prior treatment for drug and alcohol abuse held irrelevant.** — Although defendant asserted that a logical connection exists between prior treatment for alcohol and drug abuse and present ability to remember whether one consented to have sex, the trial court correctly ruled that the victim's previous treatment for alcohol and drug abuse was absolutely irrelevant to the issue of consent. Kennard v. State, 180 Ga. App. 522, 349 S.E.2d 470 (1986).

**Evidence of similar prior offense held admissible.** — Trial court did not err in admitting evidence of a prior rape which the defendant had committed some nine years earlier since there were striking similarities between the prior offense and the offense for which the defendant was on trial. In both instances, the defendant had beaten and sexually assaulted an elderly black woman in her home at night, after gaining access to the home through a window and then finding his way to the bedroom by lighting matches. Hall v. State, 180 Ga. App. 366, 349 S.E.2d 255 (1986).

Defendant was charged with raping a mentally retarded 27-year-old. Evidence that two years earlier the defendant was convicted of taking indecent liberties with an eight- and an 11-year-old child was properly admitted as the evidence was probative to show the defendant's lustful disposition toward persons of limited mental capacity, and the evidence's relevance outweighed any prejudice. Kent v. State, 294 Ga. App. 134, 668 S.E.2d 442 (2008).

**Evidence of similar offense admissible to show bent of mind.** — When there was no question as to whether the defendant was the perpetrator of the similar offense and the modus operandi of the

defendant was the same, evidence of the similar offense was admissible to show the defendant's bent of mind to commit rape if his victims resisted his advances. Davis v. State, 180 Ga. App. 190, 348 S.E.2d 730 (1986).

**Evidence of independent crimes inadmissible when no relation to offense charged.** — In a trial for rape in 1985, when there was no similarity between the rapes in 1973 and the offense charged, and no logical connection between the prior offenses and the offense charged, the evidence of prior offenses was not admissible as an exception to the general rule that evidence of independent crimes is inadmissible at the trial of the crime charged. Wimberly v. State, 180 Ga. App. 148, 348 S.E.2d 692 (1986).

**Evidence of two prior rapes held erroneous when consent was the only issue.** — When the only issue was whether the act of sexual intercourse was with or without the consent of the prosecutrix, and malice, intent, motive, etc., were not relevant, considering the sharp conflict in the testimony, the admission of the evidence of the two prior rapes was harmful error. Wimberly v. State, 180 Ga. App. 148, 348 S.E.2d 692 (1986).

**DNA evidence properly admitted.** — In a prosecution for rape and other crimes, DNA evidence was properly admitted as detectives testified that buccal swabs were obtained from the defendant only after the defendant consented to give a DNA sample and waived in writing the defendant's Miranda rights. Sanders v. State, 297 Ga. App. 897, 678 S.E.2d 579 (2009).

**Test of victim's reaction to knife held irrelevant.** — When, while interviewing the victim, the sheriff, suddenly and without any warning, intentionally removed a knife from the sheriff's pocket and opened it in front of her and the sheriff described the victim's reaction for the jury as "almost hysterics ... she screamed, she cried, she threw up her hands; she tried to get away from me. There was a tremendous reaction," it was held that the "state of mind" of the victim was that externally induced by the actions of the testifying witness at some remote point following the incident in question, it

was not a part of the continuation of the main transaction and was not relevant to elucidate it, and it was, therefore, error to admit the sheriff's testimony. *Kennard v. State*, 180 Ga. App. 522, 349 S.E.2d 470 (1986).

**Slight penetration sufficient.** — Penetration of the female sexual organ by the sexual organ of the male which is necessary to constitute rape need be only slight. It is not necessary that the vagina shall be entered or the hymen ruptured; the entering of the anterior of the organ, known as the vulva or labia, is sufficient. *Hall v. State*, 29 Ga. App. 383, 115 S.E. 278 (1923); *Lee v. State*, 197 Ga. 123, 28 S.E.2d 465 (1943); *Addison v. State*, 198 Ga. 249, 31 S.E.2d 393 (1944); *Long v. State*, 84 Ga. App. 638, 66 S.E.2d 837 (1951); *Payne v. State*, 231 Ga. 755, 204 S.E.2d 128 (1974); *Jackson v. State*, 157 Ga. App. 604, 278 S.E.2d 5 (1981).

**Insufficient evidence of penetration.** — Defendant's conviction for rape was reversed where, although there was evidence that injuries to the victim's vagina were consistent with insertion of a wedge-shaped object, the evidence did not show that the victim's vagina was penetrated by a male sex organ. *Newton v. State*, 259 Ga. 853, 388 S.E.2d 698 (1990).

**Insufficient evidence of force.** — Defendant was entitled to a directed verdict of acquittal on the rape charge under O.C.G.A. § 16-6-1 as the state presented no evidence of force; the victim did not testify as to any use of force, physical or mental, and talking the victim into having sex was not sufficient. *Howard v. State*, 281 Ga. App. 797, 637 S.E.2d 448 (2006).

**Evidence sufficient that rapes occurred during time set out in indictment.** — In a defendant's prosecution for being a party to rape under O.C.G.A. §§ 16-2-20 and 16-6-1(a)(1), there was sufficient evidence that rapes of the 11-year-old victim, who was the defendant's child, took place during the time period specified in the indictment; the jury could have concluded that at least one rape took place during this time period because the defendant, the defendant's children, including the victim, and the rapist moved to a new house after the rapist's release from jail at the beginning

of the time period and lived there until the end of the time period when the victim was removed from the home, a neighbor testified that the victim said during that time period that the rapist was having sex with the victim at the new house, and the victim told a psychotherapist that the rapist began abusing the victim at a previous residence and continued to do so at the new house. *Johnson v. State*, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

**Sufficient evidence of penetration.** — See *Trusty v. State*, 237 Ga. App. 839, 517 S.E.2d 91 (1999); *Alford v. State*, 243 Ga. App. 212, 534 S.E.2d 81 (2000).

DNA evidence taken from deep in a paralyzed rape victim's vagina was sufficient to support the jury's finding that penetration had occurred even though the victim, because of her condition, was unable to testify to the fact of penetration. *Knight v. State*, 251 Ga. App. 145, 553 S.E.2d 670 (2001).

Defendant's conviction for rape was affirmed because, based on the testimony of the nine-year-old victim and the emergency room nurse who examined the victim, the jury was authorized to conclude that defendant's sex organ penetrated the victim's sexual aperture in violation of O.C.G.A. § 16-6-1. *Lay v. State*, 264 Ga. App. 483, 591 S.E.2d 427 (2003).

In defendant's prosecution for rape, the evidence was sufficient to show the penetration necessary to sustain a rape charge under O.C.G.A. § 16-6-1(a) because the victim was found with blood on the victim's private parts, and the victim also sustained internal tears, which were consistent with forcible intercourse. *Winkfield v. State*, 275 Ga. App. 456, 620 S.E.2d 670 (2005).

Evidence was sufficient for a rational trier of fact to find the defendant guilty of aggravated sodomy of one victim and rape and aggravated sodomy of a second victim because the jury was authorized to conclude, based on a nurse's testimony and the medical evidence, that penetration occurred since the nurse was properly qualified as an expert in sexual assault examination and testified that the first victim's external injuries established the potential for penetration; clumps of hair were found in the second victim's trailer,

**Sufficiency of Evidence (Cont'd)**

and the defendant's DNA matched the DNA found on the hair. *Blash v. State*, 304 Ga. App. 542, 697 S.E.2d 265 (2010).

**Evidence sufficient for conviction of rape, aggravated sodomy, and possession of a firearm during the commission of a crime.** — See *Williams v. State*, 247 Ga. App. 99, 543 S.E.2d 408 (2000).

Evidence supported defendant's rape conviction, including the penetration element, as the 31-year-old mentally retarded victim was left in defendant's care, defendant was found naked standing over the victim with the victim's underwear pulled aside to reveal the victim's genitals, an examination revealed recent sexual trauma and sperm, and defendant had committed a similar offense. *Page v. State*, 271 Ga. App. 541, 610 S.E.2d 171 (2005).

**Sufficient evidence to authorize conviction.** — Victim's testimony that the accused raped the victim, coupled with medical evidence and testimony concerning the victim's actions and demeanor following the rape, is sufficient evidence to authorize a conviction. *Gray v. State*, 153 Ga. App. 183, 265 S.E.2d 81 (1980).

Evidence was sufficient to support the defendant's conviction for rape because there was medical evidence of penetration, the victim selected the defendant from a photographic lineup, the rape kit was submitted for comparison with a cheek swab taken from the defendant, and the substances found on the victim revealed semen and DNA from the defendant. *Neal v. State*, 308 Ga. App. 551, 707 S.E.2d 503 (2011).

Evidence was sufficient to enable any rational trier of fact to find the defendant guilty beyond a reasonable doubt of two counts of rape under O.C.G.A. § 16-6-1(a)(1) because the teenage victim testified that the defendant threatened to harm the victim's family if the victim did not have sex with the defendant. Moreover, the victim believed the defendant, as the defendant beat the victim with a shovel, beat the victim's little brother repeatedly, and induced the victim with false promises to travel from Mexico to the

United States, where the defendant kept the victim a virtual prisoner in the defendant's apartment. *Arellano-Campos v. State*, 307 Ga. App. 561, 705 S.E.2d 323 (2011).

Evidence presented at trial was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt of rape, aggravated sodomy, aggravated assault with intent to rape, and simple battery because the victim's testimony, standing alone, could sustain the convictions; the jury was entitled to take into account similar transaction evidence for the purpose of showing the defendant's intent, bent of mind, and course of conduct, and while the defendant testified to a different version of what transpired, it was the exclusive role of the jury to determine witness credibility and to choose what evidence to believe and what to reject. *Alvarez v. State*, No. A11A0101, 2011 Ga. App. LEXIS 340 (Apr. 19, 2011).

Trial court did not err in convicting the defendant of rape, O.C.G.A. § 16-6-1(a)(1), sexual battery, O.C.G.A. § 16-6-22.1(b), aggravated battery, O.C.G.A. § 16-5-24(a), and assault, O.C.G.A. § 16-5-20(a)(1), because the victim's testimony that the defendant raped, sodomized, punched, burned, and threatened to kill the victim was sufficient to authorize the defendant's convictions. *Harris v. State*, 308 Ga. App. 523, 707 S.E.2d 908 (2011).

**Victim's testimony alone sufficient.** — See *Smith v. State*, 168 Ga. App. 92, 308 S.E.2d 226 (1983); *Davis v. State*, 168 Ga. App. 272, 308 S.E.2d 602 (1983); *Seals v. State*, 176 Ga. App. 67, 335 S.E.2d 306 (1985); *Williams v. State*, 178 Ga. App. 80, 342 S.E.2d 18 (1986); *Henry v. State*, 178 Ga. App. 127, 342 S.E.2d 499 (1986); *Price v. State*, 179 Ga. App. 691, 347 S.E.2d 365 (1986); *Davis v. State*, 180 Ga. App. 190, 348 S.E.2d 730 (1986); *Hall v. State*, 180 Ga. App. 366, 349 S.E.2d 255 (1986); *Riseden v. State*, 181 Ga. App. 453, 352 S.E.2d 634 (1987); *Eady v. State*, 182 Ga. App. 293, 355 S.E.2d 778 (1987); *Slaughter v. State*, 182 Ga. App. 805, 357 S.E.2d 124 (1987); *Strickland v. State*, 184 Ga. App. 185, 361 S.E.2d 207 (1987); *McKenzie v. State*, 187 Ga. App. 840, 371 S.E.2d 869, cert. denied, 187 Ga. App. 907, 371 S.E.2d 869 (1988); *Lockleer v. State*,

188 Ga. App. 271, 372 S.E.2d 663 (1988); Shirley v. State, 188 Ga. App. 357, 373 S.E.2d 257 (1988); Marks v. State, 192 Ga. App. 64, 383 S.E.2d 626 (1989); Spivey v. State, 193 Ga. App. 127, 386 S.E.2d 868 (1989), cert. denied, 193 Ga. App. 911, 386 S.E.2d 868 (1989); Pledger v. State, 193 Ga. App. 588, 388 S.E.2d 425 (1989); Gibbs v. State, 196 Ga. App. 140, 395 S.E.2d 387 (1990); Farmer v. State, 197 Ga. App. 267, 398 S.E.2d 235 (1990); McGee v. State, 205 Ga. App. 722, 423 S.E.2d 1993 (1992); Brown v. State, 214 Ga. App. 676, 448 S.E.2d 723 (1994); Littleton v. State, 225 Ga. App. 900, 485 S.E.2d 230 (1997); Howard v. State, 228 Ga. App. 784, 492 S.E.2d 759 (1997); Sweeney v. State, 233 Ga. App. 862, 506 S.E.2d 150 (1998); Skillern v. State, 240 Ga. App. 34, 521 S.E.2d 844 (1999); Garcia v. State, 240 Ga. App. 53, 522 S.E.2d 530 (1999); Roberts v. State, 242 Ga. App. 621, 530 S.E.2d 535 (2000); Burks v. State, 246 Ga. App. 22, 538 S.E.2d 769 (2000); Johnson v. State, 245 Ga. App. 690, 538 S.E.2d 766 (2000).

Testimony of the victim is sufficient of itself if believed and if legally adequate to sustain the conviction of rape. Perry v. State, 154 Ga. App. 385, 268 S.E.2d 747 (1980).

Evidence authorized trial court to conclude beyond a reasonable doubt that defendant had carnal knowledge of the victim forcibly and against the victim's will. Sims v. State, 167 Ga. App. 479, 306 S.E.2d 732 (1983).

When the state produced evidence that the victim had been forcibly assaulted around the vaginal area, and although the medical examiner testified that he found no sperm and only trace elements of seminal fluid, the position of the victim's body — sweater open, slip pulled up, pantyhose and panties pulled down — was entirely consistent with the jury's conclusion that a rape occurred, and although defendant argued that the injury could have been accomplished with a foreign object such as a stick, a reasonable juror could have found beyond a reasonable doubt that the victim was raped. Davis v. Kemp, 829 F.2d 1522 (11th Cir. 1987), cert. denied, 485 U.S. 929, 108 S. Ct. 1099, 99 L. Ed. 2d 262 (1988).

When the defendant argued that there was no evidence of the use of force by the defendant or any evidence that he had knowledge of any use of force, but contrary to the defendant's assertion, the victim testified as to pleading with the defendant to release her, that the defendant refused to do so and continued having vaginal intercourse with her, a rational trier of fact could reasonably have found from the evidence adduced at trial proof of the defendant's guilt beyond a reasonable doubt of the offense of rape. Williamson v. State, 186 Ga. App. 589, 367 S.E.2d 863 (1988); Ward v. State, 205 Ga. App. 584, 423 S.E.2d 288 (1992).

Rational trier of fact could have found defendant guilty beyond reasonable doubt of murder and rape. Robinson v. State, 258 Ga. 279, 368 S.E.2d 513 (1988).

Jury was authorized to conclude from the evidence that defendant accosted the victim in the mall parking lot, forced her to accompany him to a secluded area where he raped and murdered her, then took her jewelry, her pocket book and her automobile, and used her credit cards the next day. Williams v. State, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

Even excluding the DNA tests, the evidence was overwhelming as to the defendant's guilt. Morris v. State, 212 Ga. App. 42, 441 S.E.2d 273 (1994).

Rational trier of fact could have found beyond a reasonable doubt that defendant was guilty of the offense of rape as convicted. Daniels v. State, 212 Ga. App. 617, 442 S.E.2d 483 (1994).

Medical evidence showing the presence of spermatozoa inside the victim's sex organ, and the victim's testimony that defendant "forced me to have sex with him," were sufficient to support the jury's finding of penetration in violation of O.C.G.A. § 16-6-1. Fields v. State, 216 Ga. App. 184, 453 S.E.2d 794 (1995).

Victim's statements, corroborated by scientific evidence and the testimony of the security guard that he saw defendant on top of the victim, with his pants around his knees moving in "up and down intercourse type motions" constitutes sufficient evidence from which the jury could con-

**Sufficiency of Evidence (Cont'd)**

clude there was vaginal penetration. *Gido v. State*, 216 Ga. App. 330, 454 S.E.2d 201 (1995).

Testimony of a nurse that the vaginal injury suffered by the victim was consistent with trauma associated with nonconsensual sex was not objectionable. *McDougal v. State*, 239 Ga. App. 808, 521 S.E.2d 458 (1999).

Evidence was sufficient to support defendant's conviction of rape of the victim as it showed defendant had carnal knowledge of the victim and even though the victim had difficulty in initially identifying the attacker, the victim was later able to recall more specific details linking defendant to the crime. *Hawkins v. State*, 254 Ga. App. 868, 563 S.E.2d 926 (2002).

Evidence was sufficient under O.C.G.A. § 16-6-1 to support a rape conviction where it was shown that the defendant put his knee in the victim's back, pulled her hands behind her, and then tied her hands behind her back with a black cord or piece of rope. *Byrd v. State*, 259 Ga. App. 15, 576 S.E.2d 35 (2002).

Evidence consisting mostly of testimony from the victim, that the victim was awakened by defendant when the defendant broke into the victim's home, placed the defendant's hand around the victim's neck, and forced the victim to shut up or die, as the defendant threw the victim onto a couch and engaged in sexual intercourse with the victim without the victim's consent, was sufficient to uphold defendant's rape conviction, pursuant to O.C.G.A. § 16-6-1, aggravated assault conviction, pursuant to O.C.G.A. § 16-5-21, and burglary conviction, pursuant to O.C.G.A. § 16-7-1. *Lowe v. State*, 259 Ga. App. 674, 578 S.E.2d 284 (2003).

Evidence was sufficient as to the essential element of penetration to support the conviction for rape because defendant stated to officers that the incident was a rape, explained that defendant choked the victim, and stated that defendant had "intercourse" with the victim behind the store and described the victim putting the condom on defendant's penis. *Manning v. State*, 259 Ga. App. 794, 578 S.E.2d 494 (2003).

Evidence was sufficient to support defendant's convictions of rape, kidnapping, burglary, and aggravated assault since: (1) the victim testified that the victim discovered a strange person in the victim's den who grabbed the victim as the victim tried to run away, that the person held a knife to the side of the victim's face and said that the person would kill the victim if the victim screamed, that the person then forced the victim to go from room to room in the victim's home to turn out the lights, and that the person then raped the victim; (2) the victim identified defendant as the victim's attacker after hearing the defendant's voice; and (3) a DNA analyst testified that, with a probability of error of one in a trillion, DNA from defendant's blood matched the DNA found in vaginal swabs that were taken from the victim. *McKinney v. State*, 261 Ga. App. 218, 582 S.E.2d 463 (2003).

Evidence was sufficient to support a rape conviction where defendant's eight year old stepchild testified that defendant "put his private in my private," that the defendant moved the defendant's body while inside the victim, that the defendant hurt the victim's "private," where the victim circled the appropriate places on anatomically correct drawings which were admitted into evidence, testified that defendant put the defendant's "private" in the victim's mouth on more than one occasion, where eventually the victim told the victim's parent, the victim's babysitter, and the victim's doctor about these events, and where a physical examination revealed redness and swelling around the victim's vagina, which, the physician testified, could have been caused by trauma. *Torres v. State*, 262 Ga. App. 309, 585 S.E.2d 228 (2003).

When a 12-year-old child told the child's parent that defendant had just raped the child; hours after the alleged rape, a detective found defendant's checkbook in the abandoned house where the victim said the rape occurred, and a check had been written from it earlier that day; and a doctor who examined the victim within hours of the incident found abrasions and tenderness consistent with the child's description of what had occurred, the appellate court found the evidence sufficient to

support defendant's convictions of rape, statutory rape, aggravated child molestation, and child molestation. *Weathersby v. State*, 263 Ga. App. 341, 587 S.E.2d 836 (2003).

Evidence was sufficient to convict defendant of rape and aggravated robbery given the victim's identification of defendant as the assailant, defendant's incriminating statements to police about the attack, and the victim's injuries, which included anal bruising. *McMorris v. State*, 263 Ga. App. 630, 588 S.E.2d 817 (2003).

When the victim alleged that the defendant robbed and raped the victim at knifepoint, identified the defendant from a photo lineup and at trial, DNA on the victim's clothes matched that of the defendant, the defendant testified the defendant had consensual sex with the victim for money, and the detective who first interviewed the defendant testified that the defendant never told the detective that the defendant had consensual sex, the evidence was sufficient to convict the defendant of rape. *Munn v. State*, 263 Ga. App. 821, 589 S.E.2d 596 (2003).

Victim's testimony, which was supported by statements the victim made to family, friends, and investigators regarding sexual acts the defendant committed upon the victim, together with the medical findings of the pediatrician who examined the victim were completely consistent with the victim's allegation of abuse by sexual intercourse; therefore, the evidence was more than sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of rape. *Wilkins v. State*, 264 Ga. App. 524, 591 S.E.2d 445 (2003).

Evidence was sufficient to support defendant's rape conviction where a victim testified that defendant forced the victim to have sex with the defendant, that the victim did not want to engage in such conduct, and that the defendant's penis penetrated the victim's vagina during sex. *Evans v. State*, 266 Ga. App. 405, 597 S.E.2d 505 (2004).

Evidence of the victim alone was sufficient to authorize a guilty verdict in a child molestation case; there was no requirement that the victim's testimony be corroborated, and defendant's convictions

of child molestation, aggravated child molestation, rape, aggravated sexual battery, and cruelty to children were affirmed. *McKinney v. State*, 269 Ga. App. 12, 602 S.E.2d 904 (2004).

When the victim's and a police officer's testimonies about the crime location established venue, and the defendant induced a jury question as to whether a toy gun was a firearm but did not object to the trial court's instruction, the defendant was properly convicted of rape, false imprisonment, and possession of a firearm during the commission of a felony under O.C.G.A. §§ 16-5-41(a), 16-6-1(a), and 16-11-106(b). *Bravo v. State*, 269 Ga. App. 242, 603 S.E.2d 669 (2004).

When the victim, the defendant's 11-year-old stepchild, testified that the defendant penetrated the child forcibly and against the child's will, the child's testimony satisfied the elements in O.C.G.A. § 16-6-1; in addition, DNA evidence confirmed that the defendant's semen was in the victim's vagina and cervix, medical evidence showed bruising consistent with intercourse, and the evidence was sufficient to support the rape conviction. *Reynolds v. State*, 269 Ga. App. 268, 603 S.E.2d 779 (2004).

Because defendant took the 16-year old female victim to the hotel where defendant was staying, and after playing video games, forced her to have sexual intercourse against her will, the victim's testimony, by itself, was sufficient to sustain the defendant's conviction under O.C.G.A. § 16-6-1(a)(1). *Johnson v. State*, 305 Ga. App. 853, 700 S.E.2d 735 (2010).

**Evidence sufficient to support conviction.** — Sufficient evidence, including testimony from the child victim identifying defendant's vehicle, evidence of defendant's DNA matching that of the victim and expert testimony that the frequency of such occurrence was approximately one in two billion in the Caucasian population, and similar transaction evidence, supported defendant's kidnapping with bodily injury, rape, aggravated sodomy, aggravated child molestation, aggravated assault, and first-degree cruelty to children convictions. *Morita v. State*, 270 Ga. App. 372, 606 S.E.2d 595 (2004).

As the victim testified that defendant

**Sufficiency of Evidence (Cont'd)**

entered the victim's bedroom and without the victim's consent inserted the defendant's finger and genitals into the victim, this testimony established forcible penetration; moreover, the examining sexual assault specialist concluded that the victim's wounds were consistent with the victim's story of sexual assault and indicated forced penetration by the finger and the penis; the evidence was sufficient for the jury to find the defendant guilty of rape and aggravated sexual battery, pursuant to O.C.G.A. §§ 16-6-1(a)(1) and 16-6-22.2(b). Duran v. State, 274 Ga. App. 876, 619 S.E.2d 388 (2005).

Trial court's denial of defendant's motion for acquittal, pursuant to O.C.G.A. § 17-9-1, was proper, as there was sufficient evidence to support defendant's convictions for kidnapping, rape, and robbery by intimidation, in violation of O.C.G.A. §§ 16-5-40, 16-6-1, and 16-8-41, respectively, because the victim positively identified defendant upon the defendant's arrest and at trial, there was similar transaction evidence from another victim who was approached and threatened in the same manner, and there was also corroborative physical evidence; defendant threatened the victim, who was at a bus stop, with a gun, robbed the victim, forced the victim to a storage area in a garage, and raped the victim. Sims v. State, 275 Ga. App. 836, 621 S.E.2d 869 (2005).

Evidence was sufficient to support a rape conviction after the victim, who had been with the defendant for several hours and showed signs of a sexual assault, immediately picked the photograph of the defendant from a six photo lineup and identified the defendant in court, and where the defendant had hidden from the police. Jennings v. State, 277 Ga. App. 159, 626 S.E.2d 155 (2006).

Despite the victim's recantation of the events that occurred leading up to the rape, kidnapping, and aggravated assault committed by defendant, the evidence presented of the victim's statements and the testimony of the other state witnesses and medical personnel as to the extent of the victim's injuries was sufficient to support

the convictions. Hambrick v. State, 278 Ga. App. 768, 629 S.E.2d 442 (2006).

Testimony of a single witness was sufficient to establish a fact under O.C.G.A. § 24-4-8, and defendant's convictions for kidnapping, burglary, aggravated sodomy, rape, and false imprisonment were supported by sufficient evidence where the victim testified that defendant forced the victim into a train boxcar, threatened to kill the victim, and had vaginal and oral sex with the victim against the victim's will and without the victim's consent; there was also circumstantial evidence showing the victim's lack of consent, including the victim's fleeing from the boxcar while naked, the victim's outcry to a train engineer that the victim had been raped, and the victim's injuries. Davis v. State, 278 Ga. App. 628, 629 S.E.2d 537 (2006).

Sufficient evidence supported a rape conviction despite defendant's claim that the sex was consensual, where the victim, who was working on defendant's shrimp boat, testified that the defendant forced the victim to have sex with the defendant by threatening the victim with a knife. Nguyen v. State, 279 Ga. App. 129, 630 S.E.2d 636 (2006).

Sufficient evidence supported defendant's rape conviction, under O.C.G.A. § 16-6-1(a), because the jury was authorized to find, based on the victim's testimony alone, that defendant had carnal knowledge of the victim against the victim's will, and additional evidence of the victim's immediate outcry to police and medical personnel, the victim's emotional state, and medical findings made evidence of defendant's guilt overwhelming. Machuca v. State, 279 Ga. App. 231, 630 S.E.2d 828 (2006).

Defendant's convictions of rape, aggravated sodomy, false imprisonment, and two counts of aggravated assault were supported by sufficient evidence in the form of the victim's injuries, and the victim's testimony that, among other things, after the victim refused the defendant's request for sex, the defendant threw the victim on the bed, hit her in the back and on the arms with hedge clippers, ordered the victim to remove the victim's clothes, dragged the victim by the hair back into

the house after the victim had escaped through a window, grabbed the victim, twisted the victim's arm, and said, "I'm trying — bitch, I'm going to kill you," hit the victim in the arm and leg with the hedge clippers, punched the victim on the lips and on the forehead, threw the victim on the bed and raped the victim and made the victim perform oral sex on the defendant. *Tarver v. State*, 280 Ga. App. 89, 633 S.E.2d 415 (2006).

Convictions for kidnapping, aggravated sexual battery, sexual battery, and attempted rape were all upheld on appeal, as a photo lineup was not impermissibly suggestive, similar transaction evidence was properly admitted, the defendant had notice of the evidence, and the jury was authorized to find the victim credible and to accept the victim's testimony; hence, a rational trier of fact could have found from the evidence presented that the defendant committed the charged crimes beyond a reasonable doubt. *Watley v. State*, 281 Ga. App. 244, 635 S.E.2d 857 (2006).

There was sufficient evidence to convict the defendant of rape under O.C.G.A. § 16-6-1; the victim testified that the defendant forcibly placed defendant's penis in the victim's vagina and made two or three painful thrusts as the victim was fighting the defendant off, and a victim's testimony, without more, was sufficient to sustain a conviction. *Allen v. State*, 281 Ga. App. 294, 635 S.E.2d 884 (2006).

Because sufficient evidence showed that the defendant, by posing as a police officer and driving the victims to remote locations, used fear and intimidation to ensure that the victims would cooperate and agree to have sex, the defendant was not entitled to an acquittal as to the charges of impersonating an officer, aggravated sodomy, attempted aggravated sodomy, aggravated assault and rape; furthermore, though both victims willingly got into the defendant's car, after the victims pleaded to be let go and the defendant refused to grant those pleas, the act amounted to a kidnapping. *Dasher v. State*, 281 Ga. App. 326, 636 S.E.2d 83 (2006).

Testimony that the victim physically resisted the defendant's sexual advances to no avail was sufficient to support the defendant's rape and aggravated sodomy

convictions; moreover, because sufficient evidence was presented that the defendant was the victim's biological and/or legal father, sufficient evidence supported the defendant's incest conviction as well. *Williams v. State*, 284 Ga. App. 255, 643 S.E.2d 749 (2007).

Rape, incest, child molestation, aggravated child molestation, and aggravated sodomy convictions were all upheld on appeal, given that: (1) the elements of child molestation and aggravated child molestation, including venue, were supported by the female victim's testimony; and (2) the trial court's charge on the mandatory presumption of consent was proper. *Forbes v. State*, 284 Ga. App. 520, 644 S.E.2d 345 (2007).

It was not necessary for the state's circumstantial evidence against a defendant to exclude every conceivable hypothesis, and contrary to the defendant's assertions, the state of undress the victim was found in, coupled with DNA evidence that linked the defendant to the victim, was sufficient to support a jury's conclusion that the defendant raped and murdered the victim as opposed to having committed necrophilia or having engaged in consensual sex with the victim before the victim died. *Walker v. State*, 282 Ga. 406, 651 S.E.2d 12 (2007).

There was sufficient evidence to support a rape conviction; the victim's testimony that defendant threatened her life when she voiced reluctance to disrobe helped to establish her lack of consent and constituted evidence of force, and there was also medical evidence of forced intercourse. *Smith v. State*, 287 Ga. App. 222, 651 S.E.2d 133 (2007).

Victim's testimony and the fact that she had bruises consistent with the rape and battery she described were sufficient to support defendant's conviction for violating O.C.G.A. §§ 16-6-1(a)(1) and 16-6-22.2(b); that no semen was found on the victim did not undercut the conviction, and any discrepancies between the victim's testimony and the testimony of two occupants of defendant's house, who stated that the victim was bruised before the assault, were properly resolved by the jury as the trier of fact. *Duran v. Walker*, No. 06-15758, 2007 U.S. App. LEXIS 7489 (11th Cir. Mar. 29, 2007) (Unpublished).

**Sufficiency of Evidence (Cont'd)**

Because the testimony of both rape victims sufficiently demonstrated that the defendant had carnal knowledge of both victims on numerous occasions, and on some of those occasions, the victims were forced and threatened to engage in sex with the defendant against their will, both rape convictions were upheld on appeal. *Wightman v. State*, 289 Ga. App. 225, 656 S.E.2d 563 (2008).

Victim's testimony as to the non-consensual and forcible nature of the victim's sexual contact with the defendant, standing alone, was sufficient to sustain the defendant's conviction of rape. *Brown v. State*, 293 Ga. App. 633, 667 S.E.2d 899 (2008).

Evidence was sufficient to support the defendant's conviction of rape because the child victim stated in a forensic interview that it hurt when the defendant pushed his penis partly into her vagina, that she did not want him to do that, that she told him to stop and tried to push him away, and that she was afraid to tell her mother about it because the defendant had threatened that this information would hurt her mother. This evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of forcible rape. *Pendley v. State*, No. A10A2301, 2011 Ga. App. LEXIS 283 (Mar. 25, 2011).

**Rape of an elderly victim.** — Evidence supported the defendant's convictions of burglary, kidnapping with bodily injury, rape, aggravated assault, robbery, and theft by taking when a treating physician stated that the 86-year-old victim's injuries, including blood inside her vagina and bruises and contusions on her vagina, were consistent with forcible penetration; when the defendant admitted entering the victim's home, removing her clothing, restraining her with electrical cords, hitting her, putting a plastic bag over her head, forcing her from one room to another, and taking her money and her car; and when DNA from the defendant matched the DNA of two hair roots found on the victim's living room floor. *Smith v. State*, 291 Ga. App. 545, 662 S.E.2d 323 (2008).

Evidence supported the defendant's

convictions of rape under O.C.G.A. § 16-6-1(a)(2), aggravated sexual battery under O.C.G.A. § 16-6-22.2, and two counts of child molestation under O.C.G.A. § 16-6-4(a) with regard to his daughter, who was seven at the time. The victim testified that the defendant touched her vagina with his hand and insisted that she touch his penis with her hand; a detective testified that the victim told him that the defendant touched her on her vagina with his hands, fingers, and penis and that he asked her to touch his penis; another detective, who conducted a videotaped interview with the victim, testified that the victim told her that she had sex with the defendant on multiple occasions; in the interview, the victim stated that the defendant pulled her pants down and put his penis inside her vagina and that he put his hand inside her vagina; and the victim's mother and grandmother testified to similar statements by the victim. *Osborne v. State*, 291 Ga. App. 711, 662 S.E.2d 792 (2008), cert. denied, 2008 Ga. LEXIS 783 (Ga. 2008).

Testimony by a victim that the defendant and an accomplice, armed with handguns, forcibly entered the victim's apartment, raped and sodomized the victim, struck the victim with a gun, stole jewelry, bound the victim, and escaped in a car owned by the victim's prospective spouse, and evidence that 24 fingerprints lifted from the apartment and car matched the defendant's, was sufficient to convict the defendant of rape. *Crawford v. State*, 292 Ga. App. 463, 664 S.E.2d 820 (2008).

Evidence supported a defendant's conviction for malice murder and rape. The victim had seminal fluid on her leg and buttocks and in her vagina, a massive wound in the back of the head caused by at least five individual blows that had driven pieces of her skull into her brain, and ligature marks on her neck; the defendant told a co-worker that he had hit a woman on the back of the head; DNA obtained from the defendant matched that found on the victim; and the defendant told a detective that he had killed the victim. *Holmes v. State*, 284 Ga. 330, 667 S.E.2d 71 (2008).

**Mentally retarded victims.** — A 27-year-old mentally retarded person tes-

tified of being raped by the defendant after he entered the victim's apartment; this testimony was corroborated by eyewitnesses who saw the defendant with the victim, blood at the scene, and wounds to the victim's genitals. Coupled with the defendant's prior offenses for taking indecent liberties with minors, and the defendant's eventual admissions after initially claiming to barely know the victim, the evidence was sufficient to convict the defendant of rape. *Kent v. State*, 294 Ga. App. 134, 668 S.E.2d 442 (2008).

There was no merit to the defendant's argument that the evidence was insufficient to sustain the defendant's rape conviction because there was no physical evidence, such as lacerations, scratching, bruising, or other injuries, to show that the sex the defendant had with the victim was nonconsensual. The victim testified as to the nonconsensual and forcible nature of the victim's contact with the defendant, and that testimony, standing alone, was sufficient to sustain the conviction. *Brown v. State*, 293 Ga. App. 564, 667 S.E.2d 410 (2008).

There was sufficient evidence to support a defendant's convictions for rape, incest, statutory rape, and child molestation against one of the defendant's children and a stepchild based on the defendant's repeated engagement in sexual intercourse with the children at various times while one was 12 to 16 years old and the other was 16 to 19 years old, and evidence of a letter threatening suicide on the defendant's part and apologizing for the actions against the children was also introduced against the defendant. However, the conviction on the charge of aggravated sexual battery against the stepchild was in error and required reversal since the state failed to introduce direct or circumstantial evidence sufficient to prove beyond a reasonable doubt that the defendant violated O.C.G.A. § 16-6-22.2 by penetrating that child's sexual organ with a replica penis. *Connelly v. State*, 295 Ga. App. 765, 673 S.E.2d 274 (2009), cert. denied, No. S09C0892, 2009 Ga. LEXIS 260 (Ga. 2009).

Following evidence was sufficient to convict the defendant of kidnapping with bodily injury, aggravated sodomy, rape,

and robbery by intimidation: 1) the victim's testimony of being repeatedly raped by the defendant at knife point, forced to perform oral sex, beaten, robbed, and threatened with death; 2) a nurse's testimony that the victim was crying, rocking back and forth, and had bruised cheeks; and 3) evidence that the defendant's DNA matched sperm cell DNA found on the victim's body. *Sanders v. State*, 297 Ga. App. 897, 678 S.E.2d 579 (2009).

Sufficient evidence supported the defendant's convictions of armed robbery, O.C.G.A. § 16-8-41(a), rape, O.C.G.A. § 16-6-1(a)(1), aggravated assault, O.C.G.A. § 16-5-21(a)(2), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), kidnapping, O.C.G.A. § 16-5-40(a), and aggravated sodomy, O.C.G.A. § 16-6-2(a)(2) involving four different victims on three separate dates; both the husband and the wife, the victims in the first criminal incident, identified the defendant in court as the perpetrator of the crimes. Two separate DNA analyses testified to by two forensic biologists showed that the defendant's sperm was present in the vaginas of the other two female victims. *Robins v. State*, 298 Ga. App. 70, 679 S.E.2d 92 (2009).

There was sufficient evidence to support a defendant's convictions for rape, aggravated sodomy, kidnapping, burglary, and misdemeanor sexual battery based on the similar transaction evidence produced by the state, the fact that the defendant's DNA was found in the victims' beds, and that the defendant's identity was established, all of which sufficiently linked the defendant to the crimes beyond a reasonable doubt. *Goolsby v. State*, 299 Ga. App. 330, 682 S.E.2d 671 (2009).

**Identification evidence sufficient.** — Evidence supported defendant's rape, aggravated sodomy, aggravated assault, criminal trespass, misdemeanor obstruction of a law enforcement officer, felony obstruction of a law enforcement officer, and possession of marijuana conviction because: (1) a victim testified that defendant choked the victim, slammed the victim around a room, and raped and sodomized the victim, then drank a beer, took the victim's BC powder packets, and a cell phone, and left; (2) defendant fled

**Sufficiency of Evidence (Cont'd)**

from the police, kicked two officers, and had marijuana, BC packets, and a cell phone on the defendant's person; (3) defendant's DNA matched the DNA on the beer can; (4) a nurse testified that the victim's bruise was consistent with strangulation; and (5) a doctor testified that the victim's injuries were consistent with rape and sodomy. *Lewis v. State*, 271 Ga. App. 744, 611 S.E.2d 80 (2005).

Evidence was sufficient to support defendant's rape conviction because it showed that defendant carried the defendant's child from the child's bed to the bed defendant shared with the defendant's spouse and watched the defendant's spouse lay on top of the child, squeezing the child's stomach and rendering the child unable to cry out even when the spouse hurt the child by placing the spouse's genitals in the child's genitals. *Spivey v. State*, 272 Ga. App. 224, 612 S.E.2d 65 (2005).

Evidence supported defendant's conviction for rape because the victim testified that defendant held the victim down on a bed, with the defendant's elbow across the victim's throat, and forced the victim to have intercourse with the defendant while the victim pleaded with the defendant to stop; further, a witness saw defendant on top of the protesting victim. *Stevenson v. State*, 272 Ga. App. 335, 612 S.E.2d 521 (2005).

Evidence supported defendant's conviction for rape and sexual battery as the victim testified that the victim was raped by a person who entered the victim's home while a friend was visiting and the friend identified defendant as the person who entered the home when the friend was visiting. *Powell v. State*, 272 Ga. App. 628, 612 S.E.2d 916 (2005).

Because the victim's statement of sexual abuse was sufficient under O.C.G.A. § 24-4-8 to convict defendant of kidnapping with bodily injury, aggravated child molestation, rape, aggravated sodomy, aggravated assault, and possession of a knife during the commission of a crime, the victim's testimony did not have to be corroborated by physical evidence. *Gartrell v. State*, 272 Ga. App. 726, 613 S.E.2d 226 (2005).

In defendant's prosecution for rape, kidnapping with bodily injury, and burglary, the evidence was sufficient to show that defendant was the perpetrator of the offenses because the evidence showed the assailant to be a young, African-American person driving a white automobile with certain plates, and defendant admitted that the defendant had been driving a stolen white automobile prior to the date that the crimes occurred; this evidence coupled with DNA evidence showing DNA of both defendant and the victim in stains left on the bedding in the victim's apartment where the rape occurred was sufficient to enable any rational trier of fact to determine beyond a reasonable doubt that defendant was the perpetrator of the crimes of which he was found guilty. *Winkfield v. State*, 275 Ga. App. 456, 620 S.E.2d 670 (2005).

Despite a juvenile's challenge to the sufficiency of the evidence, an adjudication entered by the juvenile court on a charge of attempted rape was proper because the adjudication was supported not only by the testimony of the victim, but also by the corroborating testimony offered by both the victim's neighbor, who witnessed the attack, and the victim's sister, who chased the juvenile away from the scene. *In the Interest of J.L.H.*, 289 Ga. App. 30, 656 S.E.2d 160 (2007).

Evidence was sufficient to convict a defendant of rape as the testimony of the defendant's accomplice that the defendant raped the victim was corroborated by the victim's out-of-court and in-court identification of the defendant as the rapist and the fact that the defendant's DNA was found on the victim's clothing. *Williams v. State*, 295 Ga. App. 9, 670 S.E.2d 828 (2008).

**Recanting of child victim's testimony.** — Witnesses testified pursuant to O.C.G.A. § 24-3-16 that the defendant's stepchild, then 12, told them about being repeatedly raped and molested by the defendant. That the stepchild recanted these statements at trial did not render the hearsay inadmissible under § 24-3-16, and as the stepchild's credibility was for the jury to decide, the evidence was sufficient to support the defendant's convictions for rape, incest, and child molesta-

tion. *Harvey v. State*, 295 Ga. App. 458, 671 S.E.2d 924 (2009).

**Evidence sufficient for conviction of rape, aggravated sodomy, and burglary.** — See *Clark v. State*, 186 Ga. App. 882, 369 S.E.2d 282 (1988).

**Evidence sufficient for conviction of attempted rape.** — See *Lumsden v. State*, 222 Ga. App. 635, 475 S.E.2d 681 (1996); *Hollis v. State*, 225 Ga. App. 370, 484 S.E.2d 54 (1997).

**Evidence sufficient for conviction of rape and possession of firearm during commission of felony.** *Clemmons v. State*, 210 Ga. App. 632, 437 S.E.2d 350 (1993).

**Evidence sufficient for conviction of rape and incest.** — See *Woodford v. State*, 240 Ga. App. 875, 525 S.E.2d 408 (1999).

**Evidence sufficient for conviction of rape and burglary with intent to rape.** — See *Clark v. State*, 249 Ga. App. 97, 547 S.E.2d 734 (2001).

**Evidence sufficient for conviction for rape, murder, and robbery.** — See *Davis v. State*, 292 Ga. App. 782, 666 S.E.2d 56 (2008).

**Sufficient evidence of aiding and abetting to convict defendant of rape.** — There was sufficient evidence to support the finding that defendant aided and abetted, pursuant to O.C.G.A. § 16-2-20(b), the father's rape of the daughter in violation of O.C.G.A. § 16-6-1(a)(1); defendant told the daughter to take the daughter's clothes off and was present when the father had sex with the daughter. *Zepp v. State*, 276 Ga. App. 466, 623 S.E.2d 569 (2005), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

**Evidence sufficient that defendant was a party to rape.** — Defendant was properly convicted of being a party to rape under O.C.G.A. §§ 16-2-20 and 16-6-1(a)(1), because evidence that the defendant knew that the defendant's 11-year-old child was being raped, told the child to lie to investigators, failed to prevent the rapist from having contact with the child, helped the rapist get out of jail, and allowed the rapist to move in with the defendant and the child showed that the defendant affirmatively encouraged and

was a party to the rapes. *Johnson v. State*, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

**Failure to preserve lab sample evidence did not warrant dismissal.** — Trial court's order dismissing an indictment charging the defendant with rape, incest, aggravated child molestation, and child molestation on grounds that the state improperly failed to preserve lab samples taken from the victim was reversed because the defendant failed to show that the failure was the result of bad faith on the part of the state or the police, and the value of the sample to the defendant was only potentially exculpatory. *State v. Brady*, 287 Ga. App. 626, 653 S.E.2d 72 (2007).

**No abandonment of criminal enterprise shown.** — Since the evidence showed that, upon discovering the victim was menstruating, the defendant apparently found the accomplishment of the crime of rape to be more difficult, the defendant was not found to have abandoned the criminal enterprise, choosing instead to force the victim to perform fellatio; therefore, sufficient evidence existed to support the defendant's conviction for attempted rape, since under the circumstances it cannot be said that the defendant made a complete renunciation of the criminal purpose. *Allen v. State*, 286 Ga. App. 82, 648 S.E.2d 677 (2007).

**Counsel not ineffective in rape trial.** — With regard to a defendant's convictions for false imprisonment, rape, and aggravated child molestation arising from allegations that the defendant sexually molested a 9-year-old relative, the defendant failed to meet the burden of establishing that the defendant received ineffective assistance of counsel as to trial counsel's alleged failure to proffer the defendant's anticipated testimony regarding the victim's alleged sexual behavior as the term "hot" as used by the defendant regarding the victim was explained by the officer who interviewed the defendant as meaning that the defendant believed that the victim was sexually active with another, thus, the jury was made aware of what the defendant meant by the term, as opposed to being left with the mistaken impression that the defendant found the victim sexually attractive. *Furlow v.*

**Sufficiency of Evidence (Cont'd)**

State, 297 Ga. App. 375, 677 S.E.2d 412 (2009).

**Failure to present expert testimony on capacity to consent.** — In a rape and aggravated sodomy case, the trial court properly rejected the defendant's claim that trial counsel was ineffective for not introducing evidence on the adult victim's mental capacity to consent. Because the defendant failed to proffer the testimony of an uncalled witness, the defendant could not prove that there was a reasonable probability that the trial would have ended differently; furthermore, counsel gave a reasonable explanation for not introducing expert testimony in that counsel believed that the victim might have the capacity to consent and that counsel believed that expert testimony on the issue would not sway the jury. *Ravon v. State*, 297 Ga. App. 643, 678 S.E.2d 107 (2009).

**Sentence**

**One sentence imposable for three charges and three convictions of rape.** — When three charges of rape against a defendant differed from one another only with respect to the averment of date, in none of the three was the date made an essential element, and all the dates alleged fell within the period of the statute of limitation, only one sentence for the three charges and convictions could be imposed. *LaPan v. State*, 167 Ga. App. 250, 305 S.E.2d 858 (1983).

**Sentences for both aggravated assault and rape did not violate double jeopardy**, since even if defendant had departed from the victim's apartment prior to the forcible sexual penetration of her, he still would have been guilty of the aggravated assault of the victim because he had pointed a pistol at her through the window and held the pistol while he led her from room to room before the rape. *Taylor v. State*, 177 Ga. App. 624, 340 S.E.2d 263 (1986).

**Sentencing as a party to rape.** — Fairness of a defendant's sentence of life imprisonment for being a party to rape was not examined because, contrary to the defendant's claims, the plain terms of

O.C.G.A. § 17-10-6.1(a)(5) did not prohibit the defendant from applying for scrutiny of the sentence by the Georgia Sentence Review Panel; as the defendant conceded, the sentence fell within the statutory limits under O.C.G.A. §§ 16-2-21 and 16-6-1, and as a rule, sentences that fell within such limits were not reviewed for legal error. *Johnson v. State*, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

**Life without parole.** — O.C.G.A. § 17-10-6.1(a) defined both rape and aggravated sodomy as "serious violent felonies;" thus, in light of a prior aggravated sodomy conviction, a trial court would have been required to sentence the defendant to life without parole for subsequent violent rape felonies under the sentencing statutes either as they existed at the time of the rapes, 1996, or at the time of the defendant's trial, 1998. *Thompson v. State*, 279 Ga. App. 657, 632 S.E.2d 407 (2006).

Sentencing the defendant to life without parole and to undergo chemical castration were not permissible punishments for defendant's rape conviction so that portion of defendant's sentence was vacated and remanded. *Johnson v. State*, 280 Ga. App. 341, 634 S.E.2d 134 (2006).

When a defendant pled guilty to rape, and the state did not seek the death penalty, it was error to impose a sentence of life without parole under O.C.G.A. § 16-6-1(b); under case law and O.C.G.A. § 17-10-16(a), a life sentence without parole was authorized only in cases when the state first sought the death penalty. *Velazquez v. State*, 283 Ga. App. 863, 643 S.E.2d 291 (2007), aff'd, 238 Ga. 206, 657 S.E.2d 838 (2008).

Trial court correctly sentenced a defendant to serve life without the possibility of parole because the defendant was a four-time recidivist and the maximum sentence for rape was life in prison. Further, the state provided the defendant with notice prior to trial that the state would seek to have the defendant sentenced as a recidivist, pursuant O.C.G.A. § 17-10-7. *Hall v. State*, 292 Ga. App. 544, 664 S.E.2d 882 (2008), cert. denied, No. S08C1841, 2008 Ga. LEXIS 926 (Ga. 2008).

**Rule of lenity did not apply to multiple convictions.** — In a criminal trial on charges that the defendant allowed the repeated rapes of the defendant's 11-year-old child, the rule of lenity did not require that the defendant's felony convictions for being a party to rape and cruelty to children should be subsumed by the misdemeanor conviction for contributing to the deprivation of children because different facts were necessary to prove the offenses; the rape conviction required proof under O.C.G.A. §§ 16-2-20 and 16-6-1(a)(1) that the defendant took affirmative steps to aid the rapist, the cruelty to children conviction required proof under O.C.G.A. § 16-5-70(b) that the defendant caused excessive mental pain to the child, and the conviction for contributing to the deprivation of a minor required proof under O.C.G.A. §§ 15-11-2(8)(A) and 16-12-1(b)(3) that the defendant failed to provide the child with proper care necessary for the child's health, which the state proved by showing that the defendant failed to seek prenatal care for the child even though the defendant knew that the child was pregnant. Johnson v. State, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

**Rape sentence vacated.** — Defendant's sentence on a rape count for which the defendant was acquitted was vacated and the case was remanded for the defendant to be sentenced on a rape count for which the defendant was convicted as it was error to sentence the defendant for the rape for which the defendant was acquitted. Smith v. State, 282 Ga. App. 339, 638 S.E.2d 791 (2006).

Upon certiorari review before the Supreme Court of Georgia, the Court of Appeals of Georgia properly vacated a rape sentence entered by the trial court, holding that the defendant was incorrectly sentenced to a term of life in prison without the possibility of parole, as the state failed to give notice that the state intended to seek the death penalty, and the trial court failed to find that any aggravating circumstance under O.C.G.A. § 17-10-30 existed, pursuant to former O.C.G.A. § 17-10-32.1; thus, the trial court was not authorized to sentence the defendant to life in prison without the

possibility of parole. State v. Velazquez, 283 Ga. 206, 657 S.E.2d 838 (2008).

**New trial and mistrial properly denied.** — Rape conviction was upheld on appeal as the defendant was not entitled to a new trial based on defense counsel's failure to object to certain testimony from the victim about the defendant's history of selling drugs and failure to subpoena certain medical records; moreover, the defendant was properly denied a mistrial as the trial court issued a curative instruction regarding the alleged improper character evidence admitted, and thereafter polled the jury to ensure that jurors would in fact disregard that evidence. Mitchell v. State, 287 Ga. App. 517, 651 S.E.2d 821 (2007).

**Defendant's ineffective assistance of counsel claim did not warrant a new trial** in a prosecution for rape, kidnapping, aggravated stalking, and two counts of stalking; because of the limited nature of a challenged witnesses' trial testimony, defense counsel made a strategic decision not to seek recusal of the trial judge, who was the brother of the challenged witness, and counsel discussed with the defendant the reasons for not seeking recusal. Pirkle v. State, 289 Ga. App. 450, 657 S.E.2d 560 (2008).

**Appellate court is without authority to review sentences within statutory range.** Covington v. State, 157 Ga. App. 371, 277 S.E.2d 744 (1981).

**O.C.G.A. § 16-6-1(b) a specific statute that prevailed over general sentencing statute.** — O.C.G.A. § 16-6-1(b) was a specific statute authorizing sentences for rape and therefore prevailed over the general sentencing statute, O.C.G.A. § 17-10-1. Burke v. State, 274 Ga. App. 402, 618 S.E.2d 36 (2005).

**Sentence of life without parole improper.** — Sentence of life without parole was tied to the imposition of the death penalty, and, consequently the possibility of the trial court imposing such a sentence on the defendant was excluded. Johnson v. State, 280 Ga. App. 341, 634 S.E.2d 134 (2006).

### Death Penalty

**Punishment of death does not invariably violate the Constitution.** Gregg v. Georgia, 428 U.S. 153, 96 S. Ct.

**Death Penalty (Cont'd)**

2909, 49 L. Ed. 2d 859 (1976).

**Necessity of finding aggravating circumstance as prerequisite to sentencing defendant to death.** — Before a convicted defendant may be sentenced to death, the jury, or the trial judge in cases tried without a jury, must find beyond a reasonable doubt one of the 10 aggravating circumstances specified in former Code 1933, § 27-2534.1. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (see O.C.G.A. § 17-10-30).

**Sentence of death is grossly disproportionate and excessive punishment for rape** and is therefore forbidden by U.S. Const., amend. 8 as cruel and unusual punishment. Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977).

**Death penalty for rape is not unconstitutional where victim is killed.** Moore v. State, 240 Ga. 807, 243 S.E.2d 1, cert. denied, 439 U.S. 903, 99 S. Ct. 268, 58 L. Ed. 2d 249 (1978).

**When death to victim does not result, death penalty for rape must be set aside.** Boyer v. State, 240 Ga. 170, 240 S.E.2d 68 (1977).

**Speedy trial for capital offense of rape without death.** — While the death penalty could not be constitutionally imposed for a rape conviction when the victim did not die, rape was still a capital offense, for purposes of the speedy trial statutes, O.C.G.A. §§ 17-7-170 and 17-7-171, because a determination that the death penalty could not be imposed did not affect the legislature's decision that rape was a crime for which the state should be allowed additional time to prepare its case, so, under O.C.G.A. § 17-7-171(b), the state had until the end of the third term of court following the term in which a speedy trial demand was made to try such a case. Merrow v. State, 268 Ga. App. 47, 601 S.E.2d 428 (2004).

**Speedy trial requirements.** — Trial court properly denied defendant's motion autrefois convict in a rape case under O.C.G.A. § 16-6-1; defendant did not substantially comply with the O.C.G.A. § 17-7-170 requirements for filing a speedy trial demand on sexual battery charges that were pending before the instant rape charge was filed, because defendant failed to file the demand on the trial judge, no speedy trial demand was made. Baker v. State, 270 Ga. App. 762, 608 S.E.2d 38 (2004).

**OPINIONS OF THE ATTORNEY GENERAL**

**The 1996 amendment** repealed the ten year mandatory minimum sentence for rape and aggravated sodomy formerly

applicable to first offenders. 1996 Op. Att'y Gen. No. U96-20.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 65 Am. Jur. 2d, Rape, § 1 et seq.

**Am. Jur. Trials.** — Handling the Defense in a Rape Prosecution, 18 Am. Jur. Trials 341.

**C.J.S.** — 75 C.J.S., Rape, § 1 et seq.

**ALR.** — Subsequent marriage as bar to prosecution for rape, 9 ALR 339.

Civil liability for carnal knowledge with actual consent of girl under age of consent, 79 ALR 1229.

Assault with intent to ravish or rape consenting female under age of consent, 81 ALR 599.

Rape as bailable offense, 118 ALR 1115.

Former acquittal or conviction under indictment or other information for rape or other sexual offense which does not allege that female was under age of consent as bar to subsequent prosecution under indictment or information which alleges that she was under age of consent; and vice versa, 119 ALR 1205.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses, 167 ALR 565; 77 ALR2d 841.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, had children, and the like, 62 ALR2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix, 62 ALR2d 1083.

Incest as included within charge of rape, 76 ALR2d 484.

Rape by fraud or impersonation, 91 ALR2d 591.

Impotency as defense to charge of rape, attempt to rape, or assault with intent to commit rape, 23 ALR3d 1351.

Rape or similar offense based on intercourse with woman who is allegedly mentally deficient, 31 ALR3d 1227.

Applicability, in proceedings under statutes relating to sexual psychopaths, of constitutional provisions for the protection of a person accused of crime, 34 ALR3d 652.

Racial discrimination in punishment for crime, 40 ALR3d 227.

What constitutes penetration in prosecution for rape or statutory rape, 76 ALR3d 163.

Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape, 81 ALR3d 1228.

What constitutes offense of "sexual battery," 87 ALR3d 1250.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 ALR3d 257.

Constitutionality of rape laws limited to protection of females only, 99 ALR3d 129.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient, 99 ALR3d 854.

Venue in rape cases where crime is committed partly in one place and partly in another, 100 ALR3d 1174.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix, 2 ALR4th 330.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 ALR4th 1009.

Criminal responsibility of husband for rape, or assault to commit rape, on wife, 24 ALR4th 105.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome, 42 ALR4th 879.

Conviction of rape or related sexual offenses on basis of intercourse accomplished under the pretext of, or in the course of, medical treatment, 65 ALR4th 1064.

Prosecution of female as principal for rape, 67 ALR4th 1127.

Fact that murder-rape victim was dead at time of penetration as affecting conviction for rape, 76 ALR4th 1147.

Propriety of publishing identity of sexual assault victim, 40 ALR5th 787.

Validity, construction, and application of state statutes authorizing community notification of release of convicted sex offender, 78 ALR5th 489.

Admissibility of expert testimony as to proper techniques for interviewing children or evaluating techniques employed in particular case, 87 ALR5th 693.

Defense of mistake of fact as to victim's consent in rape prosecution, 102 ALR5th 447.

Offense of rape after withdrawal of consent, 33 ALR6th 353.

## 16-6-2. Sodomy; aggravated sodomy; medical expenses.

(a)(1) A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.

(2) A person commits the offense of aggravated sodomy when he or she commits sodomy with force and against the will of the other person or when he or she commits sodomy with a person who is less than ten years of age. The fact that the person allegedly sodomized is the spouse of a defendant shall not be a defense to a charge of aggravated sodomy.

(b)(1) Except as provided in subsection (d) of this Code section, a person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years and shall be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.

(2) A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by probation for life. Any person convicted under this Code section of the offense of aggravated sodomy shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.

(c) When evidence relating to an allegation of aggravated sodomy is collected in the course of a medical examination of the person who is the victim of the alleged crime, the Georgia Crime Victims Emergency Fund, as provided for in Chapter 15 of Title 17, shall be financially responsible for the cost of the medical examination to the extent that expense is incurred for the limited purpose of collecting evidence.

(d) If the victim is at least 13 but less than 16 years of age and the person convicted of sodomy is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor and shall not be subject to the sentencing and punishment provisions of Code Section 17-10-6.2. (Laws 1833, Cobb's 1851 Digest, p. 787; Code 1863, §§ 4251, 4252; Code 1868, §§ 4286, 4287; Code 1873, §§ 4352, 4353; Code 1882, §§ 4352, 4353; Penal Code 1895, §§ 382, 383; Penal Code 1910, §§ 373, 374; Code 1933, §§ 26-5901, 26-5902; Ga. L. 1949, p. 275, § 1; Code 1933, § 26-2002, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1994, p. 1959, § 7; Ga. L. 1996, p. 1115, § 2; Ga. L. 1997, p. 6, § 3; Ga. L. 2000, p. 1346, § 1; Ga. L. 2006, p. 379, § 9/HB 1059; Ga. L. 2011, p. 214, § 2/HB 503.)

**The 2011 amendment**, effective July 1, 2011, substituted "Georgia Crime Victims Emergency Fund, as provided for in Chapter 15 of Title 17," for "law enforcement agency investigating the alleged crime" in the middle of subsection (c).

**Cross references.** — Actions for childhood sexual abuse, § 9-3-33.1. Affirmative defense to certain sexual crimes, § 16-3-6. Computer pornography and child exploitation prevention, § 16-12-100.2. Time limitation on prosecutions for crimes punishable by death or life imprisonment, § 17-3-1. Televising testimony of child who is victim of offense under this Code section, § 17-8-55. Visitation with minors

by convicted sexual offenders while imprisoned, § 42-5-56.

**Editor's notes.** — Ga. L. 1994, p. 1959, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Sentence Reform Act of 1994'."

Ga. L. 1994, p. 1959, § 2, not codified by the General Assembly, provides: "The General Assembly declares and finds:

"(1) That persons who are convicted of certain serious violent felonies shall serve minimum terms of imprisonment which shall not be suspended, probated, stayed, deferred, or otherwise withheld by the sentencing judge; and

"(2) That sentences ordered by courts in cases of certain serious violent felonies shall be served in their entirety and shall not be reduced by parole or by any earned time, early release, work release, or other such sentence-reducing measures administered by the Department of Corrections."

Ga. L. 1994, p. 1959, § 16, not codified by the General Assembly, provides: "The provisions of this Act shall apply only to those offenses committed on or after the effective date of this Act; provided, however, that any conviction occurring prior to, on, or after the effective date of this Act shall be deemed a 'conviction' for the purposes of this Act and shall be counted in determining the appropriate sentence to be imposed for any offense committed on or after the effective date of this Act."

Ga. L. 1994, p. 1959, § 17, not codified by the General Assembly, provides for severability.

Ga. L. 1994, p. 1959, § 18, not codified by the General Assembly, provides: "This Act shall become effective on January 1, 1995, upon ratification by the voters of this state at the 1994 November general election of that proposed amendment to Article IV, Section II, Paragraph II of the Constitution authorizing the General Assembly to provide for mandatory minimum sentences and sentences of life without possibility of parole in certain cases and providing restrictions on the authority of the State Board of Pardons and Paroles to grant paroles...." That amendment was ratified by the voters on November 8, 1994, so the amendment to this Code section by this Act became effective on January 1, 1995.

Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: "The General Assembly declares and finds: (1) That the 'Sentence Reform Act of 1994,' approved April 20, 1994 (Ga. L. 1994, p. 1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated, deferred, or withheld by the sentencing court; (2) That in *State v. Allmond*, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the 'Sentence Reform Act of 1994,' that the provisions of the First

Offender Act would still be available to the sentencing court, which would mean that a person who committed a serious violent felony could be sentenced to less than the minimum mandatory ten-year sentence; and (3) That, contrary to the decision in *State v. Allmond*, it is the expressed intent of the General Assembly that persons who commit a serious violent felony specified in the 'Sentence Reform Act of 1994' shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment."

Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides that: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who

are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides that:

"The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

**Law reviews.** — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For survey of 1985 Eleventh Circuit cases on civil constitutional law, see 37 Merger L. Rev. 1253 (1986). For annual survey article discussing developments in criminal law, see 51 Mercer L. Rev. 209 (1999). For article on 2006 amendment of this Code section, see 23 Georgia St. U.L. Rev. 11 (2006). For article, "I'm Not Gay, M'Kay?: Should Falsely Calling Someone a Homosexual be Defamatory?", see 44 Ga. L. Rev. 739 (2010).

For note, "The Crimes Against Nature," see 16 J. of Pub. L. 159 (1967). For note, "Sexual Orientation Discrimination in the Wake of *Bowers v. Hardwick*," see 22 Ga. L. Rev. 773 (1988). For note, "Powell v. State: The Demise of Georgia's Consensual Sodomy Statute," see 51 Mercer L. Rev. 987 (2000). For note, "Rabbit' Hunting in the Supreme Court: The Constitutionality of State Prohibitions of Sex Toy Sales Following *Lawrence v. Texas*," see 44 Ga. L. Rev. 245 (2009).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION AGGRAVATED SODOMY

##### General Consideration

**Editor's notes.** — Many of the cases noted below were decided prior to the amendments to the length of sentence specified in subsection (b).

**Constitutionality.** — Former Code 1933, § 26-2002 was not so vague, indefinite, and overbroad as to violate the due process and equal protection clauses of the state and federal Constitutions. *Wanzer v. State*, 232 Ga. 523, 207 S.E.2d 466 (1974) (see O.C.G.A. § 16-6-2).

O.C.G.A. § 16-6-2 did not violate an

individual's fundamental right to privacy though it does not differentiate between the sex or marital status of the possible offenders and, therefore, applies equally to homosexual and heterosexual intimate relationships, where the issue of the validity of that section if used to prohibit the intimate affairs of a married heterosexual couple in the privacy of their marital bedroom was not reached because defendant, a homosexual, had failed to show that defendant's own conduct could not be regulated by a statute drawn with the requi-

site narrow specificity. *Gordon v. State*, 257 Ga. 439, 360 S.E.2d 253 (1987).

Claim of defendant that O.C.G.A. § 16-6-2 violates due process and equal protection because it is selectively enforced against unmarried persons, and because "victims" are not prosecuted for engaging in the consensual conduct, failed where defendant did not establish the actual manner of enforcement. *King v. State*, 265 Ga. 440, 458 S.E.2d 98 (1995).

O.C.G.A. § 16-6-2 does not violate the right to privacy under the Georgia Constitution. *Christensen v. State*, 266 Ga. 474, 468 S.E.2d 188 (1996).

Insofar as it criminalizes the performance of private, unforced non-commercial acts of sexual intimacy between persons legally able to consent, the statute manifestly infringes upon a constitutional provision which guarantees to the citizens of Georgia the right of privacy. *Powell v. State*, 270 Ga. 327, 510 S.E.2d 18 (1998).

Conviction of the defendant of sodomy for a sex act in a public, commercial place was not prohibited by *Powell v. State*, 270 Ga. 327, 510 S.E.2d 18 (1998). *Gagnon v. State*, 240 Ga. App. 754, 525 S.E.2d 127 (1999).

Conduct for which defendant was convicted, even if the conduct was consensual, took place outdoors in a wooded area adjacent to a public road which was not a private place within the contemplation of the Fourth Amendment and, therefore, was not protected conduct. *Mauk v. State*, 242 Ga. App. 191, 529 S.E.2d 197 (2000), cert. denied, 532 U.S. 924, 121 S. Ct. 1364, 149 L. Ed. 2d 293 (2001).

Nothing in the decision in *Powell v. State*, 270 Ga. 327, 510 S.E.2d 18 (1998), holding O.C.G.A. § 16-6-2 unconstitutional to the extent it broadly criminalized private, unforced, noncommercial acts of sodomy between consenting persons legally able to give such consent, could be construed to create an exception for acts of sodomy committed by a school teacher with a student. *State v. Eastwood*, 243 Ga. App. 822, 535 S.E.2d 246 (2000).

**Standing to contest constitutionality.** — Defendant who was sentenced to less than the maximum penalty provided by O.C.G.A. § 16-6-2 lacked standing to

contest whether such maximum penalty constitutes cruel and unusual punishment. *King v. State*, 265 Ga. 440, 458 S.E.2d 98 (1995).

**Venue.** — Incident on which a sodomy charge was based occurred about one mile from the home in Gordon County where the defendant and the victim lived, when the defendant and the victim were driving home; thus, under O.C.G.A. § 17-2-2(e), the crime was considered to have occurred in Gordon County, through which the car traveled, and the state proved venue. *Prudhomme v. State*, 285 Ga. App. 662, 647 S.E.2d 343 (2007).

**Juvenile court properly dismissed delinquency petition since transfer hearing provisions did not apply.** — Juvenile court properly dismissed a delinquency petition without a hearing, which petition alleged that the juvenile committed aggravated sodomy, as O.C.G.A. § 15-11-30.2(f) expressly provided that the transfer hearing provisions did not apply to any proceeding within the exclusive jurisdiction of a superior court, pursuant to O.C.G.A. § 15-11-28(b)(2)(A), which included aggravated sodomy. *In the Interest of N.C.*, 293 Ga. App. 374, 667 S.E.2d 181 (2008).

**Right of privacy.** — An adult who pays a fourteen-year-old child to engage in sodomy has no right of privacy in that conduct. *Ray v. State*, 259 Ga. 868, 389 S.E.2d 326 (1990), overruled on other grounds, *Wilson v. State*, 277 Ga. 195, 586 S.E.2d 669 (2003).

**Cruel and unusual punishment.** — Habeas court properly ruled that an inmate's sentence of 10 years in prison for having consensual oral sex with a 15-year-old when the inmate was only 17 years old constituted cruel and unusual punishment in light of the 2006 amendments to O.C.G.A. §§ 16-6-4 and 42-1-12. *Humphrey v. Wilson*, 282 Ga. 520, 652 S.E.2d 501 (2007).

**Solicitation of sodomy.** — *Powell v. State*, 270 Ga. 327, 510 S.E.2d 18 (1998), which struck down O.C.G.A. § 16-6-2 insofar as it applies to private, non-commercial acts between consenting adults, did not impliedly strike down O.C.G.A. § 16-6-15, the solicitation of sodomy statute. *Howard v. State*, 272 Ga.

**General Consideration (Cont'd)**

242, 527 S.E.2d 194 (2000).

**Proving discriminatory enforcement.** — When the defendant contended to having been denied equal protection of the law because officials actually enforce the sodomy law only against offending homosexuals and not against others who violate the sodomy law, the defendant did not prove the contention as the manner of enforcement of the sodomy law was not established in the record. Gordon v. State, 257 Ga. 439, 360 S.E.2d 253 (1987).

**No evidence to support contention that O.C.G.A. § 16-6-2(a) is selectively enforced only against homosexuals.** — See Ray v. State, 259 Ga. 868, 389 S.E.2d 326 (1990), overruled on other grounds, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003).

**No right to privacy for commission of sodomy in public places.** — Whatever the constitutional privacy rights may be of one who engages in sodomy in private places, they do not attach to another doing the same in public places. Stover v. State, 256 Ga. 515, 350 S.E.2d 577 (1986); Smashum v. State, 261 Ga. 248, 403 S.E.2d 797 (1991).

**Sodomy statute not changed.** — By the enactment of the Official Code of Georgia, the General Assembly did not intend to change the sodomy statute, now O.C.G.A. § 16-6-2, to exclude as a crime the placing of one's mouth on the sexual organ of another. Porter v. State, 168 Ga. App. 703, 309 S.E.2d 919 (1983).

**Statute does not provide for two maximum sentences.** — Although O.C.G.A. § 16-6-2 vests broad discretion in the sentencing judge, contrary to the defendant's contentions, the statute does not provide two maximum sentences. Nihart v. State, 227 Ga. App. 272, 488 S.E.2d 740 (1997).

**One who voluntarily participates in unnatural act of sexual intercourse with another is also guilty of sodomy.** One who does not so participate is not guilty. Perryman v. State, 63 Ga. App. 819, 12 S.E.2d 388 (1940).

**Evidence of force against eight year old not necessary.** — Child of eight years is incapable under the law of con-

senting to any sexual act, rendering any sexual acts directed to such a child forcible under the law. Hamm v. State, 214 Ga. App. 705, 448 S.E.2d 773 (1994).

Because children do not have the capacity to give consent to or resist a sexual act directed at them, acts such as incest, sodomy, and aggravated sodomy are, in law, forcible and against the will of the child. House v. State, 236 Ga. App. 405, 512 S.E.2d 287 (1999).

**Penetration is not a requirement as to sodomy;** all that is required is some contact. Carter v. State, 122 Ga. App. 21, 176 S.E.2d 238 (1970); Wimpey v. State, 180 Ga. App. 529, 349 S.E.2d 773 (1986); Scott v. State, 223 Ga. App. 479, 477 S.E.2d 901 (1996); Wright v. State, 259 Ga. App. 74, 576 S.E.2d 64 (2003).

As to sodomy, proof of penetration is not required. Proof that the sexual act involved the sexual organs of one and the anus of another is sufficient. Ruff v. State, 132 Ga. App. 568, 208 S.E.2d 581 (1974).

**Connection between man and woman per linguam in vagina is sodomy** under former Code 1983, § 26-2002. Carter v. State, 122 Ga. App. 21, 176 S.E.2d 238 (1970), overruled on other grounds, 271 Ga. 605 (1999). (see O.C.G.A. § 16-6-2).

**Jury instruction on the definition of sodomy was necessary,** even though sodomy was not one of the offenses charged in the indictment, since sodomy was an element of the offenses of aggravated child molestation, O.C.G.A. § 16-6-2(a), for which defendant was on trial. Ramirez v. State, 265 Ga. App. 808, 595 S.E.2d 630 (2004).

**Sodomy is a lesser included offense of aggravated sodomy.** Stover v. State, 256 Ga. 515, 350 S.E.2d 577 (1986).

**Sodomy was not an included offense of rape.** — Trial court's failure to rule that defendant's convictions for anal and oral sodomy merged into defendant's rape conviction was not error, since each of the three offenses contained at least one element not contained in the others and cannot merge as a matter of law. Even though it is anatomically impossible for the three offenses to merge as a matter of fact, the matter was properly submitted for resolution to the jury, which resolved

the matter against defendant. Johnson v. State, 195 Ga. App. 723, 394 S.E.2d 586 (1990).

**Female under 14 years of age is legally incapable of giving consent;** therefore, it is not necessary to prove the "against the will element." Hines v. State, 173 Ga. App. 657, 327 S.E.2d 786 (1985).

**Indictment sufficient.** — Sodomy indictment stating that defendant "did place his penis in the mouth of" the minor victim did not fatally vary from the evidence showing that he allowed the victim to kiss his sex organ. Turner v. State, 231 Ga. App. 747, 500 S.E.2d 628 (1998).

**Evidence rebutting consent.** — In a prosecution for sodomy, the fact of the woman's having made complaint soon after the assault took place is admissible in evidence for the purpose of rebutting the idea that the female consented to the criminal act. Riddlehoover v. State, 153 Ga. App. 194, 264 S.E.2d 666 (1980).

**No corroboration requirement.** — However beneficent it might be to require that the testimony of children of tender years be corroborated, there is no statute or decision in the state which makes such a requirement in criminal prosecutions for offenses of sodomy or taking indecent liberties with a child. Clardy v. State, 87 Ga. App. 633, 75 S.E.2d 208 (1953).

**Corroboration is not required** to warrant a conviction for the offenses of incest, sodomy, and child molestation, and trial court's failure to charge the jury that corroboration was required was not error. Scales v. State, 171 Ga. App. 924, 321 S.E.2d 764 (1984).

**Statements of victim to mother and nurse held admissible.** — As to the victim's mother and the nurse who examined the victim, their testimony regarding statements the victim made to them, was admissible as substantive evidence of the matter asserted because the victim was under oath and subject to cross-examination about her testimony and about her out-of-court statements. Runion v. State, 180 Ga. App. 440, 349 S.E.2d 288 (1986).

**Admission of evidence of sexual intercourse in sodomy prosecution.** — In sodomy prosecution, evidence of an act of sexual intercourse which took place at

the same time and was a part of the same transaction with which the defendant was charged was properly admitted, where the separate acts were so connected in time and so similar in their relations that motive, intent, and state of mind could reasonably be imputed to both. McMichen v. State, 62 Ga. App. 50, 7 S.E.2d 749 (1940).

**Whether the act of sodomy is "anatomically impossible"** is a question of fact for determination by the jury. Wimpey v. State, 180 Ga. App. 529, 349 S.E.2d 773 (1986).

**Pattern of sexual exploitation shown.** — When the evidence showed that the defendant first began having sexual relations with his stepdaughter when she was about 12 years of age and continued having sexual relations with her until she was in her seventeenth year, the pattern of sexual exploitation presented was, as a matter of law, forcible and against the will, because of the stepdaughter's age at onset, and because of her familial relationship with the defendant; the assertion that consensual sexual activity is protected by a right of privacy was inapplicable as no consent was possible. Richardson v. State, 256 Ga. 746, 353 S.E.2d 342 (1987).

**Inquiry into victim's past sexual experiences was properly refused,** even when a physician testified that in examining the victim it was obvious the victim had been sexually active. Worth v. State, 183 Ga. App. 68, 358 S.E.2d 251 (1987).

**Failure to present expert testimony on capacity to consent.** — In a rape and aggravated sodomy case, the trial court properly rejected the defendant's claim that trial counsel was ineffective for not introducing evidence on the adult victim's mental capacity to consent. Because the defendant failed to proffer the testimony of an uncalled witness, the defendant could not prove that there was a reasonable probability that the trial would have ended differently; furthermore, counsel gave a reasonable explanation for not introducing expert testimony in that counsel believed that the victim might have the capacity to consent and that counsel believed that expert testimony on the issue would not sway the jury. Ravon v. State, 297 Ga. App. 643, 678 S.E.2d 107 (2009).

**General Consideration (Cont'd)**

**Ten-year sentence upheld.** — Since the legislature has provided for a maximum sentence of confinement of 20 years, where the trial court sentenced defendant to ten years confinement followed by probation for repeated acts of sodomy committed against a minor, the sentence did not shock the conscience. *Gordon v. State*, 257 Ga. 439, 360 S.E.2d 253 (1987); *Ray v. State*, 259 Ga. 868, 389 S.E.2d 326 (1990), overruled on other grounds, *Wilson v. State*, 277 Ga. 195, 586 S.E.2d 669 (2003).

**Defendant was properly sentenced for both sodomy and child molestation**, where the indictment as drawn charged defendant specifically with two separate and different sexual acts, and the child molestation was proved without any reference to the act of sodomy and was factually and legally distinct from it. *Garrett v. State*, 188 Ga. App. 176, 372 S.E.2d 506 (1988).

Child molestation in connection with the fondling of the victim's vagina did not merge with aggravated sodomy charges based on two acts of oral sex, where the acts of sodomy were not used to establish the child molestation charge. *Pressley v. State*, 197 Ga. App. 270, 398 S.E.2d 268 (1990).

**Defendant convicted on child molestation despite sodomy acquittal.** — Defendant's acquittal on a separate charge of aggravated sodomy did not require that defendant should also have been acquitted on an aggravated child molestation charge. Because there was evidence of physical injury to support the aggravated molestation charge, it was not necessary to prove sodomy to maintain the molestation conviction. *Baker v. State*, 228 Ga. App. 32, 491 S.E.2d 78 (1997).

**Evidence sufficient for child molestation conviction.** — Evidence was sufficient to sustain the defendant's convictions for aggravated sodomy and aggravated child molestation where the child testified that the defendant made the child perform oral sex and penetrated the child anally, and the record showed opportunity, consistent allegations by the victim to multiple parties, and deception by the defendant when asked about the

charged offenses during a polygraph examination. *Guzman v. State*, 273 Ga. App. 819, 616 S.E.2d 142 (2005).

Thirteen-year-old victim's testimony that when victim was sleeping, defendant pulled down victim's pants and underwear and performed oral sex on the victim, and that testimony was corroborated by defendant's love interest who observed the incident, was sufficient evidence to support defendant's conviction for aggravated child molestation, in violation of O.C.G.A. § 16-6-4(c), as there was sufficient evidence to establish that defendant committed "sodomy," as that term was defined under O.C.G.A. § 16-6-2(a); accordingly, the trial court properly denied defendant's motion for a judgment of acquittal pursuant to O.C.G.A. § 17-9-1. *Steverson v. State*, 276 Ga. App. 876, 625 S.E.2d 476 (2005).

Rape, incest, child molestation, aggravated child molestation, and aggravated sodomy convictions were all upheld on appeal, given that the elements of child molestation and aggravated child molestation, including venue, were supported by the female victim's testimony. *Forbes v. State*, 284 Ga. App. 520, 644 S.E.2d 345 (2007).

Minor victim's description of oral sex with defendant, a 30 year old male, established sodomy under O.C.G.A. § 16-6-2(a)(1), which was sufficient to support a conviction of aggravated child molestation. *Flewelling v. State*, 300 Ga. App. 505, 685 S.E.2d 758 (2009).

Prisoner's sufficiency of the evidence claim under 28 U.S.C. § 2254 was properly denied because although the jury rejected testimony of forcible rape by a 13-year-old victim, the jury was free to accept testimony stating that the victim had sexual intercourse and performed oral sex on the prisoner and proof of consent was not required under O.C.G.A. §§ 16-6-2, 16-6-3, and 16-6-4 for offenses of statutory rape and aggravated child molestation. *Dorsey v. Burnette*, No. 08-13700, 2009 U.S. App. LEXIS 5771 (11th Cir. Mar. 18, 2009) (Unpublished).

**Child molestation and aggravated sodomy are legally distinct**, and when the indictment for each offense is based on separate and distinct acts, the offenses do

not merge. *Howard v. State*, 200 Ga. App. 188, 407 S.E.2d 769, cert. denied, 200 Ga. App. 896, 407 S.E.2d 769 (1991).

**O.C.G.A. § 16-6-2 has never provided for the death penalty.** *Waters v. State*, 248 Ga. 355, 283 S.E.2d 238 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1983).

**Registration as sex offender.** — Evidence was sufficient to support the defendant's conviction of failure to register as a sex offender, as required by O.C.G.A. § 42-1-12, because when the defendant was charged with failure to register the defendant was required to register as a sex offender since the defendant had been convicted of criminal sexual conduct toward a minor in violation of O.C.G.A. § 16-6-2, and the Supreme Court's ruling that § 16-6-2 infringed upon the right of privacy had to be applied retroactively on collateral review, but the Court of Appeals could not apply it in the defendant's case since it was not on collateral review; the appeal was from a conviction for failure to register as a sex offender, which was a proceeding separate from defendant's original offense, and at the time of defendant's sodomy conviction, the conduct in which the defendant engaged was against the law in Georgia. *Green v. State*, 303 Ga. App. 210, 692 S.E.2d 784 (2010).

**Cited** in *Jordon v. State*, 227 Ga. 427, 181 S.E.2d 50 (1971); *Jordan v. State*, 124 Ga. App. 135, 183 S.E.2d 54 (1971); *United States v. One Carton Containing Quantity of Paperback Books*, 324 F. Supp. 957 (N.D. Ga. 1971); *United States v. Stone*, 472 F.2d 909 (5th Cir. 1973); *Johnson v. State*, 134 Ga. App. 209, 214 S.E.2d 4 (1975); *Pace v. City of Atlanta*, 135 Ga. App. 399, 218 S.E.2d 128 (1975); *Megar v. State*, 144 Ga. App. 564, 241 S.E.2d 447 (1978); *Stewart v. State*, 147 Ga. App. 547, 249 S.E.2d 351 (1978); *Fluker v. State*, 248 Ga. 290, 282 S.E.2d 112 (1981); *Parker v. State*, 162 Ga. App. 271, 290 S.E.2d 518 (1982); *Thompson v. State*, 163 Ga. App. 35, 292 S.E.2d 470 (1982); *Sims v. State*, 251 Ga. 877, 311 S.E.2d 161 (1984); *Shepherd v. State*, 173 Ga. App. 499, 326 S.E.2d 596 (1985); *Whited v. State*, 173 Ga. App. 435, 326 S.E.2d 803 (1985); *Yeck v. State*, 174 Ga. App. 710, 331 S.E.2d 76 (1985); *Gilbert v.*

*State*, 176 Ga. App. 561, 336 S.E.2d 828 (1985); *Scruggs v. State*, 181 Ga. App. 55, 351 S.E.2d 256 (1986); *Lambeth v. State*, 257 Ga. 15, 354 S.E.2d 144 (1987); *Bostic v. State*, 184 Ga. App. 509, 361 S.E.2d 872 (1987); *Stinson v. State*, 185 Ga. App. 543, 364 S.E.2d 910 (1988); *Jones v. State*, 194 Ga. App. 356, 390 S.E.2d 623 (1990); *Wiggins v. State*, 208 Ga. App. 757, 432 S.E.2d 113 (1993); *Green v. State*, 249 Ga. App. 546, 547 S.E.2d 569 (2001); *Higgins v. State*, 251 Ga. App. 175, 554 S.E.2d 212 (2001); *Greulich v. State*, 263 Ga. App. 552, 588 S.E.2d 450 (2003); *Odom v. State*, 267 Ga. App. 701, 600 S.E.2d 759 (2004); *Gresham v. State*, 281 Ga. App. 116, 635 S.E.2d 316 (2006); *Brown v. State*, 280 Ga. App. 767, 634 S.E.2d 875 (2006); *Walthall v. State*, 281 Ga. App. 434, 636 S.E.2d 126 (2006); *Grovenstein v. State*, 282 Ga. App. 109, 637 S.E.2d 821 (2006); *Opio v. State*, 283 Ga. App. 894, 642 S.E.2d 906 (2007); *Gaines v. State*, 285 Ga. App. 654, 647 S.E.2d 357 (2007); *Rivera v. State*, 282 Ga. 355, 647 S.E.2d 70 (2007); *Disharoon v. State*, 288 Ga. App. 1, 652 S.E.2d 902 (2007); *Selfe v. State*, 290 Ga. App. 857, 660 S.E.2d 727 (2008); *Hyde v. State*, 291 Ga. App. 662, 662 S.E.2d 764 (2008); *Jennings v. State*, 292 Ga. App. 149, 664 S.E.2d 248 (2008); *Greene v. State*, 295 Ga. App. 803, 673 S.E.2d 292 (2009); *Metts v. State*, 297 Ga. App. 330, 677 S.E.2d 377 (2009).

### Aggravated Sodomy

**Indictment insufficient.** — Count of the indictment charged that appellant committed the offense of aggravated sodomy by unlawfully performing "a sexual act involving his anus and the mouth of the victim" did not meet the statutory definition of sodomy. *Moore v. State*, 212 Ga. App. 497, 442 S.E.2d 311 (1994).

**Penetration not an element of sodomy or aggravated sodomy.** — Penetration is not an element of sodomy or aggravated sodomy, O.C.G.A. § 16-6-2(a); regardless of whether anal penetration was sufficiently established by the evidence, the state was not required to prove penetration. *Adams v. State*, 299 Ga. App. 39, 681 S.E.2d 725 (2009), aff'd, 287 Ga. 513, 696 S.E.2d 676 (2010).

**Aggravated Sodomy (Cont'd)**

**Misreading of one word in indictment was harmless error.** — With regard to a defendant's convictions for aggravated sodomy and kidnapping, the misreading of the word "in" instead of "and" when the indictment was read to the jury regarding the aggravated sodomy count did not constitute an improper comment on the evidence. Considering the charge as a whole, the appellate court was satisfied that the jury could not have been misled or confused by the trial court's minor slip of the tongue since the singular use of "in" instead of "and" constituted harmless error. *Smith v. State*, 294 Ga. App. 692, 670 S.E.2d 191 (2008).

**No fatal variance between indictment and trial evidence.** — Even though the indictment charged the defendant with committing aggravated sodomy by performing "anal intercourse," and the defendant claimed that there was no evidence of penetration, no fatal variance existed between the indictment and the evidence at trial because the indictment satisfactorily informed defendant of the charge and protected the defendant from subsequent prosecutions for the same offense and the defendant was not misled or prejudiced. *Adams v. State*, 299 Ga. App. 39, 681 S.E.2d 725 (2009), aff'd, 287 Ga. 513, 696 S.E.2d 676 (2010).

**Insufficient evidence of venue.** — Absent sufficient proof establishing venue, the defendant's aggravated sexual battery and aggravated sodomy convictions were reversed; but, given that sufficient evidence otherwise existed to support the former charge, retrial on the charge would not violate the defendant's double jeopardy rights. *Melton v. State*, 282 Ga. App. 685, 639 S.E.2d 411 (2006).

**Prior similar transactions evidence admissible.** — In a defendant's trial for aggravated sodomy in violation of O.C.G.A. § 16-6-2(a)(2), a trial court did not err in admitting three similar transactions in which the defendant attempted to or did force sex on a victim because these acts, although two were only attempts that were interrupted by law enforcement, showed a bent of mind to initiate a sexual encounter without a

person's consent. *Blanch v. State*, 306 Ga. App. 631, 703 S.E.2d 48 (2010).

**Evidence sufficient for conviction.**

— See *Smith v. State*, 168 Ga. App. 92, 308 S.E.2d 226 (1983); *Carter v. State*, 168 Ga. App. 177, 308 S.E.2d 438 (1983); *Davis v. State*, 168 Ga. App. 272, 308 S.E.2d 602 (1983); *Williams v. State*, 178 Ga. App. 80, 342 S.E.2d 18 (1986); *Bentley v. State*, 179 Ga. App. 287, 346 S.E.2d 98 (1986); *Funderburke v. State*, 180 Ga. App. 317, 349 S.E.2d 551 (1986); *Cooper v. State*, 180 Ga. App. 37, 348 S.E.2d 486 (1986), aff'd, 256 Ga. 631, 352 S.E.2d 382 (1987); *McKenzie v. State*, 187 Ga. App. 840, 371 S.E.2d 869, cert. denied, 187 Ga. App. 907, 371 S.E.2d 869 (1988); *Meier v. State*, 190 Ga. App. 625, 379 S.E.2d 588 (1989); *Evans v. State*, 191 Ga. App. 364, 381 S.E.2d 760 (1989); *Shelnutt v. State*, 197 Ga. App. 122, 397 S.E.2d 607 (1990); *Ray v. State*, 259 Ga. 868, 389 S.E.2d 326 (1990), overruled on other grounds, *Wilson v. State*, 277 Ga. 195, 586 S.E.2d 669 (2003); *Stine v. State*, 199 Ga. App. 898, 406 S.E.2d 292 (1991); *Miles v. State*, 201 Ga. App. 568, 411 S.E.2d 566 (1991); *King v. State*, 265 Ga. 440, 458 S.E.2d 98 (1995); *Miller v. State*, 228 Ga. App. 754, 492 S.E.2d 734 (1997); *Summerour v. State*, 242 Ga. App. 599, 530 S.E.2d 494 (2000); *In re J.D.*, 243 Ga. App. 644, 534 S.E.2d 112 (2000); *Williams v. State*, 247 Ga. App. 99, 543 S.E.2d 408 (2000); *Blansit v. State*, 248 Ga. App. 323, 546 S.E.2d 81 (2001); *Ragan v. State*, 250 Ga. App. 89, 550 S.E.2d 476 (2001); *Bazin v. State*, 299 Ga. App. 875, 683 S.E.2d 917 (2009).

Evidence was sufficient for a rational trier of fact to have found defendant guilty beyond a reasonable doubt of aggravated sodomy where, inter alia, he told his victims, his underage step-daughters, that if they told anyone, he would hurt them. *Chancey v. State*, 258 Ga. App. 716, 574 S.E.2d 904 (2002).

Term "force" includes not only physical force, but also mental coercion. *Brewster v. State*, 261 Ga. App. 795, 584 S.E.2d 66 (2003).

Defendant was properly convicted of attempted aggravated sodomy where the defendant attacked a jogger, attempted to force the jogger to perform oral sex on the

defendant, and where the jogger only escaped after struggling to break free and running to the jogger's home. *Mann v. State*, 263 Ga. App. 131, 587 S.E.2d 288 (2003).

There was sufficient evidence to support defendant's conviction for sodomy in violation of O.C.G.A. § 16-6-2 where the record revealed that the defendant and the codefendant walked up to the victim, a crack cocaine addict, grabbed the victim and hit the victim in the face, pulled the victim into the woods, and forced a penis into the victim's mouth and then tried to enter the victim from behind. *Pitts v. State*, 263 Ga. App. 322, 587 S.E.2d 811 (2003).

Evidence was sufficient to support defendant's aggravated sodomy convictions as a victim testified that the defendant forced the victim to perform oral sex on defendant against the victim's will, using threats and intimidation. *Evans v. State*, 266 Ga. App. 405, 597 S.E.2d 505 (2004).

Evidence was sufficient to convict defendant and codefendant of aggravated sodomy because: (1) defendant and codefendant grabbed the victim, hit the victim, ripped the victim's dress, pushed the victim to the ground, and took turns putting their sexual organs in the victim's mouth; and (2) a short time after the crime, an officer took defendant back to the scene, where the victim and an eyewitness identified the defendant as one of the perpetrators. *Sims v. State*, 267 Ga. App. 572, 600 S.E.2d 613 (2004).

Aggravated child molestation, child molestation, enticing a child for indecent purposes, and aggravated sodomy convictions were all supported by sufficient evidence provided by the victims detailing the inappropriate touching and anal penetration committed by defendant, and confirmed by the examining experts. *Wilkerson v. State*, 267 Ga. App. 585, 600 S.E.2d 677 (2004).

Sufficient evidence, including testimony from the child victim identifying the defendant's vehicle, evidence of the defendant's DNA matching that of the victim, and expert testimony that the frequency of such occurrence was approximately one in two billion in the Caucasian population, and similar transaction evidence, sup-

ported defendant's kidnapping with bodily injury, rape, aggravated sodomy, aggravated child molestation, aggravated assault, and first-degree cruelty to children convictions. *Morita v. State*, 270 Ga. App. 372, 606 S.E.2d 595 (2004).

Term "force" included mental coercion such as intimidation and evidence at an initial trial that the victim was a mildly mentally retarded adult functioning as a 12-year-old, and that the victim feared being punished by the defendant if the victim did not cooperate with the defendant's sexual advances, was sufficient evidence of mental coercion in the form of intimidation to satisfy the element of force for the crime of aggravated sodomy; since the evidence was sufficient to sustain the conviction, double jeopardy did not prevent a retrial granted on the ground that defendant received ineffective assistance of counsel. *Weldon v. State*, 270 Ga. App. 574, 607 S.E.2d 175 (2004).

Evidence supported defendant's rape, aggravated sodomy, aggravated assault, criminal trespass, misdemeanor obstruction of a law enforcement officer, felony obstruction of a law enforcement officer, and possession of marijuana conviction because: (1) a victim testified that defendant choked the victim, slammed the victim around a room, and raped and sodomized the victim, then drank a beer, took the victim's BC powder packets, and a cell phone, and left; (2) defendant fled from the police, kicked two officers, and had marijuana, BC packets, and a cell phone on his person; (3) defendant's DNA matched the DNA on the beer can; (4) a nurse testified that the victim's bruise was consistent with strangulation; and (5) a doctor testified that the victim's injuries were consistent with rape and sodomy. *Lewis v. State*, 271 Ga. App. 744, 611 S.E.2d 80 (2005).

Because the victim's statement of sexual abuse was sufficient under O.C.G.A. § 24-4-8 to convict defendant of kidnapping with bodily injury, aggravated child molestation, rape, aggravated sodomy, aggravated assault, and possession of a knife during the commission of a crime, the victim's testimony did not have to be corroborated by physical evidence. *Gartrell v. State*, 272 Ga. App. 726, 613 S.E.2d 226 (2005).

**Aggravated Sodomy (Cont'd)**

Testimony of a single witness was sufficient to establish a fact under O.C.G.A. § 24-4-8, and defendant's convictions for kidnapping, burglary, aggravated sodomy, rape, and false imprisonment were supported by sufficient evidence where the victim testified that defendant forced the victim into a train boxcar, threatened to kill the victim, and had vaginal and oral sex with the victim against the victim's will and without the victim's consent; there was also circumstantial evidence showing the victim's lack of consent, including the victim's fleeing from the boxcar while naked, the victim's outcry to a train engineer that the victim had been raped, and the victim's injuries. *Davis v. State*, 278 Ga. App. 628, 629 S.E.2d 537 (2006).

Evidence that the defendant had and received oral sex with the defendant's love interest's minor children, sometimes by force, on numerous occasions, was sufficient to sustain a conviction for aggravated sodomy in violation of O.C.G.A. § 16-6-2. *Moore v. State*, 279 Ga. App. 105, 630 S.E.2d 557 (2006).

Evidence was sufficient to support a conviction of aggravated child molestation since the alleged child victim testified that when the child was five-years-old, defendant "put his private in my mouth and peed in it, and made me swallow it," since, among other witnesses, the child's parent and step-parent testified about what the child told them about the incident, since a detective testified about an interview with the child about the incident, and since the state introduced a videotape of the interview into evidence and played it to the jury. *Tyler v. State*, 279 Ga. App. 809, 632 S.E.2d 716 (2006), cert. denied, 2006 Ga. LEXIS 810 (Ga. 2006); overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Defendant's convictions of rape, aggravated sodomy, false imprisonment, and two counts of aggravated assault were supported by sufficient evidence in the form of the victim's injuries, and the victim's testimony that, among other things, after the victim refused the defendant's request for sex, the defendant threw the

victim on the bed, hit her in the back and on the arms with hedge clippers, ordered the victim to remove the victim's clothes, dragged the victim by the hair back into the house after the victim had escaped through a window, grabbed the victim, twisted the victim's arm, and said, "I'm trying — bitch, I'm going to kill you," hit the victim in the arm and leg with the hedge clippers, punched the victim on the lips and on the forehead, threw the victim on the bed and raped the victim and made the victim perform oral sex on the defendant. *Tarver v. State*, 280 Ga. App. 89, 633 S.E.2d 415 (2006).

Sufficient evidence supported the defendant's convictions of aggravated assault in violation of O.C.G.A. § 16-5-21 and aggravated sodomy in violation of O.C.G.A. § 16-6-2(a) although the defendant pointed to the defendant's previous sexual relationship with the victim and to alleged inconsistencies in the testimony of the victim and the victim's friend; the appellate court refused to weigh the evidence or determine witness credibility, and it found that the evidence, which included testimony that the defendant forcibly placed the victim in the defendant's truck, drove the victim across the state line to an apartment, forced the victim to have sex with the defendant, and cut the victim with a knife, was sufficient to convict. *Martin v. State*, 281 Ga. App. 64, 635 S.E.2d 358 (2006).

Because sufficient evidence showed that the defendant, by posing as a police officer and driving the victims to remote locations, used fear and intimidation to ensure that said victims would cooperate and agree to have sex, the defendant was not entitled to an acquittal as to the charges of impersonating an officer, aggravated sodomy, attempted aggravated sodomy, aggravated assault and rape; furthermore, though both victims willingly got into the defendant's car, after the victims pleaded to be let go and the defendant refused to grant those pleas, said act amounted to a kidnapping. *Dasher v. State*, 281 Ga. App. 326, 636 S.E.2d 83 (2006).

Sufficient evidence supported the defendant's convictions of aggravated child molestation under O.C.G.A. § 16-6-4(c), at-

tempted aggravated sodomy under O.C.G.A. §§ 16-4-1 and 16-6-2(a), and statutory rape under O.C.G.A. § 16-6-3(a); the victim testified that the defendant put the defendant's privates inside the victim's privates and attempted to put the defendant's privates in the victim's behind, and the nurse practitioner testified that the physical examination of the victim indicated injuries consistent with the victim's testimony. *Anderson v. State*, 282 Ga. App. 58, 637 S.E.2d 790 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Evidence supported a defendant's conviction for aggravated sodomy as a showing of penetration was not required to establish sodomy and: (1) an eight-year-old child (child one) told child one's parent that the defendant touched child one "on the front down below"; (2) a 10-year-old child (child two) told child two's parent that the defendant "tried to put (the defendant's) thing in my butt"; (3) child one described acts of oral and anal sodomy to an investigator and nodded affirmatively at trial when asked if the defendant had touched child one's penis with the defendant's mouth; (4) child one indicated that the defendant had touched child one's "behind" with the defendant's "private part"; and (5) child two testified that the defendant touched child two's "behind" with the defendant's private part, and that the defendant touched child two's private part with the defendant's mouth. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

Despite the defendant's correct assertion that the trial court erred in charging the jury that one of the factors to be considered in assessing the reliability of identification testimony was the level of certainty shown by the witness about the identification, because there was evidence other than the victim's identification of the defendant which connected the defendant to the offenses of burglary, aggravated sodomy, and aggravated sexual battery, said error was harmless and the convictions for the same were upheld. *Bharadia v. State*, 282 Ga. App. 556, 639 S.E.2d 545 (2006), cert. denied, No. S07C0522, 2007 Ga. LEXIS 222 (Ga. 2007).

Defendant's aggravated child molestation and aggravated sodomy convictions were upheld on appeal as supported by sufficient evidence including: (1) the testimony from both victims, which was corroborated by an investigator and a treating doctor; and (2) similar transaction evidence of the defendant's oral and anal molestation of other minor siblings, which was introduced for the purpose of showing a course of conduct, intent, and bent of mind toward sexual behavior with young relatives, and not to impugn the defendant's character. *Chauncey v. State*, 283 Ga. App. 217, 641 S.E.2d 229 (2007).

Testimony that the victim physically resisted the defendant's sexual advances to no avail was sufficient to support the defendant's rape and aggravated sodomy convictions; moreover, because sufficient evidence was presented that the defendant was the victim's biological and/or legal father, sufficient evidence supported the defendant's incest conviction as well. *Williams v. State*, 284 Ga. App. 255, 643 S.E.2d 749 (2007).

Because sufficient direct evidence was presented via the victim's testimony that the defendant improperly touched and digitally penetrated the victim's vagina, convictions upon charges of aggravated sodomy, aggravated child molestation, and other crimes arising from that contact were upheld on appeal; further, any error related to the admission of the victim's videotaped statement was harmless, as such statement would have been admissible as res gestae or to prove the defendant's lustful disposition. *Morrow v. State*, 284 Ga. App. 297, 643 S.E.2d 808 (2007).

On appeal from convictions for two counts of child molestation and two counts of aggravated sodomy, no reason for reversal was found because: (1) sufficient evidence was presented in support of the same, making the trial court's denial of an acquittal proper; (2) the time that counsel had to prepare for trial was adequate, thus diminishing the need for a continuance; (3) the defendant's statement to police was not made upon a promise of reward or hope of benefit; and (4) the defendant failed to show that the outcome of the trial would have been different but for counsel's alleged deficiencies. *Robbins*

**Aggravated Sodomy (Cont'd)**

v. State, 290 Ga. App. 323, 659 S.E.2d 628 (2008).

Testimony by a victim that the defendant and an accomplice, armed with handguns, forcibly entered the victim's apartment, raped and sodomized the victim, struck the victim with a gun, stole jewelry, bound the victim, and escaped in a car owned by the victim's prospective spouse, and evidence that 24 fingerprints lifted from the apartment and car matched the defendant's was sufficient to convict the defendant of aggravated sodomy. *Crawford v. State*, 292 Ga. App. 463, 664 S.E.2d 820 (2008).

Testimony of an 11-year-old child that the defendant had sodomized the child on several occasions was sufficient by itself to convict the defendant of sodomy, O.C.G.A. § 16-6-2(a)(1), as it was the jury's role to resolve any inconsistencies in the child's testimony or conflicts between the child's testimony and that of others. *Terry v. State*, 293 Ga. App. 455, 667 S.E.2d 109 (2008).

Evidence was sufficient to support a verdict of aggravated sodomy. The victim testified that the defendant threatened to kill her and that she had oral sex with him as a result; furthermore, defense witnesses testified that the victim screamed "rape" and "stop" several times, which caused the witnesses to twice respond to see what was happening, and that on one of those occasions, the victim jumped into the back of a truck in order to get away from the defendant. *Eller v. State*, 294 Ga. App. 77, 668 S.E.2d 755 (2008).

There was sufficient evidence to uphold a defendant's convictions for aggravated sodomy and kidnapping based on the testimony of the victim; who identified the defendant as the attacker who forced the victim into a vehicle by threat of a knife; there was evidence of various injuries on the victim consistent with the victim's description of the attack; the defendant admitted to having sexual intercourse with the victim but asserted that the intercourse was consensual; and forensic biologists testified as state expert witnesses that the swab of the victim's rectal cavity contained sperm and that DNA

found on that swab matched DNA from the defendant's blood sample. *Smith v. State*, 294 Ga. App. 692, 670 S.E.2d 191 (2008).

Trial court properly denied a defendant's motion for new trial on the ground that there was insufficient evidence to prove aggravated sodomy since the only evidence of the victim performing oral sodomy upon the defendant came from the uncorroborated testimony of the victim's parent, who was an accomplice to the sexual abuse and because there was insufficient evidence of force. To the contrary, the victim's testimony as to the sexual abuse committed by the defendant sufficiently corroborated the testimony of the victim's parent, and the testimony of the victim that the defendant kept multiple guns around the outbuilding where the trio lived and that the defendant had repeatedly threatened to shoot the victim if the victim did not engage in the sexual acts was sufficient to prove the element of force. *Driggers v. State*, 295 Ga. App. 711, 673 S.E.2d 95 (2009).

With regard to a defendant's conviction for aggravated sodomy of an eight-year-old child, the evidence was sufficient to support the conviction based on the testimony of the victim alone. The victim had positively identified the defendant as the person who forced the victim to perform oral sex while the victim was playing alone in a vacant lot, and it was wholly within the province of the jury to believe the victim's testimony over the defendant's alibi testimony that the defendant was out-of-state at the time the alleged incident occurred. *Kelley v. State*, 295 Ga. App. 663, 673 S.E.2d 63 (2009), cert. denied, No. S09C0879, 2009 Ga. LEXIS 256 (Ga. 2009).

Evidence was sufficient to support convictions of child molestation, O.C.G.A. § 16-6-4(a), aggravated child molestation, O.C.G.A. § 16-6-4(c), and sodomy, O.C.G.A. § 16-6-2, because, in addition to the victim's testimony that the defendant had engaged in sexual intercourse and sodomy with the victim, there was physical evidence that supported the victim's testimony that the victim had been abused; the jury was authorized to believe the testimony of the victim as well as the

expert witness who testified on behalf of the state. *Roberts v. State*, 297 Ga. App. 672, 678 S.E.2d 137 (2009).

Following evidence was sufficient to convict the defendant of kidnapping with bodily injury, aggravated sodomy, rape, and robbery by intimidation: 1) the victim's testimony of being repeatedly raped by the defendant at knife point, forced to perform oral sex, beaten, robbed, and threatened with death; 2) a nurse's testimony that the victim was crying, rocking back and forth, and had bruised cheeks; and 3) evidence that the defendant's DNA matched sperm cell DNA found on the victim's body. *Sanders v. State*, 297 Ga. App. 897, 678 S.E.2d 579 (2009).

Sufficient evidence supported the defendant's convictions of armed robbery, O.C.G.A. § 16-8-41(a), rape, O.C.G.A. § 16-6-1(a)(1), aggravated assault, O.C.G.A. § 16-5-21(a)(2), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), kidnapping, O.C.G.A. § 16-5-40(a), and aggravated sodomy, O.C.G.A. § 16-6-2(a)(2) involving four different victims on three separate dates; both the husband and the wife, the victims in the first criminal incident, identified the defendant in court as the perpetrator of the crimes. Two separate DNA analyses testified to by two forensic biologists showed that the defendant's sperm was present in the vaginas of the other two female victims. *Robins v. State*, 298 Ga. App. 70, 679 S.E.2d 92 (2009).

There was sufficient evidence presented for the jury to find the defendant guilty of criminal attempt to commit aggravated sodomy because the state presented sufficient evidence via the victim's testimony that the defendant attempted to force the victim to perform oral sodomy; the victim testified that the defendant moved her to the bedroom of her home while holding a knife and told her to perform oral sex on him and that when she explained that she could not engage in the act the defendant, while still standing over her, moistened and fondled himself and then forced her to fondle him. *Williams v. State*, 300 Ga. App. 839, 686 S.E.2d 446 (2009).

Sufficient evidence was presented to the jury to support the defendant's convictions for armed robbery, aggravated assault,

burglary, criminal attempt to commit aggravated sodomy, and possession of a knife during the commission of a crime because the victim's testimony alone was sufficient to support the convictions; regardless of any inconsistencies in the victim's testimony, it was for the jury to assess witness credibility, and the jury chose to believe the victim's identification of the defendant as the individual who committed the crimes. *Williams v. State*, 300 Ga. App. 839, 686 S.E.2d 446 (2009).

Trial court did not err in convicting the defendant of criminal attempt to commit aggravated sodomy in violation of O.C.G.A. §§ 16-4-1 and 16-6-2 because a reasonable trier of fact could have found that the defendant had the necessary criminal intent to commit aggravated sodomy when the evidence presented at trial showed that the defendant forced the victim's mouth into close proximity with the defendant's sex organs while the victim screamed for help, kicked, and fought the defendant; a reasonable trier of fact could have found that had the victim not been able to escape, the defendant would have forced the victim to engage in sodomy, thereby demonstrating that the defendant had taken a substantial step toward committing aggravated sodomy even though the defendant had not spoken, touched either the defendant's or the victim's sex organs, or exposed the defendant's genitals when the violent acts occurred. *English v. State*, 301 Ga. App. 842, 689 S.E.2d 130 (2010).

Evidence was sufficient for a rational trier of fact to find the defendant guilty of aggravated sodomy of one victim and rape and aggravated sodomy of a second victim because the jury was authorized to conclude, based on a nurse's testimony and the medical evidence, that penetration occurred since the nurse was properly qualified as an expert in sexual assault examination and testified that the first victim's external injuries established the potential for penetration; clumps of hair was found in the second victim's trailer, and the defendant's DNA matched the DNA found on the hair. *Blash v. State*, 304 Ga. App. 542, 697 S.E.2d 265 (2010).

Evidence presented at trial was sufficient to authorize a rational jury to find

**Aggravated Sodomy (Cont'd)**

the defendant guilty beyond a reasonable doubt of rape, aggravated sodomy, aggravated assault with intent to rape, and simple battery because the victim's testimony, standing alone, could sustain the convictions; the jury was entitled to take into account similar transaction evidence for the purpose of showing the defendant's intent, bent of mind, and course of conduct, and while the defendant testified to a different version of what transpired, it was the exclusive role of the jury to determine witness credibility and to choose what evidence to believe and what to reject. Alvarez v. State, No. A11A0101, 2011 Ga. App. LEXIS 340 (Apr. 19, 2011).

**Evidence insufficient for conviction.** — Sufficient evidence did not exist to convict a defendant of aggravated sodomy under O.C.G.A. § 16-6-2(a)(1) because no evidence was submitted that the defendant was present and intentionally aided and abetted the minor victim's father in making the victim put the victim's mouth on the father's penis. Mote v. State, 297 Ga. App. 13, 676 S.E.2d 379 (2009).

Sufficient evidence did not support the conclusion that the prisoner committed aggravated sodomy against the first victim as there was no express testimony that the prisoner's penis touched the victim's anus; moreover, no rational juror could have drawn an inference from the testimony actually presented that the necessary contact occurred because the factual elements necessary for proof of aggravated sodomy in the form of penile-anal contact, as required by O.C.G.A. § 16-6-2(a), could not be inferred from either the penile-oral contact, or the penile-vaginal penetration, or the oral-anal contact that did occur. Green v. Nelson, 595 F.3d 1245 (11th Cir. ), cert. denied, U.S. , 131 S. Ct. 827, 178 L. Ed. 2d 564 (2010).

**Evidence of force against minor victim necessary for conviction.** — Although it was not necessary for the state to prove that the nine-year-old victim did not consent to the acts complained of, it was necessary for the state to prove that the defendant used force to commit the acts of sodomy, and where the state

failed to introduce such evidence of force, the evidence was not sufficient to support the aggravated sodomy conviction. Hines v. State, 173 Ga. App. 657, 327 S.E.2d 786 (1985).

Force is a separate essential element that the state is required to prove to obtain a conviction for aggravated sodomy against a victim under the age of consent. Brewer v. State, 271 Ga. 605, 523 S.E.2d 18 (1999), reversing Brewer v. State, 236 Ga. App. 546, 512 S.E.2d 30 (1999) and overruling Cooper v. State, 256 Ga. 631, 352 S.E.2d 382 (1987).

**Evidence of physical force against five year old not necessary.** — A five year old child cannot consent to any sexual act and sexual acts directed to such a child are, in law, forcible and against the will. Cooper v. State, 256 Ga. 631, 352 S.E.2d 382 (1987).

**Although a court cannot presume force merely because victim of aggravated sodomy is underage,** the amount of evidence necessary to prove force against a child is minimal; even if the acts occurred after the victim reached age ten; the evidence supported defendant's aggravated sodomy convictions because, among other things, the victim testified that the victim did not want to engage in oral sex, that defendant made the victim do it by pushing the victim's head onto the defendant's private part, that the victim resisted when the defendant pushed the victim's head down, and when the victim did not do what defendant asked, the defendant slapped the victim. Henry v. State, 274 Ga. App. 139, 616 S.E.2d 883 (2005).

**Force was proven** in a case involving victims five and ten years of age by evidence that defendant used physical force upon the children, used violence against and threatened their mother in their presence, and intimidated, coerced and threatened them in a manner sufficient to instill in them a reasonable apprehension of bodily harm, violence or other dangerous consequences if they did not comply with his demands. Patterson v. State, 242 Ga. App. 885, 531 S.E.2d 759 (2000).

Prisoner was not entitled to a writ of habeas corpus based on the argument of actual innocence because there was no

evidence to support the element of force required to convict the prisoner for aggravated sodomy and that it would be a miscarriage of justice to apply procedural bar; the victim testified that the victim submitted to the prisoner's desires because the victim believed that the prisoner would physically hurt the victim which, in the context of the prisoner's words and actions, constituted a reasonable fear. Thompson v. Stinson, 279 Ga. 196, 611 S.E.2d 29 (2005).

There was sufficient evidence of force for an aggravated sodomy conviction; the ten-year-old victim's testimony that she was scared and that she wanted the defendant to stop established that her lack of resistance was induced by fear, and the defendant's pulling down the victim's pants and underwear while she slept was some evidence of force. Boileau v. State, 285 Ga. App. 221, 645 S.E.2d 577 (2007).

**Lack of resistance, induced by fear,** is not legally cognizable consent but is force; thus, evidence that defendant's daughter did not resist due to reasonable fear was sufficient to satisfy the force element of aggravated sodomy. Ingram v. State, 211 Ga. App. 252, 438 S.E.2d 708 (1993).

**Severance of offenses.** — Defendant's motion to sever the failure to register as a sex offender counts under former O.C.G.A. § 42-1-12 from the remaining aggravated sodomy and child molestation counts was properly denied as: (1) the defendant was not entitled to severance as a matter of right since the charges involved a series of acts which were connected together; (2) the case was not so complex as to impair the jury's ability to distinguish the evidence and to apply the law intelligently to the counts as joined; and (3) the failure to sever the failure to register as a sex offender counts was proper, even applying an analogy to cases involving possession of a firearm by a convicted felon, as the failure to report charges were legally material to the crimes against two children because the failure constituted evasive conduct that was circumstantial evidence of guilt and evidence of the conduct underlying the defendant's conviction of a sex offense in North Carolina was admissible as a simi-

lar transaction. Bryson v. State, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

**There is no implicit marital exclusion** within O.C.G.A. § 16-6-2 that makes it legally impossible for a husband to be guilty of an offense of aggravated sodomy performed upon his wife. Warren v. State, 255 Ga. 151, 336 S.E.2d 221 (1985) (decided prior to 1996 amendment).

**Defendant's familial relationship to victim.** — Force, as an element of aggravated sodomy under O.C.G.A. § 16-6-2(a), may be inferred by evidence of intimidation arising from the familial relationship. Long v. State, 241 Ga. App. 370, 526 S.E.2d 85 (1999).

**General character of alleged victim as homosexual is irrelevant** as to whether the victim was forced against the victim's will to commit acts of sodomy. Abner v. State, 139 Ga. App. 600, 229 S.E.2d 83 (1976).

**Kidnapping and aggravated sodomy crimes did not merge** since there was sufficient evidence from which the jury could have found that defendant's action in choking the victim almost to the point of unconsciousness after forcibly taking the victim from the living room to the bedroom constituted the bodily injury necessary to establish all the elements of kidnapping with bodily injury, which was completed before defendant committed the aggravated sodomy. Olsen v. State, 191 Ga. App. 763, 382 S.E.2d 715 (1989).

**Kidnapping and aggravated sodomy not included offenses.** — Kidnapping and aggravated sodomy are not included offenses as a matter of law and, even though they may be included as a matter of fact, where the same evidence was not used to prove both crimes, the trial court did not err by refusing to find a merger. Hardy v. State, 210 Ga. App. 811, 437 S.E.2d 790 (1993).

**False imprisonment and aggravated sodomy not included offenses.** — Trial court did not err in failing to merge a false imprisonment offense with attempt to commit aggravated sodomy. Howard v. State, 272 Ga. 242, 527 S.E.2d 194 (2000).

**Enticing child for indecent purposes not included in aggravated sodomy.** — Enticing a child for indecent pur-

**Aggravated Sodomy (Cont'd)**

poses, in violation of O.C.G.A. § 16-6-5, is not included in offense of aggravated sodomy prohibited by O.C.G.A. § 16-6-2; each of these offenses involves proof of distinct essential elements. Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275 (1981).

Enticing a child for indecent purposes, unlike offense of aggravated sodomy, includes element of asportation. Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275 (1981).

**Child molestation not lesser included offense.** — O.C.G.A. § 16-6-4(a) (child molestation) was not a lesser included offense of aggravated sodomy, either as a matter of law, under either O.C.G.A. § 16-1-6(2) or O.C.G.A. § 16-1-7(a), or as a matter of fact. Hill v. State, 183 Ga. App. 654, 360 S.E.2d 4 (1987).

Offense of aggravated sodomy did not factually merge into the offense of child molestation since one of the offenses was established by proof of the same or less than all the facts required to prove the other. LeGallienne v. State, 180 Ga. App. 108, 348 S.E.2d 471 (1986).

**Aggravated sodomy differs from rape and child molestation.** — Jury's verdict of not guilty of rape was not repugnant to and inconsistent with the verdicts of guilty for aggravated sodomy and child molestation. The elements of each of the three crimes charged are different, and the conduct related to each, as evidenced in this case, was also different, distinct, and separate. Hill v. State, 183 Ga. App. 654, 360 S.E.2d 4 (1987).

Because the record contained sufficient evidence of multiple acts committed against the victim by the defendant for the trier of fact to find the defendant guilty beyond a reasonable doubt of both aggravated child molestation and aggravated sodomy, the offenses did not merge as a matter of law or fact; thus, the evidence supporting one count was not "used up" in proving the other count. Forbes v. State, 284 Ga. App. 520, 644 S.E.2d 345 (2007).

**Criminal intent.** — Trial judge was authorized to find beyond a reasonable

doubt that defendant acted with the criminal intent to commit the prohibited act of aggravated sodomy by placing defendant's sexual organ in the victim's mouth with force and against the victim's will. Since there was no evidence that the trial court did not make the requisite finding regarding criminal intent, the appellate court found no error. Sims v. State, 267 Ga. App. 572, 600 S.E.2d 613 (2004).

**Intent to rape and attempted aggravated sodomy are not lesser included offenses of each other.** — Statutory definitions of intent to rape under O.C.G.A. § 16-5-21, and attempted aggravated sodomy under O.C.G.A. § 16-6-2, make it clear that the Georgia General Assembly intended to prohibit two designated kinds of general conduct, and that the two crimes, which were codified in separate chapters, are not established by same proof of all facts; neither crime is a lesser, or included, offense of the other as a matter of law or fact, for facts must differ to convict under the statutes. Bissell v. State, 157 Ga. App. 711, 278 S.E.2d 415 (1981).

**Merger of sodomy and aggravated sodomy convictions.** — When, following conviction, the trial court merged aggravated sodomy and sodomy counts and entered judgment against defendant on rape and aggravated sodomy counts, the ruling in Powell v. State, 270 Ga. 327, 510 S.E.2d 18 (1998) did not render defendant's conviction for aggravated sodomy void. McBee v. State, 239 Ga. App. 314, 521 S.E.2d 209 (1999).

**Jury instruction on aggravated sodomy.** — No reversible error resulted from the trial court's jury instruction that aggravated sodomy may be committed by acts involving the sex organ of one and the mouth or anus of another, notwithstanding the fact the indictment and evidence only involved acts of oral sodomy. Garland v. State, 213 Ga. App. 583, 445 S.E.2d 567 (1994).

**Charge as to consent appropriate.** — Trial court did not err in charging the jury on consent, since consent is at issue in a prosecution for aggravated sodomy. Evans v. State, 191 Ga. App. 364, 381 S.E.2d 760 (1989).

Trial judge correctly charged the jury

that the element of "against the will," or consent, was automatically shown by the victim's age, in a prosecution of a defendant charged with aggravated sodomy and child molestation of defendant's 11-year-old niece. *Miles v. State*, 201 Ga. App. 568, 411 S.E.2d 566 (1991).

**Instruction on simple sodomy as lesser included offense** of the aggravated sodomy charged was not required where the victim's age obviated any element of consent and the victim testified she feared bodily harm if she did not accede to defendant's wishes. *LaPan v. State*, 167 Ga. App. 250, 305 S.E.2d 858 (1983).

**Charge on presumption that no crime has been committed.** — Refusal of the trial court to give a requested charge that "in all cases there exists the presumption that no crime has been committed," is not error when the victim's testimony, if believed by the jury, was sufficient direct evidence to establish a corpus for the offenses of rape, burglary, and aggravated sodomy alleged, and the trial court charged the jury the general charge on the presumption of innocence. *Smith v. State*, 180 Ga. App. 422, 349 S.E.2d 279 (1986).

**Charge on child molestation held inappropriate.** — In a trial for aggravated sodomy, where the victim was a five year old child, the trial court's refusal to charge on request, as a lesser-included offense, the elements of child molestation as defined by O.C.G.A. § 16-6-4, was not error; since under the evidence, such a charge would have been inappropriate, as the victim testified that defendant did the act, and defendant denied it. *Cooper v. State*, 256 Ga. 631, 352 S.E.2d 382 (1987).

**Charge of both sodomy and child molestation.** — When the evidence showed that, at least as to two of the three victims, the defendant committed the illegal act charged in each pair of counts aggravated sodomy and aggravated child molestation on more than one occasion, but the indictment did not charge the defendant with separate and distinct acts but merely charged the defendant with two different crimes for the same described act, the defendant should have been sentenced for only one of the two

offenses for which the defendant was convicted as to each of the three victims. This case is distinguishable from those cases in which the court has upheld the conviction and sentencing for separate crimes and rejected the defendant's claim of merger because the indictment charged the defendant with multiple, distinct offenses. *Lewis v. State*, 205 Ga. App. 29, 421 S.E.2d 339 (1992).

Defendant's aggravated child molestation charge merged with the aggravated sodomy charge, as both were based on the same act of sodomy; while defendant committed multiple acts of anal sodomy against one of the victims, the indictment did not charge the defendant with separate and distinct acts but merely charged the defendant with two different crimes for the same described act. *Wilkerston v. State*, 267 Ga. App. 585, 600 S.E.2d 677 (2004).

**Defendant's incriminating admission to victim admissible.** — Victim was properly allowed to testify, at defendant's trial for rape and aggravated sodomy, that, during the course of the victim's ordeal, defendant had made the incriminating admission to the victim that "there's been ten others, ten other women, and you're not the only one." *Copeland v. State*, 177 Ga. App. 773, 341 S.E.2d 302 (1986).

**Testimony of child-victim's mother, regarding talk uttered by a child in sleep, was admissible** as original evidence at the defendant's trial for aggravated sodomy. *Godfrey v. State*, 187 Ga. App. 319, 370 S.E.2d 183 (1988).

**Evidence sufficient for conviction of rape, aggravated sodomy, and burglary.** — See *Clark v. State*, 186 Ga. App. 882, 369 S.E.2d 282 (1988).

**Evidence sufficient to authorize guilty verdict for aggravated sodomy and armed robbery.** — See *Jackson v. State*, 165 Ga. App. 737, 302 S.E.2d 611 (1983).

**Evidence insufficient for conviction.** — Evidence of genital to genital contact whereby defendant contacted victim's penis and "butt" without contacting victim's anus was insufficient to support a conviction under O.C.G.A. § 16-6-2. *Elrod v. State*, 208 Ga. App. 787, 432 S.E.2d 808 (1993).

**Aggravated Sodomy (Cont'd)**

**Twenty-year maximum sentence imposed** for aggravated sodomy did not shock the conscience, and therefore did not impose cruel and unusual punishment. Rodgers v. State, 261 Ga. 33, 401 S.E.2d 735 (1991).

**Circumstantial evidence of force through intimidation** was sufficient to support an aggravated sodomy conviction after a child victim, age 17 at the time in question, testified that the victim "freaked out" when defendant performed oral sex on the victim, that the victim did not want the oral sex to happen, that the victim did tell the defendant to stop since the victim trusted defendant like a father figure, and that the victim could not have stopped defendant because of defendant's size. Schneider v. State, 267 Ga. App. 508, 603 S.E.2d 663 (2004).

**Evidence sufficient for aggravated child molestation.** — Evidence was sufficient to support defendant's conviction for aggravated child molestation, which involved an act of sodomy, by placing the defendant's genitals in the child's anus because the child testified that defendant "put his private in [the child's] butt." Neal v. State, 271 Ga. App. 283, 609 S.E.2d 204 (2005).

**Aggravated child molestation based on sodomy.** — Evidence supported defendant's conviction for aggravated child molestation and aggravated sexual battery because: (1) the 11-year-old victim testified that defendant put the defendant's hand on the child's private part, put the defendant's finger in the child's private part, put the defendant's mouth on the child's private part, and put the child's mouth on the defendant's private part, and that when the child put the child's mouth on the defendant's private

part, "he came, whatever you call it"; (2) when the prosecutor asked the victim whether by that the child meant that "stuff came out of his private part," the child responded yes; and (3) in a videotaped pretrial interview, the victim explained that the child was using the term "private part" to mean penis or vagina. Maddox v. State, 275 Ga. App. 869, 622 S.E.2d 80 (2005).

Aggravated sodomy in violation of O.C.G.A. § 16-6-2 count of the indictment should have merged into the aggravated child molestation in violation of O.C.G.A. § 16-6-4 count, as both alleged that the defendant had the victim perform oral sex on the defendant. Howard v. State, 281 Ga. App. 797, 637 S.E.2d 448 (2006).

**Aggravated sodomy based on common criminal intent of codefendant.** — Denial of motion for directed verdict on charge of aggravated sodomy was proper because defendant and the codefendant sexually assaulted three victims during armed robbery, including one instance in which defendant and the codefendant took turns raping one victim, and the aggravated sodomy was committed during the sexual assaults; the jury could reasonably find that defendant and the codefendant had a common criminal intent to commit the sexual assaults and defendant could be found guilty of the act performed by the codefendant. Coley v. State, 272 Ga. App. 446, 612 S.E.2d 608 (2005).

**Court must impose maximum sentence.** — Because the defendant was a three-time recidivist and because the maximum sentence for aggravated sodomy was life in prison, the trial court correctly imposed sentence against the defendant to serve life in prison without the possibility of parole. Bharadia v. State, 282 Ga. App. 556, 639 S.E.2d 545 (2006), cert. denied, No. S07C0522, 2007 Ga. LEXIS 222 (Ga. 2007).

**OPINIONS OF THE ATTORNEY GENERAL**

**The 1996 amendment** repealed the ten year mandatory minimum sentence for rape and aggravated sodomy formerly

applicable to first offenders. 1996 Op. Att'y Gen. No. U96-20.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 70C Am. Jur. 2d, Sodomy, § 1 et seq.

**Am. Jur. Proof of Facts.** — Sexual Organ Injuries: Male Genitalia, 70 POF3d 229.

**C.J.S.** — 81A C.J.S., Sodomy, § 1 et seq.

**ALR.** — Assault with intent to commit unnatural sex act upon minor as affected by latter's consent, 65 ALR2d 748.

Applicability, in proceedings under statutes relating to sexual psychopaths, of constitutional provisions for the protection of a person accused of crime, 34 ALR3d 652.

Consent as defense in prosecution for sodomy, 58 ALR3d 636.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

Validity of statute making sodomy a criminal offense, 20 ALR4th 1009.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse, 25 ALR4th 1213.

### 16-6-3. Statutory rape.

(a) A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the victim.

(b) Except as provided in subsection (c) of this Code section, a person convicted of the offense of statutory rape shall be punished by imprisonment for not less than one nor more than 20 years; provided, however, that if the person so convicted is 21 years of age or older, such person shall be punished by imprisonment for not less than ten nor more than 20 years. Any person convicted under this subsection of the offense of statutory rape shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.

(c) If the victim is at least 14 but less than 16 years of age and the person convicted of statutory rape is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor. (Ga. L. 1918, p. 259, §§ 1, 2; Code 1933, §§ 26-1303, 26-1304; Code 1933, § 26-2018, enacted by Ga. L. 1968, p. 715, § 1; Ga. L. 1995, p. 957, § 3; Ga. L. 1996, p. 871, § 1; Ga. L. 1996, p. 1115, § 3; Ga. L. 2006, p. 379, § 10/HB 1059.)

**Cross references.** — Actions for childhood sexual abuse, § 9-3-33.1. Admissibility of child's prior statement to witness regarding sexual or physical abuse, § 24-3-16. Visitation with minors by convicted sexual offenders while imprisoned, § 42-5-56.

**Editor's notes.** — Ga. L. 1995, p. 957, § 1, not codified by the General Assembly, provides: "This Act shall be known and

may be cited as the 'Child Protection Act of 1995'."

Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides that: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offend-

ers are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

(3) Providing for community and public notification concerning the presence of sexual offenders;

(4) Collecting data relative to sexual offenses and sexual offenders;

(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The

designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

**Law reviews.** — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001). For survey article on criminal law and procedure for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 117 (2003). For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004). For article, "The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload," see 55 Emory L.J. 691 (2006). For article on 2006 amendment of this Code section, see 23 Georgia St. U.L. Rev. 11 (2006).

For note, "Pedophilia, Exhibitionism, and Voyeurism: Legal Problems in the Deviant Society," see 4 Ga. L. Rev. 149 (1969). For note on the 2003 amendment to this Code section, see 20 Georgia St. U.L. Rev. 100 (2003). For note, "Can't Do the Time, Don't Do the Crime?: Dixon v. State, Statutory Construction, and the Harsh Realities of Mandatory Minimum Sentencing in Georgia," see 22 Georgia St. U.L. Rev. 519 (2005). For note, "Calling on the Legislature: Dixon v. State and Georgia's Statutory Scheme to Protect Minors from Sexual Exploitation," see 56 Mercer L. Rev. 777 (2005).

## JUDICIAL DECISIONS

## ANALYSIS

GENERAL CONSIDERATION

EVIDENCE

MERGER WITH OTHER OFFENSES

JURY ISSUES AND INSTRUCTIONS

**General Consideration**

**Constitutionality.** — Provision of O.C.G.A. § 16-6-3(b) for a harsher punishment for older persons found guilty of statutory rape is not unconstitutionally discriminatory. *Phagan v. State*, 268 Ga. 272, 486 S.E.2d 876 (1997), cert. denied, 522 U.S. 1128, 118 S. Ct. 1079, 140 L. Ed. 2d 136 (1998).

**Statutory intent.** — Former Code 1933, § 26-1303 was intended to apply only to cases where the act of intercourse was accomplished with the actual consent or acquiescence of the female, and was to be treated as rape merely because the female was under the age of consent as therein specified. *Strickland v. State*, 207 Ga. 284, 61 S.E.2d 118 (1950) (See O.C.G.A. § 16-6-3).

Under O.C.G.A. § 16-6-3(b), the sentence for a person convicted of statutory rape who was 21 years of age or older was between 10 and 20 years, so because defendant was more than 21 years old when the offense was committed, the original sentence of five years probation was void, and the trial court properly granted the state's motion to vacate; once the illegal sentence was vacated, the trial court was not required to sentence defendant to 10 years probation. *Thomas v. State*, 272 Ga. App. 279, 612 S.E.2d 99 (2005).

**Legislative objectives.** — Former Code 1933, § 26-2018 was substantially related to the legislative objectives of protecting young girls from the unique physical and psychological damage resulting from sexual intercourse with males. *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979) (See O.C.G.A. § 16-6-3).

**Statute raised age of consent from that of common law.** — Former Code 1933, § 26-1303 did not have the effect of creating a new and separate crime of rape, but sought only to raise the age of consent from that of the common law, which was

under ten years of age to 14 years of age. *Harrison v. State*, 71 Ga. App. 369, 31 S.E.2d 119 (1944) (See O.C.G.A. § 16-6-3).

**Indictment listing only forcible rape sufficient for statutory rape.** — Even though an indictment listed only the statute for forcible rape, because it alleged facts relevant to statutory rape, defendant was put on notice that defendant was being charged with the latter offense and was not prejudiced. *Brown v. State*, 228 Ga. App. 748, 492 S.E.2d 555 (1997).

Defendant was properly convicted of statutory rape, even though the indictment only charged him with forcible rape. As the indictment alleged the victim was under 16, it put the defendant on notice that statutory rape could be considered a factually lesser included offense of forcible rape. *Hill v. State*, 295 Ga. App. 360, 671 S.E.2d 853 (2008).

**Indictment failing to allege commission of crime.** — Indictment alleging that defendant attempted to commit the crime of statutory rape by taking the substantial step of discussing engaging in sexual intercourse via computer and driving to an arranged meeting place for the purpose of engaging in sexual intercourse was not fatally defective for failure to allege the commission of a crime. *Dennard v. State*, 243 Ga. App. 868, 534 S.E.2d 182 (2000).

**Defendant cannot admit charges and be innocent as a matter of law.** — Defendant's general demurrer was properly denied, where the indictment alleged that defendant violated O.C.G.A. §§ 16-6-3 and 16-6-4(c) over a period of time, some of which was after the victim turned 16, as defendant could not admit the charges and still be innocent as a matter of law. *Grizzard v. State*, 258 Ga. App. 124, 572 S.E.2d 760 (2002).

**Only slight penetration necessary.** — Penetration of the female sexual organ by the sexual organ of the male, which is

**General Consideration (Cont'd)**

necessary to constitute rape, need be only slight. It is not necessary that the vagina shall be entered or the hymen ruptured, but an entering of the anterior of the organ, known as the vulva or labia, is sufficient. *Lee v. State*, 197 Ga. 123, 28 S.E.2d 465 (1943).

In rape there must be a penetration of the female organ of generation by the male organ of generation; that penetration may be slight or great, but there must be some penetration of the female organ by the male organ in order to consummate a rape. *Addison v. State*, 198 Ga. 249, 31 S.E.2d 393 (1944).

**Proof that vulva was entered is sufficient.** — Proof that the vagina was entered is not essential to a conviction of rape, but proof that the vulva was entered is sufficient to show penetration, although the vagina be intact and not penetrated in the least. *Addison v. State*, 198 Ga. 249, 31 S.E.2d 393 (1944).

**Proof of force is unnecessary.** — When one has carnal intercourse with a female under the age of 14, proof of force is unnecessary to show rape. *Smith v. State*, 192 Ga. 713, 16 S.E.2d 543 (1941).

**Acts of force are irrelevant** in a statutory rape case; it is the act of sexual intercourse and the age of the female that constitute the crime of statutory rape. *Claitt v. State*, 154 Ga. App. 727, 270 S.E.2d 34 (1980).

**Questions of consent and chastity immaterial.** — When defendant was on trial for alleged offense of rape of a girl nine years of age, the court did not err in refusing to permit his attorney to interrogate the female as to a claimed particular instance of unchastity with another man, as the offense would have been rape, regardless of the girl's consent, and furthermore on a trial for rape, the female cannot be impeached by evidence of specific acts of unchastity. *Latimer v. State*, 188 Ga. 775, 4 S.E.2d 631 (1939).

When the illegal sexual or carnal intercourse is with a female child under the age of 14 years, the questions of consent and chastity are not material, and it would serve no useful purpose to allow a thorough and sifting examination as to her

credibility in regard to such questions. *Deen v. State*, 216 Ga. 387, 116 S.E.2d 595 (1960).

**Considerations of "consent" and "force" and "against her will" are irrelevant** in statutory rape case, and the age of the victim is irrelevant in a forcible rape case except insofar as it may show her incapable of giving consent and thereby supply the "against her will" element. *Hill v. State*, 246 Ga. 402, 271 S.E.2d 802 (1980), cert. denied, 451 U.S. 923, 101 S. Ct. 2001, 68 L. Ed. 2d 313 (1981).

**"Force and arms" was not an element of the offenses of statutory rape**, O.C.G.A. § 16-6-3, child molestation, O.C.G.A. § 16-6-4, or furnishing alcohol to a minor, O.C.G.A. § 3-3-23, and since an indictment was couched in the words of the statutes and correctly informed defendant of offenses charged, the indictment's allegation of use of force was mere surplusage and was properly disregarded. *Colon v. State*, 275 Ga. App. 73, 619 S.E.2d 773 (2005).

**Statutory scheme to protect children under 14 (now 16).** — Carnal knowledge of a child under ten, even though she consented to the act, is rape. *Swink v. State*, 225 Ga. 717, 171 S.E.2d 304 (1969).

Together, former Code 1933, §§ 26-2018 through 26-2020 (see O.C.G.A. §§ 16-6-3 through 16-6-5) provided a general statutory scheme giving protection to both male and female children under the age of 14 (now 16), regardless of the offender's gender, and thus were not invalid as depriving this defendant of equal protection of the law. *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979).

Juvenile male defendant convicted of statutory rape was not deprived of equal protection, even though the statutory rape law applies only to a male engaging in sexual intercourse with an underage female, since, under the statute on child molestation, a female who engages in sexual intercourse with a male under the age of 14 is subject to the same penalties. *In re B.L.S.*, 264 Ga. 643, 449 S.E.2d 823 (1994).

Right of privacy under Ga. Const. 1983, Art. I, Sec. I, Para. I prohibited the state

from prosecuting defendant for fornication under O.C.G.A. § 16-6-18, since defendant and defendant's love interest, both age 16 and of legal age to consent to sex under O.C.G.A. § 16-6-3(a), engaged in private, unforced, non-commercial sex. *In re J.M.*, 276 Ga. 88, 575 S.E.2d 441 (2003).

**Reasonable belief that prosecutrix was of age of consent is no defense.** — Defendant's knowledge of age of female is not essential element of crime of statutory rape and therefore it is no defense that accused reasonably believed that prosecutrix was of age of consent. *Tant v. State*, 158 Ga. App. 624, 281 S.E.2d 357 (1981).

**Effect of change in age of consent.** — When defendant had lawfully engaged in consensual sexual activity with a minor prior to the amendment raising the age of consent, the amendment did not interfere with defendant's constitutional right of privacy so as to exempt the defendant from its coverage of subsequent sexual activity with the minor. *Phagan v. State*, 268 Ga. 272, 486 S.E.2d 876 (1997), cert. denied, 522 U.S. 1128, 118 S. Ct. 1079, 140 L. Ed. 2d 136 (1998); *McMillian v. State*, 263 Ga. App. 782, 589 S.E.2d 335 (2003).

**Knowledge of victim's age not an element.** — When a defendant was charged with statutory rape and child molestation in violation of O.C.G.A. §§ 16-6-3 and 16-6-4, the trial court properly excluded any evidence showing that defendant believed that the victim was over the age of consent; knowledge of the victim's age was not an element of either statute. *Haywood v. State*, 283 Ga. App. 568, 642 S.E.2d 203 (2007).

**Gender based classifications** require less than strict scrutiny but more than minimum scrutiny and must serve important governmental objectives and must be substantially related to achievement of those objectives. *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979).

**O.C.G.A. § 16-6-3 does not create a private cause of action in tort** in favor of an alleged victim. *McNamee v. A.J.W.*, 238 Ga. App. 534, 519 S.E.2d 298 (1999).

**Retrial did not violate due process.** — Retrial on child molestation charge did not violate due process given the legisla-

ture's clear intention to prosecute sexual intercourse only as statutory rape. *Maynard v. State*, 290 Ga. App. 403, 659 S.E.2d 831 (2008).

**Directed verdict of acquittal was moot when guilty of attempt.** — Because the defendant was not convicted on the statutory-rape charge but was, instead, found guilty of attempted statutory rape as a lesser-included offense, the issue of whether the trial court erred in denying the defendant's motion for a directed verdict of acquittal as to the statutory-rape charge was moot. *Judice v. State*, 308 Ga. App. 229, 707 S.E.2d 114 (2011).

**Sex offender registration required for violation.** — Trial court properly held that the defendant, who was convicted of a statutory rape that occurred when the defendant was 18 and the victim was 13, had to register as a sex offender. Because the victim was under 14, the case did not fall within the exception of O.C.G.A. § 42-1-12(a)(9)(C) for misdemeanor statutory rape under O.C.G.A. § 16-6-3(c); moreover, the defendant was prosecuted in superior court, not juvenile court. *Planas v. State*, 296 Ga. App. 51, 673 S.E.2d 566 (2009).

**Cited in** *Bearden v. State*, 122 Ga. App. 25, 176 S.E.2d 243 (1970); *Lee v. Hopper*, 499 F.2d 456 (5th Cir. 1974); *Presnell v. State*, 241 Ga. 49, 243 S.E.2d 496 (1978); *Beldonza v. State*, 160 Ga. App. 647, 288 S.E.2d 37 (1981); *Copeland v. State*, 160 Ga. App. 786, 287 S.E.2d 120 (1982); *Tucker v. State*, 173 Ga. App. 742, 327 S.E.2d 852 (1985); *McCravy v. State*, 176 Ga. App. 683, 337 S.E.2d 442 (1985); *Payne v. State*, 258 Ga. 711, 373 S.E.2d 626 (1988); *Daniel v. State*, 194 Ga. App. 495, 391 S.E.2d 128 (1990); *Legg v. State*, 207 Ga. App. 399, 428 S.E.2d 87 (1993); *State v. Collins*, 270 Ga. 42, 508 S.E.2d 390 (1998); *Trejo v. State*, 245 Ga. App. 316, 537 S.E.2d 755 (2000); *Melton v. State*, 282 Ga. App. 685, 639 S.E.2d 411 (2006).

## Evidence

**Evidence of victim's past sexual encounters is irrelevant.** — In statutory rape proceedings, testimony as to victim's past sexual encounters, even though entered into evidence without objection, is

**Evidence (Cont'd)**

irrelevant, i.e., having no tendency to prove or disprove any matter in issue in the case. *Hill v. State*, 159 Ga. App. 489, 283 S.E.2d 703 (1981).

Inquiry into the victim's past sexual experiences was properly refused, even where a physician testified that in examining the victim it was obvious she had been sexually active. *Worth v. State*, 183 Ga. App. 68, 358 S.E.2d 251 (1987).

**Corroborating evidence.** — Law prescribes no standard for the strength of corroborating evidence, but it must be something more than a mere colorable support. *Wright v. State*, 184 Ga. 62, 190 S.E. 663 (1937).

Corroborative evidence, whether consisting of acts or admissions, must at least be of such a character and quality as tends to prove the guilt of the accused by connecting the accused with the crime. It need not, however, include testimony of an eyewitness of the act itself, or extend to everything said or done, and need not be positive or direct. *Wright v. State*, 184 Ga. 62, 190 S.E. 663 (1937).

Under former Code 1933, § 26-1304 (see now O.C.G.A. § 16-6-3), the evidence supporting that of the female or corroborative thereof must be testimony other than that of her own, as to the commission of the offense by the accused; and while it need not be sufficient of itself to establish guilt of the accused, it must tend to establish his guilt, although it is not necessary that the female be corroborated as to every essential element of the crime. In other words, there must be corroborating evidence fairly tending to prove that the crime was committed and that it was committed by the defendant. *Wright v. State*, 184 Ga. 62, 190 S.E. 663 (1937).

Only corroboration necessary in a case of rape where the woman is an imbecile or a child under 14 years of age incapable of consenting is proof of facts or circumstances tending to sustain the testimony of the woman as to acts of sexual intercourse with the defendant. *Sewell v. State*, 60 Ga. App. 606, 4 S.E.2d 475 (1939).

Quantum of corroboration needed in a rape case is not that which is in itself sufficient to convict the accused, but only

that amount of independent evidence which tends to prove that the incident occurred as alleged. Slight circumstances may be sufficient corroboration, but ultimately the question of corroboration is one for the jury. *Davis v. State*, 204 Ga. App. 657, 420 S.E.2d 349 (1992).

Testimony of the victim's mother as to statements made to her by the victim and her own knowledge of defendant's actions was sufficient corroborating evidence. *Lee v. State*, 232 Ga. App. 300, 501 S.E.2d 844 (1998).

Victim's testimony in a prosecution for statutory rape was sufficiently corroborated by her prior consistent statements, both verbal and written, and by a psychologist's testimony that she showed signs of sexual abuse syndrome. *Patterson v. State*, 233 Ga. App. 776, 505 S.E.2d 518 (1998).

Victim's prior consistent statements, as recounted by their recipients, can satisfy the O.C.G.A. § 16-6-3 corroboration requirement. *Simpson v. State*, 234 Ga. App. 729, 507 S.E.2d 860 (1998), aff'd, 271 Ga. 772, 523 S.E.2d 320 (1999).

Act of intercourse as testified to by the victim was corroborated by her outcry to her mother three weeks after the attack. *Reece v. State*, 241 Ga. App. 809, 527 S.E.2d 642 (2000).

Corroborated by defendant's confession, the victim's testimony that defendant had sexual intercourse with the victim when the victim was 14 sufficed to sustain the conviction. *Bankston v. State*, 249 Ga. App. 118, 548 S.E.2d 25 (2001).

Evidence was sufficient to corroborate the victim's testimony that the victim first had sexual intercourse with defendant at age 14 after the victim's mother testified that after a divorce from defendant and while the victim was living with the victim's parent, defendant began to come by her house when the mother was not there in order to see the victim, and that the mother found a letter from the victim to defendant in which the victim referred to the night they had sexual intercourse; thus, a reasonable trier of fact could rationally find from all the evidence proof beyond a reasonable doubt of defendant's guilt of statutory rape. *Byrd v. State*, 258 Ga. App. 572, 574 S.E.2d 655 (2002).

Defendant's conviction for statutory rape was affirmed on appeal because the victim's testimony was corroborated by the victim's parent, the police, and the medical and scientific findings. *Weldon v. State*, 270 Ga. App. 262, 606 S.E.2d 329 (2004).

Two 14-year-old victims' prior consistent statements that the defendant had sexual intercourse with them, recounted by third parties, were sufficient corroboration under O.C.G.A. § 16-6-3(a) to convict the defendant of two counts of statutory rape. *Hill v. State*, 295 Ga. App. 360, 671 S.E.2d 853 (2008).

**Defendant's confession as corroboration.** — Defendant's confession to deputy sheriff, referring to the transaction charged in the indictment (rape upon his stepdaughter, a girl less than 13) would be sufficient corroboration, whether the verdict be for rape, the crime charged in the indictment, or a lesser offense included in the crime charged. *Sewell v. State*, 60 Ga. App. 606, 4 S.E.2d 475 (1939).

**Corroborating identification evidence is not necessary** in statutory rape prosecutions. *Chambers v. State*, 141 Ga. App. 438, 233 S.E.2d 818, rev'd on other grounds, 240 Ga. 76, 239 S.E.2d 324 (1977), later appeal, 146 Ga. App. 126, 245 S.E.2d 467 (1978); *Hill v. State*, 159 Ga. App. 489, 283 S.E.2d 703 (1981); *Davis v. State*, 204 Ga. App. 657, 420 S.E.2d 349 (1992).

**Only fact of commission of crime of rape must be corroborated** by other evidence and corroborating identification evidence is not necessary. *Chambers v. State*, 141 Ga. App. 438, 233 S.E.2d 818, rev'd on other grounds, 240 Ga. 76, 239 S.E.2d 324 (1977), later appeal, 146 Ga. App. 126, 245 S.E.2d 467 (1978).

**Corroborative evidence tending to prove guilt of accused.** — Corroborative evidence, whether consisting of acts or admissions, must at least be of such a character and quality as tends to prove the guilt of the accused by connecting the accused with the crime. *Chambers v. State*, 141 Ga. App. 438, 233 S.E.2d 818, rev'd on other grounds, 240 Ga. 76, 239 S.E.2d 324 (1977), later appeal, 146 Ga. App. 126, 245 S.E.2d 467 (1978).

Evidence supporting that of the female

or corroborative thereof must be testimony other than that of her own, as to the commission of the offense by the accused; and while it need not be sufficient of itself to establish the guilt of the accused, it must tend to establish his guilt although it is not necessary that the female be corroborated as to every essential element of the crime. *Chambers v. State*, 141 Ga. App. 438, 233 S.E.2d 818, rev'd on other grounds, 240 Ga. 76, 239 S.E.2d 324 (1977), later appeal, 146 Ga. App. 126, 245 S.E.2d 467 (1978).

Corroborating evidence in the form of: (1) testimony from a nurse practitioner about the victim's genital injuries; and (2) an outcry by the victim to a refugee health counselor that defendant had been sexually abusing the victim since the victim was seven years old was sufficient to support defendant's statutory rape conviction pursuant to O.C.G.A. § 16-6-3(a). *Falak v. State*, 261 Ga. App. 404, 583 S.E.2d 146 (2003).

**Quantum of corroboration needed** in rape case is not that which is in itself sufficient to convict accused, but only that amount of independent evidence which tends to prove that incident occurred as alleged. Slight circumstances may be sufficient corroboration. *Hill v. State*, 159 Ga. App. 489, 283 S.E.2d 703 (1981); *Dye v. State*, 205 Ga. App. 781, 423 S.E.2d 713 (1992); *Collins v. State*, 229 Ga. App. 658, 495 S.E.2d 59 (1998), aff'd, 270 Ga. 42, 508 S.E.2d 390 (1998).

When the victim's testimony showed that an act of sexual intercourse occurred, it was not necessary that her testimony be corroborated in every particular. *In re B.L.S.*, 264 Ga. 643, 449 S.E.2d 823 (1994).

**Corroboration and sufficiency of evidence.** — Child-victim's prior consistent statements, as recounted by third parties to whom such statements were made, along with the child-victim's subsequent behavior, constituted sufficient substantive evidence of corroboration to convict for statutory rape. *Turner v. State*, 223 Ga. App. 448, 477 S.E.2d 847 (1996); *Wilson v. State*, 241 Ga. App. 426, 526 S.E.2d 381 (1999), cert. denied, 531 U.S. 907, 121 S. Ct. 252, 148 L. Ed. 2d 182 (2000).

**Evidence (Cont'd)**

Testimony of the victim's mother, sister, and aunt as to the victim's outcry, stating that the victim told them the defendant raped the victim, was sufficient corroboration of the victim's testimony. Salazar v. State, 245 Ga. App. 878, 539 S.E.2d 231 (2000).

Trial court did not err in denying a motion for a directed verdict on a charge of statutory rape, as the victim's recantation did not render the evidence against the defendant insufficient, because the victim's prior inconsistent statements concerning the sexual activity was substantive evidence of guilt; further, the prior inconsistent statements, corroborated by statements to others, as well as the defendant's own testimony that there was a sexual relationship, satisfied the sufficiency of the evidence standard of Jackson v. Virginia. Lewis v. State, 278 Ga. App. 160, 628 S.E.2d 239 (2006).

Sufficient evidence supported the defendant's convictions of aggravated child molestation under O.C.G.A. § 16-6-4(c), attempted aggravated sodomy under O.C.G.A. §§ 16-4-1 and 16-6-2(a), and statutory rape under O.C.G.A. § 16-6-3(a); the victim testified that the defendant put the defendant's privates inside the victim's privates and attempted to put the defendant's privates in the victim's behind, and the nurse practitioner testified that the physical examination of the victim indicated injuries consistent with the victim's testimony. Anderson v. State, 282 Ga. App. 58, 637 S.E.2d 790 (2006), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007).

Trial court upheld the defendant's statutory rape and child molestation convictions despite a challenge to the date-range period relating to the child molestation charge as sufficient evidence from the victim, which was supported by both the victim's mother and an examining nurse, supported the conviction; further, the defendant admitted to the victim's mother that sexual intercourse with the victim had occurred before. Northern v. State, 285 Ga. App. 303, 645 S.E.2d 701 (2007).

**Polygraph results are adequate to provide corroboration of victim's testi-**

mony required by former Code 1933, § 26-2018 (see O.C.G.A. § 16-6-3). State v. Chambers, 240 Ga. 76, 239 S.E.2d 324 (1977); Chambers v. State, 146 Ga. App. 126, 245 S.E.2d 467 (1978).

**Victim's statements corroborated by testimony of nurse and confession of defendant.** — When the testimony of the victim was supported by that of the nurse who had examined her and testified to the victim's previous statements inculpatory of defendant and the victim's testimony was also supported by defendant's confession of other acts which would constitute child molestation of the victim, the victim's testimony was sufficiently corroborated, and the evidence did not demand a verdict of acquittal. Runion v. State, 180 Ga. App. 440, 349 S.E.2d 288 (1986).

**Victim's statements as corroborating evidence.** — Child-victim's prior consistent statements, as recounted by third parties to whom such statements were made, can constitute "sufficient substantive evidence of corroboration" in a statutory rape case. Ogles v. State, 218 Ga. App. 92, 460 S.E.2d 866 (1995).

**Victim's testimony regarding defendant's sexual conduct was corroborated** by defendant's own testimony that he told the girl to hide when he heard his wife approaching and by his wife's testimony that he looked "scared" when she discovered the child with him. Timmons v. State, 182 Ga. App. 556, 356 S.E.2d 523 (1987).

**Testimony of two witnesses about defendant's molestation of them when they were children,** such incidents having occurred 11 and six years before trial, were properly admitted, where the prior incidents were extremely similar to the offenses for which defendant was tried and convicted. Childs v. State, 177 Ga. App. 257, 339 S.E.2d 311 (1985).

**Admission of prior offenses.** — When defendant appealed defendant's conviction on multiple counts of violating O.C.G.A. §§ 16-6-3, 16-6-4, 16-6-5, and 16-6-5.1, defendant unsuccessfully argued that the trial court erred in admitting two similar transactions. As to the first similar transaction, defendant induced any alleged error in that defendant's own

counsel was the first to elicit the testimony of that transaction, and as to the second transaction, the trial court did not clearly err in finding that, because the transaction involved a sexual act by defendant in defendant's counseling office with a female whom defendant was counseling, the transaction was sufficiently similar to one of the crimes at issue which alleged a sexual act by defendant in defendant's counseling office with a female. Evans v. State, 300 Ga. App. 180, 684 S.E.2d 311 (2009), cert. denied, No. S10C0215, 2010 Ga. LEXIS 304 (Ga. 2010).

**Statement made based upon mistake as to rape victim's age admissible.** — When neither defendant nor the officer knew at the time of the pretrial interview that the female with whom defendant admitted having had sex was age 13 and so under the age of consent, defendant's confession was nonetheless voluntary and was not induced by trickery on the officer's part. Gaines v. State, 179 Ga. App. 623, 347 S.E.2d 673 (1986).

**Statements of victim to mother and nurse held admissible.** — As to the victim's mother and the nurse who examined the victim, the admission of their testimony regarding statements the victim made to them, was admissible as substantive evidence of the matter asserted because the victim was under oath and subject to cross-examination about her testimony and about her out-of-court statements. Runion v. State, 180 Ga. App. 440, 349 S.E.2d 288 (1986).

**Less than totally explicit testimony of victim admissible.** — When the victim testified that the defendant touched her "private parts" with his "private parts" and that "it hurt," and a nurse who examined and questioned the victim testified that the victim told her that the defendant had put his penis "in the front part of her bottom," although less than totally explicit, the testimony of the victim and of the nurse could be interpreted by a reasonable and rational trier of fact as statements that the defendant's male sex organ penetrated the victim's female sex organ. Runion v. State, 180 Ga. App. 440, 349 S.E.2d 288 (1986).

**Confession and consent to DNA testing admissible.** — In a statutory

rape case, as the record showed that police had not misrepresented the 12-year-old victim's status to the defendant or promised that the defendant would be charged with rape only if the investigation established that the defendant had committed forcible rape, the defendant's confession and DNA test results were not inadmissible as having been obtained through trickery and deceit. Henry v. State, 295 Ga. App. 758, 673 S.E.2d 120 (2009).

**Sufficient evidence.** — Nine-year-old victim's testimony, corroborated by medical evidence and prior child molestation conviction, is sufficient to support a guilty verdict rendered by trier of fact. Whited v. State, 173 Ga. App. 435, 326 S.E.2d 803 (1985).

There was sufficient evidence to corroborate the victim's testimony, where it was shown that defendant had access to the victim and there was physical evidence that her hymen was ruptured and that her vagina was bleeding due to a recent injury. McClendon v. State, 187 Ga. App. 666, 371 S.E.2d 139 (1988).

Victim's prior consistent statements, as recounted by the victim's mother and a social services worker, were sufficient substantive evidence of corroboration to sustain defendant's conviction. Long v. State, 189 Ga. App. 181, 375 S.E.2d 274 (1988).

Victim's prior consistent statements to her cousin that defendant had gotten her pregnant, combined with other evidence showing that a pregnancy had in fact occurred and that defendant had the opportunity to cause it, constituted sufficient corroboration of the victim's testimony at trial to support a statutory rape conviction. Byars v. State, 198 Ga. App. 793, 403 S.E.2d 82 (1991).

See Phagan v. State, 268 Ga. 272, 486 S.E.2d 876 (1997), cert. denied, 522 U.S. 1128, 118 S. Ct. 1079, 140 L. Ed. 2d 136 (1998).

Victim's prior consistent statements to witnesses, as well as a physician's testimony that the victim's hymen was not intact, sufficiently corroborated the victim's testimony and supported the defendant's statutory rape conviction. Simpson v. State, 234 Ga. App. 729, 507 S.E.2d 860 (1998), aff'd, 271 Ga. 772, 523 S.E.2d 320 (1999).

**Evidence (Cont'd)**

Evidence was sufficient to authorize a rational trier of fact to find defendant guilty of statutory rape where the victim was not defendant's wife, but rather, defendant's relationship to the victim was not more than that of a friend and occasional babysitter. *Joiner v. State*, 257 Ga. App. 375, 571 S.E.2d 430 (2002).

When defendant's stepchild and the stepchild's friend had not reported defendant's sexual acts involving them during an earlier welfare investigation and the stepchild only told of the sexual acts after the stepchild's parent refused to let the child move in with the other biological parent, such went to the victims' credibility, which was for the jury to determine, and the evidence was sufficient to support defendant's conviction for child molestation and statutory rape. *Williams v. State*, 263 Ga. App. 22, 587 S.E.2d 187 (2003).

When a 12-year-old child told the child's parent that defendant had just raped the child; hours after the alleged rape, a detective found defendant's checkbook in the abandoned house where the victim said the rape occurred, and a check had been written from the checkbook earlier that day; and a doctor who examined the victim within hours of the incident found abrasions and tenderness consistent with the child's description of what had occurred, the appellate court found the evidence sufficient to support defendant's convictions of rape, statutory rape, aggravated child molestation, and child molestation. *Weathersby v. State*, 263 Ga. App. 341, 587 S.E.2d 836 (2003).

Victim's testimony alone was sufficient to support defendant's convictions for incest and child molestation, and the evidence was sufficient to support defendant's statutory rape conviction as it was corroborated, since the victim testified that the defendant, the victim's stepparent, began to ask the victim to masturbate and to use sex toys, including vibrators, dildos, and other objects, and would use them on the defendant and on the victim when the victim was eight or nine years old; defendant began having sexual intercourse with the victim when the victim was about 12, even though the victim told

the defendant that it was not right and that the victim did not like it; after one of the final acts of intercourse with defendant, the victim wiped the victim with a sock and kept the sock until the day the victim ran away to a friend's home and told the victim's friend about defendant's conduct, the semen stains on the sock were consistent with defendant's semen, and the state's expert's opinion was that epithelial cells present on the sock came from the victim's genital area; and when the victim was in the ninth grade, the victim told a friend about defendant's behavior but made the friend promise not to tell anyone. *Eley v. State*, 266 Ga. App. 45, 596 S.E.2d 660 (2004).

Defendant's convictions for child molestation, attempted statutory rape, and burglary were supported because: (1) defendant entered the 14-year-old victim's room through a window, uninvited, (2) the defendant told the victim to push the victim's bed against the door, (3) the defendant removed the victim's underwear and the defendant's own pants and laid on top of the victim, but the victim prevented the defendant from penetrating the victim, (4) defendant fondled the victim's breasts and touched the victim's nipples, and (5) on a prior occasion, defendant made the victim touch the defendant's genitals with the victim's hand. *Leaptrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Evidence supported a conviction for statutory rape where the victim was 14 years old at the time of the trial and the incident occurred approximately two years earlier; the victim's testimony was corroborated by the victim's sibling's testimony that the victim told the sibling that the defendant had "felt on her breasts and her butt and her vagina and that he put her on the bed and tried to put his penis inside her" and by a doctor's testimony that the doctor found no bruising, bleeding, secretions, or infections, but that the victim's hymen was not intact. *Jackson v. State*, 274 Ga. App. 26, 619 S.E.2d 294 (2005).

There was sufficient evidence to support defendant's convictions for child molestation, aggravated child molestation, statutory rape, and incest, in violation of O.C.G.A. §§ 16-6-4, 16-6-4(c), 16-6-3, and

16-6-22, respectively, because defendant's step-child gave detailed testimony as to the continuing sexual conduct that defendant inflicted on the step-child over a period of years, as the testimony from just that witness was sufficient to support the convictions, pursuant to O.C.G.A. § 24-4-8; further, there was corroborative testimony from a friend of the step-child who witnessed at least one incident, and from an aunt who testified that the older step-child had sat in defendant's lap and that the defendant rubbed the step-child's legs, which was properly admitted for purposes of corroboration, bent of mind, lustful disposition toward children, and motive. *Lewis v. State*, 275 Ga. App. 41, 619 S.E.2d 699 (2005).

In addition to the substantive evidence of defendant's guilt, provided by the victim's prior inconsistent statements, evidence of women's sexy clothing found in defendant's hotel room, which the victim said that defendant had purchased, and information downloaded from an Internet site detailing the pimping lifestyle, was sufficient evidence to authorize a rational trier of fact to find defendant guilty of aggravated child molestation, statutory rape, and pimping. *Lewis v. State*, 278 Ga. App. 160, 628 S.E.2d 239 (2006).

Convictions for child molestation, aggravated child molestation, and statutory rape were upheld, as: (1) sufficient evidence was presented, via the three victims' testimony, to support the convictions; (2) testimony from one of the defendant's other children concerning similar transactions committed against the child was properly admitted in order to show the defendant's bent of mind and lustful disposition towards the defendant's own children; and (3) the defendant's trial counsel was not ineffective. *McCoy v. State*, 278 Ga. App. 492, 629 S.E.2d 493 (2006).

There was sufficient evidence to support a defendant's convictions for rape, incest, statutory rape, and child molestation against one of the defendant's children and a stepchild based on the defendant's repeated engagement in sexual intercourse with the children at various times while one was 12 to 16 years old and the other was 16 to 19 years old, and evidence

of a letter threatening suicide on the defendant's part and apologizing for the actions against the children was also introduced against the defendant. However, the conviction on the charge of aggravated sexual battery against the stepchild was in error and required reversal since the state failed to introduce direct or circumstantial evidence sufficient to prove beyond a reasonable doubt that the defendant violated O.C.G.A. § 16-6-22.2 by penetrating that child's sexual organ with a replica penis. *Connelly v. State*, 295 Ga. App. 765, 673 S.E.2d 274 (2009), cert. denied, No. S09C0892, 2009 Ga. LEXIS 260 (Ga. 2009).

Prisoner's sufficiency of the evidence claim under 28 U.S.C. § 2254 was properly denied because although the jury rejected testimony of forcible rape by a 13-year-old victim, the jury was free to accept testimony stating that the victim had sexual intercourse and performed oral sex on the prisoner and proof of consent was not required under O.C.G.A. §§ 16-6-2, 16-6-3, and 16-6-4 for offenses of statutory rape and aggravated child molestation. *Dorsey v. Burnette*, No. 08-13700, 2009 U.S. App. LEXIS 5771 (11th Cir. Mar. 18, 2009) (Unpublished).

### **Merger with Other Offenses**

**Merger into general rape count.** — When the evidence showed that an offense of statutory rape as alleged was included in the offense of rape as alleged, the statutory rape count merged into the rape count. *Wofford v. State*, 226 Ga. App. 487, 486 S.E.2d 697 (1997).

**Statutory rape not lesser included offense of forcible rape.** — Since statutory rape requires proof of an element — age — that forcible rape does not, it cannot be a lesser included offense of forcible rape. *Hill v. State*, 246 Ga. 402, 271 S.E.2d 802 (1980), cert. denied, 451 U.S. 923, 101 S. Ct. 2001, 68 L. Ed. 2d 313 (1981).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 in failing to argue at trial and on appeal that the inmate's statutory rape and incest convictions should have merged into the inmate's rape conviction as a matter of fact since all of the crimes arose out of the

**Merger with Other Offenses (Cont'd)**

same incident, as the crimes of statutory rape and incest were not established by proof of the same or less than all the facts required to establish the crime of rape; the inmate's convictions of statutory rape under O.C.G.A. § 16-6-3 and incest under O.C.G.A. § 16-6-22 were not included pursuant to O.C.G.A. § 16-1-6(1) in the rape conviction under O.C.G.A. § 16-6-1, as statutory rape, which required evidence as to the victim's age and that the victim was not the inmate's spouse, and incest, which required proof of the victim's relation to the inmate, had elements not required for rape. *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006).

**On facts, incest is included offense of statutory rape.** *McCrane v. State*, 157 Ga. App. 110, 276 S.E.2d 263 (1981), overruled on other grounds by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006).

**Child molestation.** — Conviction for child molestation merges into the crime of statutory rape and when there is a conviction for both the conviction and sentence for the former crime must be reversed. *Coker v. State*, 164 Ga. App. 493, 297 S.E.2d 68 (1982).

Trial court did not err in instructing the jury that it could return a verdict on child molestation, where defendant had been indicted for statutory rape and the evidence showed that child molestation was a lesser included offense of statutory rape as a matter of fact. *Burgess v. State*, 189 Ga. App. 790, 377 S.E.2d 543 (1989), aff'd, 194 Ga. App. 179, 390 S.E.2d 92 (1990).

Child molestation and statutory rape offenses did not merge where they were separate legal offenses, and because the victim reported at least two separate acts of sexual intercourse with the victim's step-parent. *McMillian v. State*, 263 Ga. App. 782, 589 S.E.2d 335 (2003).

Trial court erred when it convicted defendant of child molestation because facts which were used to prove child molestation were the same facts which proved statutory rape, and the court should have merged the child molestation conviction with the statutory rape conviction. *Dorsey v. State*, 265 Ga. App. 404, 593 S.E.2d 945 (2004).

Defendant's conviction of aggravated child molestation was not based on the same conduct that would have supported a conviction for statutory rape, so the rule of lenity was inapplicable. *Wilson v. State*, 279 Ga. App. 459, 631 S.E.2d 391 (2006), cert. denied, 2006 Ga. LEXIS 1036 (Ga. 2006).

Trial court properly denied defendant's request to have defendant's convictions for statutory rape and aggravated child molestation merged for sentencing purposes as the crimes were distinct offenses with different elements; testimony of the victim also authorized the jury to find that the crimes occurred on different occasions over a period of months, and therefore the crimes did not merge as a matter of either law or fact. *Williams v. State*, 291 Ga. App. 173, 661 S.E.2d 601 (2008).

As a defendant's fondling of a 14-year-old victim and then having sexual intercourse with the victim were separate acts, involving different conduct, merger of the defendant's child molestation and statutory rape convictions during sentencing was not required. *Hill v. State*, 295 Ga. App. 360, 671 S.E.2d 853 (2008).

**Charges as to statutory rape and child molestation were not mutually exclusive.** — Trial court did not err in merging an attempted statutory rape charge into a child molestation charge, instead of merging the child molestation counts into the attempted statutory rape count; the evidence establishing that defendant fondled the victim's breasts was not used up in proving that the defendant removed their clothing and attempted penetration; accordingly, three child molestation charges were not subject to merger with the attempted statutory rape count. *Leaptrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Trial court did not err in merging an attempted statutory rape charge into a child molestation charge as the state was required to prove the commission of an immoral or indecent act (here removing the victim's and defendant's clothing), the victim's age was less than 16, and defendant's intent to arouse or satisfy the defendant's own or the child's sexual desires; thus, the state used up the evidence that defendant committed attempted statutory

rape in establishing that the defendant committed child molestation. *Leaptrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Guilty verdict entered against a defendant on a charge of statutory rape, and a not guilty verdict against that same defendant on a charge of child molestation, stemming from the same act of intercourse with the victim, were not mutually exclusive or inconsistent, as the fact that the jury acquitted defendant of the child molestation charge did not make the evidence of statutory rape any less sufficient; further, even if the acquittal was inconsistent with the conviction, the inconsistency could not be used as an avenue to challenge the conviction, since the inconsistent-verdict rule was abolished in Georgia. *Perez-Hurtado v. State*, 275 Ga. App. 162, 620 S.E.2d 435 (2005).

**Motion to dismiss statutory rape and child molestation charges on jeopardy grounds properly denied.** — Trial court properly denied the defendant's motion to dismiss charges alleging statutory rape and child molestation on jeopardy grounds as double jeopardy did not preclude the state from prosecuting defendant for both offenses, although the same conduct formed the basis for both charges. Moreover, because no corroboration was required for child molestation, the jury logically could have found, and in fact did find, the defendant guilty of molesting the victim by having sex with that victim, despite the jury's not guilty verdict on statutory rape. *Maynard v. State*, 290 Ga. App. 403, 659 S.E.2d 831 (2008).

**Enticing a child for indecent purposes** is not included in the crime of statutory rape. *Coker v. State*, 164 Ga. App. 493, 297 S.E.2d 68 (1982).

#### Jury Issues and Instructions

**Quantum of corroboration is jury question.** — Quantum of corroboration required by former Code 1933, § 26-2018 (see O.C.G.A. § 16-6-3) and its persuasive character is usually for jury. *Miller v. State*, 130 Ga. App. 275, 202 S.E.2d 682 (1973).

Ultimately, question of corroboration is one for jury. *Hill v. State*, 159 Ga. App. 489, 283 S.E.2d 703 (1981).

**Lesser included offense of child molestation.** — While an indictment did not charge the defendant with statutory rape, O.C.G.A. § 16-6-3, the allegations of the indictment notified the defendant that statutory rape could have been considered a lesser included offense of the indicted crime of child molestation; since the defendant admitted that the defendant tried to place the defendant's penis in the victim's vagina, and since the victim testified that "it hurt," a jury instruction on statutory rape as a lesser included offense of child molestation was proper. *Stulb v. State*, 279 Ga. App. 547, 631 S.E.2d 765 (2006).

**Erroneous charge.** — Charge which permitted the jury to find the defendant guilty of forcible rape pursuant to former Code 1933, § 26-2001 (see O.C.G.A. § 16-6-1), under a definition of statutory rape pursuant to former Code 1933, § 26-2018 (see O.C.G.A. § 16-6-3), and to impose a sentence of life imprisonment which could not be imposed for statutory rape was error. *Robinson v. State*, 232 Ga. 123, 205 S.E.2d 210 (1974).

**Circumstantial evidence instruction not required.** — In a prosecution for statutory rape, pretermitted the issue of whether a notebook and love letters exchanged between the defendant and the victim constituted only circumstantial evidence because the defendant made an oral request that the jury be charged on the law under O.C.G.A. § 24-4-6, but did not make a written request for the charge, the trial court did not err in failing to charge the jury as the defendant requested. *Attaway v. State*, 284 Ga. App. 855, 644 S.E.2d 919 (2007).

**No objection when defendant requested instruction.** — Trial court did not err by convicting defendant of statutory rape though the indictment cited only rape as defendant requested the statutory rape charge and, therefore, could not complain of a purported error that defendant created. *Freeman v. State*, 291 Ga. App. 651, 662 S.E.2d 750 (2008).

**Instruction on attempted statutory rape proper.** — Trial court did not err in charging the jury on attempted statutory rape, O.C.G.A. §§ 16-4-1 and 16-6-3(a), because the court's instruction to the jury

**Jury Issues and Instructions (Cont'd)**

was properly tailored to fit the allegations in the indictment and the evidence admitted at trial; the victim testified that the defendant positioned himself between her legs with his pants unbuttoned and that the two of them were about to engage in sexual intercourse before the victim's grandfather came into her bedroom, and based on that evidence, a rational trier of fact could conclude that the defendant attempted to have sexual intercourse with a person under the age of 16. *Judice v. State*, 308 Ga. App. 229, 707 S.E.2d 114 (2011).

**No error in denying misdemeanor charge and in resulting felony sentence.** — Trial court did not err in denying the defendant's request to charge the jury on misdemeanor statutory rape and in imposing a felony sentence as: (1) a charge of misdemeanor statutory rape was not supported by the evidence, due to the difference in the defendant's and the victim's age at the time of the offense; (2) the defendant's requested charge set forth an incorrect principle of law within the context of the case; and (3) the sentence of five years probation under the First Offender Act, O.C.G.A. § 42-8-60 et seq., fell within the statutory range. *Orr v. State*, 283 Ga. App. 372, 641 S.E.2d 613 (2007).

**No error in failing to instruct jury on purported lesser included offense of statutory rape.** — With regard to a defendant's convictions for felony murder, with the underlying felony being rape, among other crimes, and although the defendant filed a written request for a jury charge on involuntary manslaughter, the defendant was not entitled to a jury charge on statutory rape as the defendant failed to specify statutory rape as the underlying misdemeanor. Further, the defendant was not entitled to such a jury charge as statutory rape was not a lesser included offense to forcible rape. *Mangrum v. State*, 285 Ga. 676, 681 S.E.2d 130 (2009).

**Jury determination of credibility.** — Testimony of the girl alleged to have been raped was not impossible or so inherently improbable as to be unworthy of belief as a matter of law, but her credibil-

ity on all questions was an issue to be determined by the jury in the light of her tender years and other circumstances. *Sewell v. State*, 60 Ga. App. 606, 4 S.E.2d 475 (1939).

**First offender consideration appropriate.** — Based on the plain language of O.C.G.A. §§ 17-10-6.2(a)(4) and 42-8-60(d)(2), a defendant who commits statutory rape is excluded from first offender consideration only if the defendant was 21 years of age or older. Thus, a defendant who was 18 at the time of the offense and 19 at the time of the conviction was eligible for first offender consideration. *Planas v. State*, 296 Ga. App. 51, 673 S.E.2d 566 (2009).

**Sentencing.** — In defendant's trial on charges of child molestation and statutory rape, the trial court did not err by imposing separate sentences for each crime because the evidence showed that defendant committed both crimes on multiple occasions. *Little v. State*, 260 Ga. App. 87, 579 S.E.2d 84 (2003).

Because the indictment adequately set forth a charge of felony statutory rape, and because the evidence at trial showed the defendant to be over 21 years old and more than three years older than the victim, the trial court was not required to sentence the defendant for misdemeanor statutory rape, and in fact was precluded from doing so. *Attaway v. State*, 284 Ga. App. 855, 644 S.E.2d 919 (2007).

Trial court properly dismissed the defendant's motion to correct an allegedly void felony sentence as the sentence was authorized by the law in existence at the time of the defendant's statutory rape convictions, and the defendant failed to seek withdrawal of the guilty pleas which led to the same as a prerequisite to challenge the sentence imposed; thus, any further relief had to be sought through a petition for habeas corpus. *McClendon v. State*, 287 Ga. App. 515, 651 S.E.2d 820 (2007), cert. denied, 2008 Ga. LEXIS 174 (Ga. 2008).

There was no showing that the defendant's sentences for enticing a minor for indecent purposes, statutory rape, and contributing to the delinquency of a minor were vindictively enhanced in violation of Ga. Unif. Super. Ct. R. 33.6(B) after the

defendant was allowed to revoke a guilty plea because, *inter alia*, the trial judge found that an enhanced sentence was warranted based on material differences between the facts presented regarding the nature of the crimes during the plea hearing and the trial; the concurrent sentences of 15 years to serve for enticing a minor for indecent purposes and statutory rape plus 12 concurrent months for contributing to the delinquency of a minor were within statutory limits and valid. There was no absolute constitutional bar to imposing a more severe sentence upon re-sentencing. *Hawes v. State*, 298 Ga. App. 461, 680 S.E.2d 513 (2009), cert. denied, No. S09C1769, 2010 Ga. LEXIS 15 (Ga. 2010).

**Sentence within statutory limits.** — Trial court did not err in imposing or in refusing to reconsider the defendant's sentence of 20 years imprisonment for child

molestation, with 15 to serve in confinement for statutory rape, because the defendant's sentence was within the statutory limits set by O.C.G.A. §§ 16-6-3(b) and 16-6-4(b)(1); the defendant did not demonstrate that the defendant's sentence shocked the conscience. *Gresham v. State*, 303 Ga. App. 682, 695 S.E.2d 73 (2010).

**First offender treatment.** — After a defendant's sentence for statutory rape under O.C.G.A. § 16-6-3 was rescinded in its entirety pursuant to the defendant's motion under O.C.G.A. § 42-8-34(g), the trial court lacked jurisdiction to resentence the defendant as a first offender because first offender treatment was only permitted before a defendant had been adjudicated guilty and sentenced under O.C.G.A. § 42-8-60(a). *State v. Stulb*, 296 Ga. App. 510, 675 S.E.2d 253 (2009).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 65 Am. Jur. 2d, Rape, § 11 et seq.

**Am. Jur. Proof of Facts.** — Mistake as to Age of Statutory Rape Victim, 6 POF2d 63.

**C.J.S.** — 75 C.J.S., Rape, § 21.

**ALR.** — Civil liability for carnal knowledge with actual consent of girl under age of consent, 45 ALR 780; 79 ALR 1229.

Assault with intent to ravish or rape consenting female under age of consent, 81 ALR 599.

Former acquittal or conviction under indictment or other information for rape or other sexual offense which does not allege that female was under age of consent as bar to subsequent prosecution under indictment or information which alleges that she was under age of consent; and vice versa, 119 ALR 1205.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children, and the like, 62 ALR2d 1067.

Assault with intent to commit unnatural sex act upon minor as affected by latter's consent, 65 ALR2d 748.

Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who has

passed the anniversary date of such age, 73 ALR2d 874.

Incest as included within charge of rape, 76 ALR2d 484.

Statutory rape of female who is or has been married, 32 ALR3d 1030.

Mistake or lack of information as to victim's chastity as defense to statutory rape, 44 ALR3d 1434.

What constitutes penetration in prosecution for rape or statutory rape, 76 ALR3d 163.

Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape, 81 ALR3d 1228.

Constitutionality of rape laws limited to protection of females only, 99 ALR3d 129.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 ALR4th 1009.

Sexual child abuser's civil liability to child's parent, 54 ALR4th 93.

Statute protecting minors in a specified age range from rape or other sexual activity as applicable to defendant minor within protected age group, 18 ALR5th 856.

Mistake or lack of information as to

victim's age as defense to statutory rape, 46 ALR5th 499.

Admissibility of expert testimony as to

proper techniques for interviewing children or evaluating techniques employed in particular case, 87 ALR5th 693.

#### **16-6-4. Child molestation; aggravated child molestation.**

(a) A person commits the offense of child molestation when such person:

(1) Does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person; or

(2) By means of an electronic device, transmits images of a person engaging in, inducing, or otherwise participating in any immoral or indecent act to a child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.

(b)(1) Except as provided in paragraph (2) of this subsection, a person convicted of a first offense of child molestation shall be punished by imprisonment for not less than five nor more than 20 years and shall be subject to the sentencing and punishment provisions of Code Sections 17-10-6.2 and 17-10-7. Upon a defendant being incarcerated on a conviction for a first offense, the Department of Corrections shall provide counseling to such defendant. Except as provided in paragraph (2) of this subsection, upon a second or subsequent conviction of an offense of child molestation, the defendant shall be punished by imprisonment for not less than ten years nor more than 30 years or by imprisonment for life and shall be subject to the sentencing and punishment provisions of Code Sections 17-10-6.2 and 17-10-7; provided, however, that prior to trial, a defendant shall be given notice, in writing, that the state intends to seek a punishment of life imprisonment.

(2) If the victim is at least 14 but less than 16 years of age and the person convicted of child molestation is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor and shall not be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.

(c) A person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act physically injures the child or involves an act of sodomy.

(d)(1) Except as provided in paragraph (2) of this subsection, a person convicted of the offense of aggravated child molestation shall be punished by imprisonment for life or by a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by probation for life, and shall be subject to

the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.

(2) A person convicted of the offense of aggravated child molestation when:

(A) The victim is at least 13 but less than 16 years of age;

(B) The person convicted of aggravated child molestation is 18 years of age or younger and is no more than four years older than the victim; and

(C) The basis of the charge of aggravated child molestation involves an act of sodomy

shall be guilty of a misdemeanor and shall not be subject to the sentencing and punishment provisions of Code Section 17-10-6.1.

(e) A person shall be subject to prosecution in this state pursuant to Code Section 17-2-1 for any conduct made unlawful by paragraph (2) of subsection (a) of this Code section which the person engages in while:

(1) Either within or outside of this state if, by such conduct, the person commits a violation of paragraph (2) of subsection (a) of this Code section which involves a child who resides in this state; or

(2) Within this state if, by such conduct, the person commits a violation of paragraph (2) of subsection (a) of this Code section which involves a child who resides within or outside this state. (Ga. L. 1950, p. 387, § 1; Ga. L. 1953, Nov.-Dec. Sess., p. 408, § 1; Code 1933, § 26-2019, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1984, p. 685, § 1; Ga. L. 1984, p. 1495, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 1987, p. 617, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1993, p. 715, § 1; Ga. L. 1994, p. 1959, § 6; Ga. L. 1995, p. 957, § 4; Ga. L. 1997, p. 1578, § 1; Ga. L. 2006, p. 379, § 11/HB 1059; Ga. L. 2009, p. 729, § 1/HB 123.)

**The 2009 amendment**, effective May 5, 2009, in subsection (a), substituted “such person:” for “he or she does” at the end of the introductory paragraph, in paragraph (a)(1), added the paragraph designation, added “Does” at the beginning, and added “; or” at the end, and added paragraph (a)(2); and added subsection (e).

**Cross references.** — Actions for childhood sexual abuse, § 9-3-33.1. Computer pornography and child exploitation prevention, § 16-12-100.2. Televising testimony of child who is victim of offense under subsection (c) of this Code section, § 17-8-55. Admissibility of child’s prior statement to witness regarding sexual or

physical abuse, § 24-3-16. Visitation with minors by convicted sexual offenders while imprisoned, § 42-5-56.

**Editor's notes.** — Ga. L. 1994, p. 1959, § 1, not codified by the General Assembly, provides: “This Act shall be known and may be cited as the ‘Sentence Reform Act of 1994’.”

Ga. L. 1994, p. 1959, § 2, not codified by the General Assembly, provides: “The General Assembly declares and finds:

“(1) That persons who are convicted of certain serious violent felonies shall serve minimum terms of imprisonment which shall not be suspended, probated, stayed, deferred, or otherwise withheld by the sentencing judge; and

"(2) That sentences ordered by courts in cases of certain serious violent felonies shall be served in their entirety and shall not be reduced by parole or by any earned time, early release, work release, or other such sentence-reducing measures administered by the Department of Corrections."

Ga. L. 1994, p. 1959, § 16, not codified by the General Assembly, provides: "The provisions of this Act shall apply only to those offenses committed on or after the effective date of this Act; provided, however, that any conviction occurring prior to, on, or after the effective date of this Act shall be deemed a 'conviction' for the purposes of this Act and shall be counted in determining the appropriate sentence to be imposed for any offense committed on or after the effective date of this Act."

Ga. L. 1994, p. 1959, § 17, not codified by the General Assembly, provides: "In the event any section, subsection, sentence, clause, or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses, or phrases of this Act, which shall remain of full force and effect as if the section, subsection, sentence, clause, or phrase so declared or adjudged invalid or unconstitutional were not originally a part hereof. The General Assembly declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional."

Ga. L. 1994, p. 1959, § 18, not codified by the General Assembly, provides: "This Act shall become effective on January 1, 1995, upon ratification by the voters of this state at the 1994 November general election of that proposed amendment to Article IV, Section II, Paragraph II of the Constitution authorizing the General Assembly to provide for mandatory minimum sentences and sentences of life without possibility of parole in certain cases and providing restrictions on the authority of the State Board of Pardons and Paroles to grant paroles...." That amendment was ratified by the voters on November 8, 1994, so the amendment to this Code section by this Act became effective on January 1, 1995.

Ga. L. 1995, p. 957, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Child Protection Act of 1995'."

Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: "The General Assembly declares and finds: (1) That the 'Sentence Reform Act of 1994,' approved April 20, 1994 (Ga. L. 1994, p. 1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated, deferred, or withheld by the sentencing court; (2) That in *State v. Allmond*, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the 'Sentence Reform Act of 1994,' that the provisions of the First Offender Act would still be available to the sentencing court, which would mean that a person who committed a serious violent felony could be sentenced to less than the minimum mandatory ten-year sentence; and (3) That, contrary to the decision in *State v. Allmond*, it is the expressed intent of the General Assembly that persons who commit a serious violent felony specified in the 'Sentence Reform Act of 1994' shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment."

Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with suffi-

cient justification to implement a strategy that includes:

“(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

“(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

“(3) Providing for community and public notification concerning the presence of sexual offenders;

“(4) Collecting data relative to sexual offenses and sexual offenders;

“(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

“(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

“The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender’s presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a

regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender.”

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides: “The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.”

**Law reviews.** — For article recommending more consistency in age requirements of law pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article commenting on the 1997 amendment of this Code section, see 14 Georgia St. U.L. Rev. 95 (1997). For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004). For annual survey of criminal law, see 57 Mercer L. Rev. 113 (2005). For article on 2006 amendment of this Code section, see 23 Georgia St. U.L. Rev. 11 (2006). For survey article on criminal law, see 60 Mercer L. Rev. 85 (2008).

For note, “Pedophilia, Exhibitionism, and Voyeurism: Legal Problems in the Deviant Society,” see 4 Ga. L. Rev. 149 (1969). For note, “Can’t Do the Time, Don’t Do the Crime?: Dixon v. State, Statutory Construction, and the Harsh Realities of Mandatory Minimum Sentencing in Georgia,” see 22 Georgia St. U.L. Rev. 519 (2005). For note, “Calling on the Legislature: Dixon v. State and Georgia’s Statutory Scheme to Protect Minors from Sexual Exploitation,” see 56 Mercer L. Rev. 777 (2005).

For comment, “Civil Contempt and Child Sexual Abuse Allegations: A Modern Solomon’s Choice?,” see 40 Emory L.J. 203 (1991).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### APPLICATION

#### EXPERT TESTIMONY

#### MERGING WITH OTHER OFFENSES

## JURY ISSUES AND INSTRUCTIONS

**General Consideration**

**Editor's notes.** — Many of the cases noted below were decided prior to the 1994 amendment of subsection (d).

**Constitutionality.** — Defendant was indicted for various acts that clearly were prohibited by statute as being immoral or indecent; therefore, defendant had statutory notice that the acts were prohibited. *Davidson v. State*, 231 Ga. App. 605, 499 S.E.2d 697 (1998).

O.C.G.A. § 16-6-4 is neither impermissibly vague nor violative of due process. *Veasey v. State*, 234 Ga. App. 795, 507 S.E.2d 799 (1998).

O.C.G.A. § 16-6-4 does not violate due process for its failure to include a requirement that the state be required to prove that the defendant knew the victim was under age. *Veasey v. State*, 234 Ga. App. 795, 507 S.E.2d 799 (1998).

Court rejected the contention that there is no rational basis for treating child molestation based on an act of sodomy differently from child molestation based on other acts and that the different treatment violates the equal protection and due process rights under the United States and Georgia Constitutions. The General Assembly could reasonably conclude that the psychological well-being of minors is more damaged by acts of sodomy than by acts of intercourse and that such acts warrant a greater punishment. *Odett v. State*, 273 Ga. 353, 541 S.E.2d 29 (2001).

**Statutory scheme to protect children under 14 (now 16).** — Together, O.C.G.A. §§ 16-6-3, 16-6-4, and 16-6-5 provide a general statutory scheme giving protection to both male and female children under the age of 14 (now 16), regardless of the offender's gender, and thus are not invalid as depriving this defendant of equal protection of the law. *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979).

Juvenile male defendant convicted of statutory rape was not deprived of equal protection, even though the statutory rape law applies only to a male engaging in sexual intercourse with an underage female, since, under the statute on child

molestation, a female who engages in sexual intercourse with a male under the age of 14 is subject to the same penalties. *In re B.L.S.*, 264 Ga. 643, 449 S.E.2d 823 (1994).

**Effect of amendment changing age of consent.** — Where defendant had lawfully engaged in consensual sexual activity with a minor prior to the amendment raising the age of consent, the amendment did not interfere with defendant's constitutional right of privacy so as to exempt defendant from its coverage of subsequent sexual activity with the minor. *Phagan v. State*, 268 Ga. 272, 486 S.E.2d 876 (1997), cert. denied, 522 U.S. 1128, 118 S. Ct. 1079, 140 L. Ed. 2d 136 (1998).

**Law existing at time of crime applies.** — Contrary to a defendant's claims, the defendant was properly convicted of aggravated child molestation pursuant to the law in effect at the time of the defendant's crimes as it has long been the law in Georgia that, in general, a crime is to be construed and punished according to the provisions of the law existing at the time of the crime's commission. *Mangrum v. State*, 285 Ga. 676, 681 S.E.2d 130 (2009).

**Knowledge of victim's age not an element.** — When a defendant was charged with statutory rape and child molestation in violation of O.C.G.A. §§ 16-6-3 and 16-6-4, the trial court properly excluded any evidence showing that defendant believed that the victim was over the age of consent; knowledge of the victim's age was not an element of either statute. *Haywood v. State*, 283 Ga. App. 568, 642 S.E.2d 203 (2007).

**O.C.G.A. § 16-6-4 does not set forth alternate methods.** — O.C.G.A. § 16-6-4 does not set forth alternate methods of committing child molestation. *Day v. State*, 193 Ga. App. 179, 387 S.E.2d 409 (1989).

Although the defendant alleged that the state failed to prove that the defendant exposed the defendant's genitals to a child with the intent to arouse or satisfy both the defendant's and the child's sexual desires, there was no fatal variance between the indictment and the trial evidence in the defendant's trial for child molestation

because the conjunctive form of the indictment, which charged that the defendant acted in order to arouse or satisfy both the defendant's and the child's sexual desires, did not mean that the state was not required to prove that the defendant intended to arouse both the defendant's and the child's sexual desires; rather, the state only had to prove that the offense was committed in one of the separate ways alleged, and the state's evidence was sufficient to do that where the evidence showed that the defendant touched the child's breast, and took the child to the defendant's "hideout" in the woods where the defendant touched the child's genitals and then exposed the defendant's genitals to the child. *Hostetler v. State*, 261 Ga. App. 237, 582 S.E.2d 197 (2003).

**Constitutes forcible felony.** — Child molestation constitutes a forcible felony for the purpose of establishing the defense of justification pursuant to O.C.G.A. § 16-3-21(a). *Brown v. State*, 268 Ga. 154, 486 S.E.2d 178 (1997).

**Proving statutory intent** under O.C.G.A. § 16-6-4 does not require a showing of a "general plan." *Branam v. State*, 204 Ga. App. 205, 419 S.E.2d 86 (1992).

**Unnecessary to find adult intent.** — In order to find juvenile defendant guilty of the delinquent act of attempted aggravated child molestation, the court must find defendant attempted aggravated child molestation with intent to satisfy defendant's own desires. Whether the juvenile defendant had the sexual intent or knowledge of an adult would be irrelevant. *In re W.S.S.*, 266 Ga. 685, 470 S.E.2d 429 (1996).

**Inference of intent.** — Although the defendant contended an absence of the requisite criminal intent, it could be inferred from defendant's act of openly engaging in sexual intercourse in the presence of children that defendant acted with the intent to arouse or satisfy defendant's sexual desires. *Grimsley v. State*, 233 Ga. App. 781, 505 S.E.2d 522 (1998).

Motion for a judgment of acquittal on charges of aggravated sexual battery, aggravated child molestation, and child molestation was properly denied as the defendant's testimony that the defendant

blacked out during the incident did not demand a finding that the defendant lacked the requisite criminal intent; the victim testified that the defendant began rubbing the victim's legs, touched the victim's "private part" through the victim's clothing, pulled down the defendant's pants as well as the victim's pants, picked the victim up, and began rubbing the victim up and down against the defendant's "private part." *Ward v. State*, 274 Ga. App. 511, 618 S.E.2d 154 (2005).

Evidence was sufficient to support a defendant's conviction for child molestation in violation of O.C.G.A. § 16-6-4(a) and the trial court did not err in denying the defendant's motion for a directed verdict because the jury was entitled to infer from the defendant's act of masturbating in a child's presence that the defendant acted with the intent to arouse or satisfy the defendant's own sexual desires. *Klausen v. State*, 294 Ga. App. 463, 669 S.E.2d 460 (2008).

**Indictment failing to allege specific intent sufficient.** — Indictment which charged that defendant solicited a child to engage in certain sexual conduct but failed to allege specific intent was sufficient to charge child molestation. *Bowman v. State*, 227 Ga. App. 598, 490 S.E.2d 163 (1997).

**Indictment that attempted to charge aggravated child molestation**, but failed to do so, was sufficient because it described the offense of child molestation, the crime for which defendant was convicted and sentenced. *Jones v. State*, 240 Ga. App. 484, 523 S.E.2d 73 (1999).

**Indictment alleging year range sufficient.** — Indictment for child molestation was not insufficient because the indictment did not specify the dates on which the charged offenses occurred and instead alleged that the molestation occurred between August 1, 1991, and June 25, 2002. The victim could recall only that the abuse began when the victim was about nine and ended when the victim was thirteen; given the defendant's concessions that the defendant lived with the victim for much of the time between 1995 and 1999 and that the victim visited the defendant's house regularly thereafter, the defendant could not show that the

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defendant was prejudiced in the preparation of the defendant's defense by the indictment's range of dates concerning the indictment's three counts. *Mullis v. State*, 292 Ga. App. 218, 664 S.E.2d 271 (2008).

Indictment charging the defendant with child molestation, sexual exploitation of children, aggravated child molestation, and statutory rape was not defective for alleging a broad range of dates extending past the victim's 16th birthday because the indictment alleged that the defendant committed the crimes when the victim was under the age of 16 even though the exact dates were not known, and the victim testified that the victim had sexual intercourse with the defendant in 2003 and 2004; therefore, the indictment was not subject to a general demurrer. *Wilder v. State*, 304 Ga. App. 891, 698 S.E.2d 374 (2010).

**Defendant cannot admit charges and be innocent as a matter of law.** — Defendant's general demurrer was properly denied, where the indictment alleged that defendant violated O.C.G.A. § 16-6-4(c) and O.C.G.A. § 16-6-3 over a period of time, some of which was after the victim turned 16, as defendant could not admit the charges and still be innocent as a matter of law. *Grizzard v. State*, 258 Ga. App. 124, 572 S.E.2d 760 (2002).

**Motion to withdraw Alford plea properly denied.** — Although defendant's motion to withdraw the defendant's Alford plea to two counts of child molestation was timely because it was filed during the term in which the trial court imposed its sentence, the trial court's judgment denying the motion was upheld because the record did not support defendant's claims that the defendant did not understand the nature of an Alford plea, that the defendant's plea was not entered voluntarily and intelligently, and that the defendant did not receive effective assistance of counsel. *Whitesides v. State*, 266 Ga. App. 181, 596 S.E.2d 706 (2004).

**Motion to withdraw guilty plea properly denied.** — Trial court did not abuse the court's discretion in the denying the defendant's motion to withdraw the defendant's guilty plea to child molesta-

tion; rather than indicating that the defendant was impaired by medication, the defendant indicated that the medicine did not affect the defendant's ability to understand the proceedings. *Brown v. State*, 259 Ga. App. 576, 578 S.E.2d 188 (2003).

Trial court properly denied withdrawal of the defendant's guilty plea because the record sufficiently showed that: (1) the defendant entered a guilty plea to two counts of child molestation both knowingly and voluntarily, and in recognition of the rights being waived, absent any coercion or hope; and (2) the sentence was properly imposed, absent any proof that defense counsel was ineffective. *Geyer v. State*, 289 Ga. App. 492, 657 S.E.2d 878 (2008).

**"Any immoral or indecent act."** — In O.C.G.A. § 16-6-4, the phrase "any immoral or indecent act" in conjunction with the requisite element of offense that the act be committed "with the intent to arouse or satisfy the sexual desires of either the child or the person" is sufficiently definite. Therefore, since the statute is definite and certain in its meaning, men of common intelligence would not differ as to application of the statute's provisions. *McCord v. State*, 248 Ga. 765, 285 S.E.2d 724 (1982).

When the defendant husband and wife openly engaged in sexual intercourse in front of their children, they converted their residence from a constitutionally protected zone of privacy into a public place where their consenting sexual activity was transformed from acceptable and protected marital conduct into an "immoral and indecent act" within the meaning of O.C.G.A. § 16-6-4. *Grimsley v. State*, 233 Ga. App. 781, 505 S.E.2d 522 (1998).

Defendant was properly convicted of child molestation under O.C.G.A. § 16-6-4(a); testimony indicated that defendant approached two young girls swimming in a lake and touched the girls and asked them personal questions while defendant was nude and had an erection, and the fact that the murky lake water obscured defendant's state of sexual arousal was irrelevant, as immoral or indecent acts for purposes of O.C.G.A. § 16-6-4(a) referred to acts generally

viewed as morally indelicate or improper or offensive, and the testimony supported the conclusion beyond a reasonable doubt that defendant's actions were immoral or indecent. Further, the evidence was more than sufficient for the trier of fact to conclude that defendant touched the children with the intent to arouse his sexual desires. *Wormley v. State*, 255 Ga. App. 347, 565 S.E.2d 530 (2002).

**"Act" may be merely verbal.** — Although it was never proved that the defendant looked up the child's shorts, the "act" required by O.C.G.A. § 16-6-4(a) may be merely verbal. *Hicks v. State*, 254 Ga. App. 814, 563 S.E.2d 897 (2002).

**Alternate act allegedly committed by defendant that was not found by jury did not change sufficiency of conviction.** — As the indictment against the defendant placed the defendant on notice that the state was going to attempt to prove that the defendant committed child molestation in more than one manner, the jury's finding that the defendant committed molestation by showing the victim the defendant's penis was sufficient to support the conviction; the fact that there was an alternate act allegedly committed by the defendant that was not found by the jury did not change the sufficiency of the conviction. *Hammontree v. State*, 283 Ga. App. 736, 642 S.E.2d 412 (2007).

**No penetration is required** for child molestation to occur. *Raymond v. State*, 232 Ga. App. 228, 501 S.E.2d 568 (1998).

Penetration is not a required element of either child molestation or aggravated child molestation. *Adams v. State*, 299 Ga. App. 39, 681 S.E.2d 725 (2009), aff'd, 287 Ga. 513, 696 S.E.2d 676 (2010).

**Plan to use child to gratify sexual desires is element in crime.** — General plan to use the child to gratify the defendant's lust or passions or sexual desires is an element in this crime. *Staggers v. State*, 120 Ga. App. 875, 172 S.E.2d 462 (1969).

**Digital penetration sufficient.** — Evidence was sufficient to convict defendant of aggravated child molestation, O.C.G.A. § 16-6-4(c), where the victim's testimony, the victim's mother's testimony, and the doctor's testimony all established that de-

fendant digitally penetrated the victim, causing physical injury. *Gearin v. State*, 255 Ga. App. 329, 565 S.E.2d 540 (2002).

When the defendant was acquitted of aggravated sexual assault based on penetrating the victim's vagina and was convicted of child molestation based on touching the victim's vagina, testimony from the victim and a detective that the victim claimed the defendant touched the victim's vagina with the defendant's finger was sufficient to support the conviction for child molestation under O.C.G.A. § 16-6-4(a), despite the acquittal on the other charge. *Mitchell v. State*, 262 Ga. App. 806, 586 S.E.2d 709 (2003).

Defendant's own admission that the defendant digitally penetrated a 15-year-old victim's vagina while masturbating was sufficient to sustain the defendant's convictions for aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), and child molestation, O.C.G.A. § 16-6-4(a). *Driggers v. State*, 291 Ga. App. 841, 662 S.E.2d 872 (2008).

**Skin to skin contact not required for conviction.** — Evidence of skin-to-skin contact was not required to prove that a defendant touched a victim's vagina or made physical contact with the victim's genital area, as alleged in the indictment charging child molestation in violation of O.C.G.A. § 16-6-4 and sexual battery in violation of O.C.G.A. § 16-6-22.1(b). Evidence of contact with the victim's genital area through her panties was sufficient. *Gunn v. State*, 300 Ga. App. 229, 684 S.E.2d 380 (2009).

**Extent of injury irrelevant.** — When the defendant was accused of child molestation under O.C.G.A. § 16-6-4, the trial court did not err under O.C.G.A. § 17-8-75 in admonishing the defense counsel not to suggest that the defendant's penetration of the victim and the resulting injury had been insignificant; the evidence was irrelevant, as O.C.G.A. § 16-6-4 did not distinguish between degrees of vaginal injury. *Pickett v. State*, 277 Ga. App. 316, 626 S.E.2d 508 (2006).

**Presence of child as witness.** — Defendant need not have intended to actually use the child's body in some physical capacity in order to commit an act of molestation; it is sufficient if a person

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utilizes or capitalizes on a child's mere presence as a witness to the person's intentional immoral or indecent act, provided that the act is accomplished with the intent to arouse or satisfy the sexual desires of either the child or the person. *Grimsley v. State*, 233 Ga. App. 781, 505 S.E.2d 522 (1998).

**Whether victim was clothed or unclothed is not a factor** in determining whether an act is "immoral or indecent" so as to prove the crime of child molestation. *Davidson v. State*, 183 Ga. App. 557, 359 S.E.2d 372 (1987).

**Touching beneath clothing not required.** — Conviction for child molestation does not require a showing that a victim was touched beneath the victim's clothing. *Walsh v. State*, 236 Ga. App. 558, 512 S.E.2d 408 (1999).

Victim's statement that the victim felt defendant's privates against her own privates, even through clothing, was sufficient proof that he rubbed his penis against the child's vaginal area with the intent to arouse his sexual desires, as alleged in the indictment. *Knight v. State*, 239 Ga. App. 710, 521 S.E.2d 851 (1999).

Child molestation conviction was supported by sufficient evidence which showed that the defendant touched the victim's underwear but not her genitalia because there was no requirement that the state present testimony that precisely tracked the language found in the indictment, and a conviction for child molestation did not require a showing that the victim was touched beneath her clothing. *Dew v. State*, 292 Ga. App. 631, 665 S.E.2d 715 (2008).

**Victim too young to consent to sexual acts.** — Defendant's claim that the 15-year-old victim had consented to the defendant's sexual contact with the victim failed because a child of that age could not consent to acts that constituted child molestation. *Driggers v. State*, 291 Ga. App. 841, 662 S.E.2d 872 (2008).

**Consent irrelevant.** — Considerations of "consent" and "force" and "against her will" are irrelevant in a child molestation case. *Coker v. State*, 164 Ga. App. 493, 297 S.E.2d 68 (1982); *Hines v.*

*State*, 173 Ga. App. 657, 327 S.E.2d 786 (1985).

When the 14-year-old victim allegedly consented to having sex with defendant, the sexual molestation conviction under O.C.G.A. § 16-6-4(a) was supported by sufficient evidence; under O.C.G.A. § 16-2-1, consent by the victim was irrelevant due to the inability of the victim to legally consent to intercourse, and it was for the jury to determine, in accordance with the testimony of at least a single witness pursuant to O.C.G.A. § 24-4-8, whether defendant's conduct was immoral or indecent under O.C.G.A. § 16-6-4(a). *Slack v. State*, 265 Ga. App. 306, 593 S.E.2d 664 (2004).

**No proof of force required.** — Conviction for aggravated child molestation does not require proof of force, since such a conviction requires only proof of child molestation that either physically injures a child or involves an act of sodomy, and neither child molestation nor sodomy require proof of force. *House v. State*, 236 Ga. App. 405, 512 S.E.2d 287 (1999).

"Force and arms" was not an element of the offenses of statutory rape, O.C.G.A. § 16-6-3, child molestation, O.C.G.A. § 16-6-4, or furnishing alcohol to a minor, O.C.G.A. § 3-3-23, and since an indictment was couched in the words of the statutes and correctly informed defendant of offenses charged, the indictment's allegation of use of force was mere surplusage and was properly disregarded. *Colon v. State*, 275 Ga. App. 73, 619 S.E.2d 773 (2005).

**Crime of child molestation requires victim and accused to be in presence of each other.** — Victim and accused must be together in order for the crime of child molestation to be committed. *Selfe v. State*, 290 Ga. App. 857, 660 S.E.2d 727 (2008), cert. denied, 2008 Ga. LEXIS 493 (Ga. 2008).

**Evidence of victim's sexual activity admissible.** — Given that the defendant was not charged with rape, evidence of the victim's sexual activity, and the fact that the victim had a love interest, with whom the victim allegedly had sexual intercourse during the time of the alleged sexual abuse, should not have been excluded under either the 2004 or 2005 version of

the rape shield statute, as: (1) said evidence acted as a possible explanation for the victim's physical trauma, placing the victim's credibility and the defendant's guilt into question; (2) the jury's split verdict supported the defendant's argument that even without the excluded testimony, the state's case was far less than overwhelming; and (3) the appeals court could not determine what role the excluded evidence would have played in the jury's deliberations; hence, a new trial as to the charges of child molestation and incest was ordered. *Gresham v. State*, 281 Ga. App. 116, 635 S.E.2d 316 (2006).

Trial court abused the court's discretion in excluding evidence that a child molestation victim had been having sex with her boyfriend because the evidence would provide an alternate explanation as to why the victim's hymen had been penetrated, and absent the evidence of the sexual relationship with the boyfriend, the obvious inference was that the defendant had caused the penetration injuries; the state decided to present evidence of the penetration damage to the victim's hymen, and it was the state's affirmative act of "opening the door" to the area that required the trial court to allow the defendant to present evidence that someone other than the defendant caused the injury. *Tidwell v. State*, 306 Ga. App. 307, 701 S.E.2d 920 (2010).

Defendant's convictions for child molestation in violation of O.C.G.A. § 16-6-4(a) and sexual battery in violation of O.C.G.A. § 16-6-22.1(b) were vacated because the trial court erred by applying O.C.G.A. § 24-2-3(a) to the case and striking the testimony regarding the victim's previous alleged sexual conduct with the victim's brother based on the court's conclusion that the rape shield statute prohibited the defendant from presenting evidence regarding the victim's prior sexual history, and the error in excluding the evidence of the victim's prior sexual history could have contributed to the jury's verdict since the only direct evidence of the defendant's guilt was the victim's testimony that the defendant sexually abused the victim; O.C.G.A. § 24-2-3, as the statute is currently written, does not apply to prosecutions for child molestation or sexual bat-

tery. *Robinson v. State*, 308 Ga. App. 562, 708 S.E.2d 303 (2011).

**County child abuse records should be provided.** — Trial court erred by failing to provide defendant with the county child abuse documents the defendant requested during the defendant's trial for child molestation, but the defendant was not denied due process since defendant failed to show that the trial court withheld any material, exculpatory information. *Dodd v. State*, 293 Ga. App. 816, 668 S.E.2d 311 (2008).

**No reversible error in admitting character evidence via defendant's drug use.** — Defendant's convictions for various sexual offenses against a child were upheld on appeal because no reversible error occurred by the trial court allowing evidence of defendant's character as relevant via a police detective testifying that when the detective arrested defendant, the detective pulled from the defendant's pocket a suspected methamphetamine glass pipe containing methamphetamine residue; the reviewing court found that the challenged evidence was cumulative since the victim, the victim's mother, and another witness all testified to the defendant's drug usage. *Quarles v. State*, 285 Ga. App. 758, 647 S.E.2d 415 (2007).

**Indictment defective.** — Trial court erred in not granting special demurrer where indictment only identified the victim with the victim's initials. *Sellers v. State*, 263 Ga. App. 144, 587 S.E.2d 276 (2003).

**Venue.** — Evidence that an investigator went to the locale described to her by defendant's daughters and concluded it was in Gwinnett County was sufficient to prove venue, where no challenge to venue was raised at trial. *Alexander v. State*, 199 Ga. App. 228, 404 S.E.2d 616 (1991).

After the defendant was convicted of felony child molestation in violation of O.C.G.A. § 16-6-4 and misdemeanor sexual battery in violation of O.C.G.A. § 16-6-22.1 and defendant appealed, contending that venue was not sufficiently established, the Court of Appeals erred in relying on statements by defendant's counsel that were contained in defendant's motion for reconsideration of bond

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in order to find that venue was sufficiently established. In reviewing a claim that venue was not sufficiently proved, the appellate court was required to rely only on evidence in the record that had been presented to the jury as venue was an element to be proved by the state, and where there was no evidence before the jury as to where defendant's business was actually located, the crime of felony child molestation, which occurred in defendant's business, was not sufficiently proved. *Thompson v. State*, 277 Ga. 102, 586 S.E.2d 231 (2003).

Testimony of two child molestation victims indicating that the defendant lived with the victims in Gwinnett County at the time the sexual abuse occurred was sufficient to establish that Gwinnett County was the proper venue. Although the victims were quite young when the abuse occurred, the credibility of the victims was for the jury to determine. *Ortiz v. State*, 295 Ga. App. 546, 672 S.E.2d 507 (2009), cert. denied, No. S09C0803, 2009 Ga. LEXIS 269 (Ga. 2009).

**Liability insurance coverage denied.** — When a child who had been sexually molested brought an action against the convicted molester for past and future physical and mental pain and suffering, the defendant's homeowner's insurance carrier had no obligation to defend or provide coverage because the policy excluded coverage for bodily injury which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by the insured person. *Allstate Ins. Co. v. Jarvis*, 195 Ga. App. 335, 393 S.E.2d 489 (1990).

**Juror not required to be excused for cause.** — Because a juror, who was both the daughter of a crime victim and a victim, stated that the juror could ultimately be fair and impartial, and would try to do so, the juror did not hold a fixed and definite opinion of the defendant's guilt or innocence requiring excusal. *Walker v. State*, 277 Ga. App. 485, 627 S.E.2d 54 (2006).

In response to a question from the trial court, a juror stated that the juror could

decide the case based on the evidence presented. Given this response, the trial court did not abuse the court's discretion in refusing to strike the juror for cause. *Huskins v. State*, 294 Ga. App. 653, 669 S.E.2d 680 (2008).

**Seven year limitations period.** — Trial court's denial of defendant's motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, on two counts of child molestation in violation of O.C.G.A. § 16-6-4, was proper because the evidence of defendant's inappropriate sexual abuse of the victim sufficiently placed the dates of the charged offenses within the seven-year limitations period of O.C.G.A. §§ 17-3-1(c) and 17-3-2.1(a)(5). *Allen v. State*, 275 Ga. App. 826, 622 S.E.2d 54 (2005).

**Defendant indicted within statute of limitations period.** — Trial court erred in dismissing the counts of the indictment charging the defendant with aggravated child molestation, child molestation, and statutory rape with a child under the age of 16 because the indictment sufficiently invoked the tolling provision of O.C.G.A. § 17-3-2.1; pursuant to O.C.G.A. § 17-3-1(c), the state had seven years to indict the defendant, and the defendant was indicted within seven years. *State v. Godfrey*, No. A10A1979, 2011 Ga. App. LEXIS 197 (Mar. 15, 2011).

**Untimely motion to suppress.** — In a prosecution on four counts of child molestation, the defendant's failure to file a timely motion to suppress waived the right to claim that the seized items were inadmissible as fruits of the poisonous tree. *Walker v. State*, 277 Ga. App. 485, 627 S.E.2d 54 (2006).

**Motions to suppress.** — Trial court erroneously suppressed the statements given by the defendant to law enforcement, because, given the totality of the circumstances apparent from the record, the defendant: (1) spoke clearly; (2) did not appear to be under the influence of alcohol or drugs; (3) appeared to understand what was read; (4) was not threatened or coerced in any way; (5) appeared very calm; (6) was not promised anything by police in exchange for defendant's cooperation; (7) did not appear to have any mental issues; (8) had only been detained

for approximately 20 minutes before defendant was Mirandized; and (9) asked the investigator to come back to speak with defendant after a brief interruption in the interview; the mere fact that there was no written Miranda waiver or electronic recording of the same did not render said waiver involuntary. *State v. Hardy*, 281 Ga. App. 365, 636 S.E.2d 36 (2006).

In a prosecution for two counts of child molestation, the trial court did not err in denying the defendant's motion to suppress a written statement given to police during the course of a pretrial interview, despite an argument that at the time the statement was given, the defendant invoked a right to counsel, as a defense objection to the admission of the same on this ground came after the statement was already admitted, and was thus untimely. *Copeland v. State*, 281 Ga. App. 656, 637 S.E.2d 90 (2006).

**Motion to dismiss statutory rape and child molestation charges on jeopardy grounds properly denied.** — Trial court properly denied the defendant's motion to dismiss charges alleging statutory rape and child molestation on jeopardy grounds as double jeopardy did not preclude the state from prosecuting defendant for both offenses, although the same conduct formed the basis for both charges. Moreover, because no corroboration was required for child molestation, the jury logically could have found, and in fact did find, the defendant guilty of molesting the victim by having sex with that victim, despite the jury's not guilty verdict on statutory rape. *Maynard v. State*, 290 Ga. App. 403, 659 S.E.2d 831 (2008).

**Ineffective assistance of counsel claim did not warrant new trial.** — In a prosecution against the defendant under O.C.G.A. § 16-6-4, because the defendant failed to show that trial counsel was ineffective in failing to present an alibi witness, and because the defendant failed to offer evidence that a medical examiner or witnesses from the Department of Family and Child Services would have been favorable to a defense, the defendant's ineffective assistance of counsel claims lacked merit. *Herrington v. State*, 285 Ga. App. 4, 645 S.E.2d 29 (2007), cert. denied, 2007 Ga. LEXIS 548 (Ga. 2007).

On appeal from convictions on two counts of child molestation and one count of aggravated sexual battery, the trial court properly found that the defendant was not entitled to a new trial based on allegations of the ineffective assistance of defense counsel because: (1) the manner in which counsel handled alleged exculpatory evidence pertaining to a similar transaction witness and the cross-examination of that witness was part of counsel's reasonable trial strategy; (2) the defendant's reciprocal discovery or due process rights were not violated; and (3) the existence of the information sought was known to the defendant, which could have been obtained with due diligence. *Ellis v. State*, 289 Ga. App. 452, 657 S.E.2d 562 (2008).

**Ineffective assistance of counsel warrants new trial.** — Defense counsel's failure to present testimony of concern in the victim's many false allegations of child molestation and failure to present expert medical or psychological testimony regarding alleged molestation victim was ineffective assistance of counsel. *Goldstein v. State*, 283 Ga. App. 1, 640 S.E.2d 599 (2006), cert. denied, 2007 Ga. LEXIS 338 (April 24, 2007).

Trial court did not abuse the court's discretion in granting the defendant a new trial based on the ineffective assistance of trial counsel, as: (1) counsel's pretrial investigation was deficient; (2) counsel made no effort to investigate or to obtain the criminal records of the state's similar transaction witness before trial, and did not ask for more time or a continuance upon learning that the defendant did not have the records; (3) the defendant pointed out that the jury had doubts about the victim's testimony based on their verdict of guilt to sexual battery, as a lesser-included offense of child molestation, the crime the defendant was charged with committing; (4) there was evidence that the victim had reason to lie; (5) the charged incident was not reported until after the defendant's wife hired a divorce lawyer, who then arranged the first interview between the victim and investigators; and (6) given that the evidence against the defendant was not overwhelming, this impeachment evidence

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was particularly crucial. *State v. Lamb*, 287 Ga. App. 389, 651 S.E.2d 504 (2007), overruled on other grounds, *O'Neal v. State*, 285 Ga. 361, 677 S.E.2d 90 (2009).

**Defense counsel not ineffective.** — In a child molestation prosecution, defense counsel's questioning of a victim about the entire circumstances of the victim's outcry, including an allegation that the defendant had used drugs, was part of a valid trial strategy. That the strategy was unsuccessful in securing an acquittal on all charges did not show that counsel's actions were objectively unreasonable. *Farris v. State*, 293 Ga. App. 674, 667 S.E.2d 676 (2008).

During the defendant's trial for child molestation, defense counsel was not ineffective for failing to request charges on sexual battery and the defense of accident or on mistake of fact because under the evidence, charges on those subjects were not authorized; counsel testified that counsel did not seek a charge on sexual battery because the defendant denied touching the victim, and as all of the charges the defendant contended should have been requested would require that the defendant admit that the defendant touched the victim as alleged, the charges would have been inconsistent with the defense's theory that there was no touching at all and were inconsistent with the defendant's adamant denial that the defendant touched the victim as the victim contended. *Kay v. State*, 306 Ga. App. 666, 703 S.E.2d 108 (2010).

**Retalial did not violate due process.** — Retrial on child molestation charge did not violate due process given the legislature's clear intention to prosecute sexual intercourse only as statutory rape. *Maynard v. State*, 290 Ga. App. 403, 659 S.E.2d 831 (2008).

**Severance of offenses.** — Defendant's motion to sever the failure to register as a sex offender counts under former O.C.G.A. § 42-1-12 from the remaining aggravated sodomy and child molestation counts was properly denied as: (1) the defendant was not entitled to severance as a matter of right since the charges involved a series of acts which were con-

nected together; (2) the case was not so complex as to impair the jury's ability to distinguish the evidence and to apply the law intelligently to the counts as joined; and (3) the failure to sever the failure to register as a sex offender counts was proper, even applying an analogy to cases involving possession of a firearm by a convicted felon, as the failure to report charges were legally material to the crimes against two children because the failure constituted evasive conduct that was circumstantial evidence of guilt and evidence of the conduct underlying the defendant's conviction of a sex offense in North Carolina was admissible as a similar transaction. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever the offenses of child molestation, O.C.G.A. § 16-6-4(a)(1), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), tattooing the body of a minor, O.C.G.A. § 16-5-71(a), and the defendant's motion for new trial on that basis because all of the sex offenses were similar and showed the defendant's common motive, plan, scheme, or bent of mind to satisfy the defendant's sexual desires, and the circumstances surrounding the tattooing offenses would have been admissible at the trial of the sex offenses to show the defendant's lustful disposition and bent of mind; the case was not so complex as to impair the jury's ability to distinguish the evidence and apply the law intelligently as to each offense. *Boatright v. State*, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

**Sentence of 220 years to serve upheld but order of chemical castration unsustainable.** — Trial court properly sentenced defendant to 220 years to serve, followed by 20 years of probation, on 24 counts of sexual exploitation of a child, as such a sentence was within the statutory parameters and did not shock the appellate court's conscious in light of the crimes committed and, in fact, defendant was actually spared serving the maximum amount of prison time authorized by O.C.G.A. § 16-12-100(g)(1). However, the trial court erred by ordering defendant to undergo chemical castration under O.C.G.A. § 16-6-4(d)(2) since such pun-

ishment was only for defendants convicted of child molestation. *Bennett v. State*, 292 Ga. App. 382, 665 S.E.2d 365 (2008).

**No Apprendi violation in sentencing.** — There was no Apprendi violation in sentencing a defendant on a child molestation conviction because the factors set forth in O.C.G.A. § 16-6-4(b)(2) described an exception to the baseline felony punishment and mitigated or decreased that punishment to the lower level of a misdemeanor if these facts were found during the sentencing hearing; the cases did not suggest that the jury must find mitigating facts which decreased the punishment for a crime. *Kolar v. State*, 292 Ga. App. 623, 665 S.E.2d 719 (2008).

**Sex offender registration required.** — Requiring a defendant who had been convicted of aggravated child molestation to submit to lifetime registration as a sex offender under O.C.G.A. § 42-1-12 did not exceed the maximum sentence allowed under O.C.G.A. § 16-6-4 as such registration was not a sentence or a punishment. *Hollie v. State*, 298 Ga. App. 1, 679 S.E.2d 47 (2009), aff'd, 287 Ga. 389, 696 S.E.2d 642 (2010).

**Cited in** *Butler v. State*, 132 Ga. App. 750, 209 S.E.2d 28 (1974); *Disharoon v. State*, 288 Ga. App. 1, 652 S.E.2d 902 (2007); *Weaver v. State*, 234 Ga. 890, 218 S.E.2d 750 (1975); *Neel v. State*, 140 Ga. App. 691, 231 S.E.2d 394 (1976); *Cole v. State*, 162 Ga. App. 353, 291 S.E.2d 427 (1982); *Massengale v. State*, 164 Ga. App. 57, 296 S.E.2d 371 (1982); *Jackson v. State*, 170 Ga. App. 172, 316 S.E.2d 816 (1984); *Chapman v. State*, 170 Ga. App. 779, 318 S.E.2d 213 (1984); *Wilcher v. State*, 171 Ga. App. 10, 318 S.E.2d 760 (1984); *Winter v. State*, 171 Ga. App. 511, 320 S.E.2d 233 (1984); *American Booksellers Ass'n v. Webb*, 590 F. Supp. 677 (N.D. Ga. 1984); *Jordan v. State*, 172 Ga. App. 496, 323 S.E.2d 657 (1984); *Howell v. State*, 172 Ga. App. 805, 324 S.E.2d 754 (1984); *Crawford v. State*, 254 Ga. 435, 330 S.E.2d 567 (1985); *McLamb v. State*, 176 Ga. App. 727, 337 S.E.2d 360 (1985); *Seymour v. State*, 177 Ga. App. 598, 340 S.E.2d 244 (1986); *Hunt v. State*, 180 Ga. App. 103, 348 S.E.2d 467 (1986); *Cooper v. State*, 180 Ga. App. 37, 348 S.E.2d 486 (1986); *Parker v. State*, 256 Ga. 543, 350

S.E.2d 570 (1986); *Cooper v. State*, 256 Ga. 631, 352 S.E.2d 382 (1987); *Banther v. State*, 182 Ga. App. 333, 355 S.E.2d 709 (1987); *Clark v. State*, 184 Ga. App. 417, 361 S.E.2d 549 (1987); *Thompson v. State*, 187 Ga. App. 563, 370 S.E.2d 819 (1988); *Roe v. State Farm Fire & Cas. Co.*, 188 Ga. App. 368, 373 S.E.2d 23 (1988); *Harris v. State*, 189 Ga. App. 49, 375 S.E.2d 122 (1988); *Daniel v. State*, 194 Ga. App. 495, 391 S.E.2d 128 (1990); *Hunter v. State*, 194 Ga. App. 711, 391 S.E.2d 695 (1990); *Rayburn v. State*, 194 Ga. App. 676, 391 S.E.2d 780 (1990); *Franklin v. State*, 195 Ga. App. 696, 394 S.E.2d 621 (1990); *Rodgers v. State*, 261 Ga. 33, 401 S.E.2d 735 (1991); *Black v. State*, 199 Ga. App. 819, 406 S.E.2d 258 (1991); *Green v. State*, 206 Ga. App. 539, 426 S.E.2d 65 (1992); *Burke v. State*, 208 Ga. App. 446, 430 S.E.2d 816 (1993); *Cooper v. State*, 212 Ga. App. 34, 441 S.E.2d 448 (1994); *Harper v. State*, 213 Ga. App. 505, 445 S.E.2d 548 (1994); *Deal v. State*, 241 Ga. App. 879, 528 S.E.2d 289 (2000); *Couch v. State*, 248 Ga. App. 238, 545 S.E.2d 685 (2001); *Roland v. Meadows*, 273 Ga. 857, 548 S.E.2d 289 (2001); *McCrickard v. State*, 249 Ga. App. 715, 549 S.E.2d 505 (2001); *Craft v. State*, 252 Ga. App. 834, 558 S.E.2d 18 (2001); *Moreno v. State*, 255 Ga. App. 88, 564 S.E.2d 505 (2002); *State v. Ware*, 258 Ga. App. 564, 574 S.E.2d 632 (2002); *Hunter v. State*, 263 Ga. App. 747, 589 S.E.2d 306 (2003); *Tompkins v. State*, 265 Ga. App. 760, 595 S.E.2d 599 (2004); *Grovenstein v. State*, 282 Ga. App. 109, 637 S.E.2d 821 (2006); *Melton v. State*, 282 Ga. App. 685, 639 S.E.2d 411 (2006); *Wallace v. State*, 288 Ga. App. 480, 654 S.E.2d 442 (2007); *Payne v. State*, 290 Ga. App. 589, 660 S.E.2d 405 (2008); *Rouse v. State*, 290 Ga. App. 740, 660 S.E.2d 476 (2008); *Williams v. State*, 290 Ga. App. 841, 660 S.E.2d 740 (2008); *Finnan v. State*, 291 Ga. App. 486, 662 S.E.2d 269 (2008); *Miller v. State*, 291 Ga. App. 478, 662 S.E.2d 261 (2008); *In the Interest of A.S.*, 293 Ga. App. 710, 667 S.E.2d 701 (2008); *Cash v. State*, 294 Ga. App. 741, 669 S.E.2d 731 (2008); *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008); *Dyer v. State*, 295 Ga. App. 495, 672 S.E.2d 462 (2009); *Golden v. State*, 299 Ga. App. 407, 683 S.E.2d 618 (2009); *Lee v. State*, 300

**General Consideration (Cont'd)**

Ga. App. 214, 684 S.E.2d 348 (2009).

**Application**

**Cruel and unusual punishment.** — Habeas court properly ruled that an inmate's sentence of 10 years in prison for having consensual oral sex with a 15-year-old when the inmate was only 17 years old constituted cruel and unusual punishment in light of the 2006 amendments to O.C.G.A. §§ 16-6-4 and 42-1-12. Humphrey v. Wilson, 282 Ga. 520, 652 S.E.2d 501 (2007).

Because the defendant was a teenager convicted only of aggravated child molestation under O.C.G.A. § 16-6-4, based solely on an act of sodomy, with no injury to the victim, involving a teenage partner two years younger, the teenager's sentence of 10 years without parole was cruel and unusual and was required to be set aside under Humphrey v. Wilson, 282 Ga. 520, 652 S.E.2d 501 (2007), without resentencing. Morris v. State, 300 Ga. App. 355, 685 S.E.2d 348 (2009), cert. denied, No. S10C0292, 2010 Ga. LEXIS 347 (Ga. 2010).

Trial court did not err in imposing or in refusing to reconsider the defendant's sentence of 20 years imprisonment for child molestation, with 15 to serve in confinement for statutory rape, because the defendant's sentence was within the statutory limits set by O.C.G.A. §§ 16-6-3(b) and 16-6-4(b)(1); the defendant did not demonstrate that the defendant's sentence shocked the conscience. Gresham v. State, 303 Ga. App. 682, 695 S.E.2d 73 (2010).

**Sentence did not constitute cruel and unusual punishment.** — Defendant failed to establish the threshold gross disproportionality inference needed to support a claim that the 10 year confinement sentence imposed on the defendant violated U.S. Const., amend. VIII and Ga. Const. 1983, Art. I, Sec. I, Para. XVII; the sentence was within the sentencing range in O.C.G.A. § 16-6-4(b)(1), the 2006 amendment to O.C.G.A. § 16-6-4(b)(2) did not apply to the defendant, so it did not provide a basis for any proportionality argument, and the evi-

dence showed that the defendant engaged in sexual intercourse with a 12-year-old child without the child's consent, and Georgia's child molestation law punished acts that were far less severe. Bragg v. State, 296 Ga. App. 422, 674 S.E.2d 650 (2009).

Although the defendant contended that the sentence provided in the amendment to O.C.G.A. § 16-6-4(d)(1), which as a result of O.C.G.A. § 17-10-6.1 (b) was 25 years, followed by life on probation, with no possibility of probation or parole for the minimum prison time of 25 years, constituted cruel and unusual punishment in violation of the Eighth Amendment, the sentence was not grossly disproportionate to the defendant's crime since aggravated child molestation committed by the defendant was not a passive felony. Moreover, the juveniles had been tried as adults and sentenced to long periods of incarceration in Georgia, and severe punishments for crimes against children had withstood previous attacks on constitutional grounds. Adams v. State, 288 Ga. 695, 707 S.E.2d 359 (2011).

**Sentence imposed on revocation of supervised release.** — In a case in which a district court imposed a 60-month sentence on defendant following the revocation of defendant's supervised release, given the severe and egregious nature of the supervised release violation, which, under O.C.G.A. § 16-6-4(d)(1), carried a life sentence, the 60-month sentence was not unreasonable. Defendant pled guilty to aggravated child molestation and enticing a child for indecent purposes, and, under 18 U.S.C. § 3553(a), the district court concluded that the sentence was necessary to punish defendant adequately, to protect the public, and to deter future similar conduct. United States v. Williams, No. 08-12549, 2009 U.S. App. LEXIS 7720 (11th Cir. Apr. 8, 2009) (Unpublished).

**No corroboration is required** for a conviction of child molestation under O.C.G.A. § 16-6-4. Baker v. State, 245 Ga. 657, 266 S.E.2d 477 (1980).

Corroboration is not required to warrant a conviction for the offense of incest, sodomy, and child molestation, and trial court's failure to charge the jury that

corroboration was required was not error. *Scales v. State*, 171 Ga. App. 924, 321 S.E.2d 764 (1984); *Padgett v. State*, 175 Ga. App. 818, 334 S.E.2d 883 (1985), aff'd, 258 Ga. 662, 374 S.E.2d 532 (1988).

There is no requirement that the testimony of the victim of child molestation be corroborated. *Adams v. State*, 186 Ga. App. 599, 367 S.E.2d 871 (1988).

Corroboration is not required for a conviction of child molestation. *Weeks v. State*, 187 Ga. App. 307, 370 S.E.2d 344, aff'd, 258 Ga. 662, 374 S.E.2d 532 (1988).

O.C.G.A. § 16-6-4 does not require corroboration of a child molestation victim's testimony. *Burrage v. State*, 234 Ga. App. 814, 508 S.E.2d 190 (1998).

Child molestation statute does not require corroborating evidence for a conviction. *Chastain v. State*, 236 Ga. App. 542, 512 S.E.2d 665 (1999).

Trial court did not err by denying the defendant's motion for a directed verdict of acquittal on a child molestation charge, despite a claim that no physical evidence of other support for the victim's claims was presented, as: (1) Georgia law did not require corroboration of a child molestation victim's testimony; and (2) the victim's testimony was sufficient to support the defendant's conviction. *Keith v. State*, 279 Ga. App. 819, 632 S.E.2d 669 (2006).

Child molestation and aggravated child molestation convictions were upheld on appeal, as a videotaped statement from the victim of said crimes accusing the defendant of requiring the victim to place the defendant's penis in the victim's mouth was corroborated by another witness; hence, the defendant was not denied due process and the child hearsay statute, O.C.G.A. § 24-3-16 did not require corroboration of child hearsay. *Simpson v. State*, 282 Ga. App. 456, 638 S.E.2d 900 (2006).

Rape, incest, child molestation, aggravated child molestation, and aggravated sodomy convictions were all upheld on appeal, given that the elements of child molestation and aggravated child molestation, including venue, were supported by the female victim's testimony. *Forbes v. State*, 284 Ga. App. 520, 644 S.E.2d 345 (2007).

While a doctor's examination of a 13-year-old victim two days after the de-

fendant's alleged molestation of the victim found no evidence of vaginal trauma and no semen was found in the victim's vagina, on the victim's skin or clothes, or in the hotel room, the testimony of the victim did not need to be corroborated to convict the defendant of aggravated child molestation under O.C.G.A. § 16-6-4(c) and three counts of child molestation under O.C.G.A. § 16-6-4(a). *Moe v. State*, 297 Ga. App. 270, 676 S.E.2d 887 (2009).

**Victim's testimony alone is sufficient to sustain conviction under O.C.G.A. § 16-6-4.** — See *Putnam v. State*, 231 Ga. App. 190, 498 S.E.2d 340 (1998); *Johnson v. State*, 231 Ga. App. 823, 499 S.E.2d 145 (1998); *Grooms v. State*, 261 Ga. App. 549, 583 S.E.2d 216 (2003).

Evidence amply supported defendant's conviction for child molestation; the 12-year old victim's testimony alone was sufficient to sustain the conviction. *Gibbs v. State*, 256 Ga. App. 559, 568 S.E.2d 850 (2002).

Victim's testimony alone was sufficient to support defendant's convictions for incest and child molestation, and the evidence was sufficient to support defendant's statutory rape conviction as it was corroborated when the victim testified that the defendant, the victim's step-parent, began to ask the victim to masturbate and use sex toys, including vibrators, dildos, and other objects, and would use them on the defendant and on the victim when the victim was eight or nine years old; defendant began having sexual intercourse with the victim when the victim was about 12, even though the victim told the defendant that it was not right and that the victim did not like it; after one of the final acts of intercourse with defendant, the victim wiped the victim with a sock and kept the sock until the day the victim ran away to a friend's home and told the victim's friend about defendant's conduct, the semen stains on the sock were consistent with defendant's semen, and the state's expert's opinion was that epithelial cells present on the sock came from the victim's vaginal area; and when the victim was in the ninth grade, the victim told a friend about defendant's behavior but made the friend promise not to tell anyone. *Eley v. State*, 266 Ga. App. 45, 596 S.E.2d 660 (2004).

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Evidence of the victim alone was sufficient to authorize a guilty verdict in a child molestation case; there was no requirement that the victim's testimony be corroborated, and defendant's convictions of child molestation, aggravated child molestation, rape, aggravated sexual battery, and cruelty to children were affirmed. *McKinney v. State*, 269 Ga. App. 12, 602 S.E.2d 904 (2004).

Evidence was sufficient to support a defendant juvenile's adjudication of delinquency for child molestation as the victim testified that: (1) the defendant juvenile followed the victim down the steps and then pushed the victim against a railing as the defendant juvenile tried to unbutton the victim's pants; (2) the defendant juvenile unbuckled the defendant juvenile's belt, and tried to rub the defendant's genitals against the victim's genitals and make the victim touch the defendant's genitals; (3) the victim pulled away and began to cry; (4) the defendant juvenile asked the victim to give the defendant juvenile a hug twice and the victim complied because the victim wanted the defendant juvenile to let the victim go; and (5) the defendant juvenile told the victim to go to class and when the victim arrived at class, the victim laid the victim's head down on the desk and cried. In the Interest of Q.F., 280 Ga. App. 812, 635 S.E.2d 209 (2006).

Evidence that a defendant asked the victim to perform sex acts on the defendant supported a conviction for attempted child molestation, the evidence that the defendant put the defendant's tongue into the victim's mouth supported the defendant's child molestation conviction, and the evidence that the defendant asked the victim to scratch the defendant's genitals and to put the defendant's genitals in the victim's mouth, made the victim suck on the defendant's genitals, and made the victim swallow the defendant's semen supported the aggravated child molestation conviction; there was no requirement that the testimony of the victim of child molestation be corroborated. *Redman v. State*, 281 Ga. App. 605, 636 S.E.2d 680 (2006).

Despite the defendant's contrary claim, the child molestation and aggravated child molestation convictions were upheld on appeal, as supported by sufficient evidence provided by the child victim that the defendant touched the child's genitals and that defendant's "pee" went into the child's mouth. *Manders v. State*, 281 Ga. App. 786, 637 S.E.2d 460 (2006).

Sufficient evidence supported the defendant's convictions of child molestation under O.C.G.A. § 16-6-4 and aggravated sexual battery under O.C.G.A. § 16-6-22.2; the testimony of the victim and the defendant conflicted, but the testimony of the victim, alone, was sufficient to authorize the jury to find the defendant guilty. *Goldstein v. State*, 283 Ga. App. 1, 640 S.E.2d 599 (2006), cert. denied, 2007 Ga. LEXIS 338 (April 24, 2007).

Victim's testimony alone was sufficient under O.C.G.A. § 24-4-8 to establish the elements of a charge against the defendant of child molestation, in violation of O.C.G.A. § 16-6-4(a), as the victim testified that while she was at the defendant's home visiting his daughter, he requested that she kiss him and have sexual intercourse with him, and that he showed her his erect penis; there was also testimony from a jail nurse who confirmed that the defendant had a tattoo on his penis as described by the victim, and there was an internet instant-message conversation between the defendant and the victim, during which he apologized to her for his actions. *Hammonree v. State*, 283 Ga. App. 736, 642 S.E.2d 412 (2007).

Because sufficient direct evidence was presented via the victim's testimony that the defendant improperly touched and digitally penetrated the victim's vagina, convictions upon charges of aggravated sodomy, aggravated child molestation, and other crimes arising from that contact were upheld on appeal; further, any error related to the admission of the victim's videotaped statement was harmless, as such statement would have been admissible as res gestae or to prove the defendant's lustful disposition. *Morrow v. State*, 284 Ga. App. 297, 643 S.E.2d 808 (2007).

Victim testified that the defendant performed oral sex on the victim on two separate occasions; although that testi-

mony represented the only evidence against the defendant, the testimony was sufficient to authorize the jury to find the defendant guilty of aggravated child molestation. *Johnson v. State*, 284 Ga. App. 147, 643 S.E.2d 556 (2007).

Victim's testimony that the defendant, the victim's cousin, engaged in an act of oral sodomy with the victim was sufficient to support the defendant's conviction of aggravated child molestation under O.C.G.A. § 16-6-4; it was not necessary that the victim's testimony be corroborated, and the victim's credibility was a matter for the jury. *Flanders v. State*, 285 Ga. App. 805, 648 S.E.2d 97 (2007).

Testimony of an 11-year-old child that the defendant had sodomized the child on several occasions was sufficient by itself to convict the defendant of aggravated child molestation, O.C.G.A. § 16-6-4(c), as it was the jury's role to resolve any inconsistencies in the child's testimony or conflicts between the child's testimony and that of others. *Terry v. State*, 293 Ga. App. 455, 667 S.E.2d 109 (2008).

Evidence was sufficient to convict a defendant of child molestation and aggravated child molestation under O.C.G.A. § 16-6-4(a) and (c), respectively, because, even assuming the victim recanted the accusations on cross-examination, the victim testified on re-direct that the victim had not fabricated the story and was nervous about being in court and seeing the defendant. The victim's testimony alone, as it was believed by the jury, was sufficient to convict the defendant. *Green v. State*, 293 Ga. App. 752, 667 S.E.2d 921 (2008).

Defendant's convictions of two counts of child molestation required no corroboration and could be sustained based on the testimony of the victims alone, each of whom testified that the defendant fondled the victim's breasts or private parts. *Hill v. State*, 295 Ga. App. 360, 671 S.E.2d 853 (2008).

Sufficient evidence was presented to support a defendant's conviction for child molestation under O.C.G.A. § 16-6-4(a) because the victim's testimony, in and of itself, could support the conviction; the victim testified that the defendant got into the victim's bed, moved the victim's pant-

ies, and rubbed the defendant's private part against the victim's private part. *Hughes v. State*, 297 Ga. App. 581, 677 S.E.2d 674 (2009).

As a 14-year-old victim's testimony of being sexually abused by the defendant was sufficient, standing alone, to support the defendant's convictions of aggravated child molestation, even assuming that testimony about the content of text messages between the defendant and the victim was improperly admitted hearsay, the defendant was not entitled to a new trial. *Hollie v. State*, 298 Ga. App. 1, 679 S.E.2d 47 (2009), aff'd, 287 Ga. 389, 696 S.E.2d 642 (2010).

Despite the absence of any physical evidence, the victims' testimonies were sufficient to find defendant guilty of aggravated child molestation and child molestation under O.C.G.A. § 16-6-4; counsel's strategic decisions in failing to call impeachment witnesses did not amount to deficient performance. *Barnes v. State*, 299 Ga. App. 253, 682 S.E.2d 359 (2009).

Evidence from a 13-year-old victim that defendant, a friend of the victim's step-father, gave the victim bourbon and marijuana, then put fingers inside the victim's privates and also touched the victim's privates with the defendant's privates was sufficient to establish child molestation. *Bright v. State*, 301 Ga. App. 204, 687 S.E.2d 208 (2009).

Victim's testimony that defendant penetrated her sexual organ with his finger was alone sufficient to prove defendant guilty of child molestation (O.C.G.A. § 16-6-4(a)) and aggravated child molestation (O.C.G.A. § 16-6-22.2(b)), pursuant to O.C.G.A. § 24-4-8. The testimony of the victim's cousin, two school friends, and the interviewing detective was admissible as substantive evidence under the Child Hearsay Statute, O.C.G.A. § 24-3-16. *Vaughn v. State*, 301 Ga. App. 391, 687 S.E.2d 651 (2009).

Evidence from a defendant's nine-year-old daughter that the defendant placed defendant's hand and defendant's privates on her privates and that something like pee came out of the defendant's private was sufficient to convict the defendant of two counts of child molestation in vio-

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lation of O.C.G.A. § 16-6-4(a)(1). Hernandez v. State, 304 Ga. App. 435, 696 S.E.2d 155 (2010).

Evidence was sufficient to sustain the defendant's convictions for child molestation and aggravated child molestation because the victim testified that the defendant kissed her on the mouth many times, fondled her breasts, licked her vagina and touched her vagina with his fingers, rubbed his penis against her vagina, and placed her mouth on his penis; although the defendant challenged the victim's motives and credibility on appeal, the jury, not the court of appeals, was tasked with determining witness credibility, and the jury was authorized to resolve any credibility issues against the defendant. Fogerty v. State, 304 Ga. App. 546, 696 S.E.2d 496 (2010).

Evidence that a defendant had sexual intercourse with his niece from age 14 to 17, touched her breasts and vagina with his mouth, touched her with sex toys, showed her pornography, and placed her mouth on his penis was sufficient to convict him of child molestation and incest in violation of O.C.G.A. §§ 16-6-4(a) and 16-6-22(a)(6). Stott v. State, 304 Ga. App. 560, 697 S.E.2d 257 (2010).

Testimony of one of the minor victims, standing alone, as to the acts the defendant committed with the victim was sufficient for the jury to find the defendant guilty beyond a reasonable doubt of aggravated child molestation, in violation of O.C.G.A. § 16-6-4(c), and child molestation, in violation of O.C.G.A. § 16-6-4(a)(1). Cobb v. State, No. A10A1700, 2011 Ga. App. LEXIS 200 (Mar. 16, 2011).

**Recanting of child victim's testimony.** — Witnesses testified pursuant to O.C.G.A. § 24-3-16 that the defendant's stepchild, then 12, told them about being repeatedly raped and molested by the defendant. That the stepchild recanted these statements at trial did not render the hearsay inadmissible under § 24-3-16, and as the stepchild's credibility was for the jury to decide, the evidence was sufficient to support the defendant's convictions for rape, incest, and child molesta-

tion. Harvey v. State, 295 Ga. App. 458, 671 S.E.2d 924 (2009).

Evidence was sufficient to convict a defendant of molesting defendant's daughter, although she recanted her accusation at trial. The daughter made a voluntary outcry to a counselor at her school and repeated the accusations to her mother, her step-sister, and a forensics interviewer. Purvis v. State, 301 Ga. App. 648, 689 S.E.2d 53 (2009), overruled on other grounds, 308 Ga. App. 562, 708 S.E.2d 303 (2011).

**Attempted child molestation.** — Asportation of the child is not an essential element of attempted child molestation. Wittschne v. State, 189 Ga. App. 828, 377 S.E.2d 681 (1988), aff'd, 259 Ga. 448, 383 S.E.2d 885 (1989).

Defendant's conviction of attempted child molestation was affirmed on evidence showing that defendant drove a van up to two young children who were roller-skating on a street, held up dollar bills and asked them if they would like to have the money, and when one girl responded affirmatively, said "let me stick my hand down your pants." Wittschne v. State, 189 Ga. App. 828, 377 S.E.2d 681 (1988), aff'd, 259 Ga. 448, 383 S.E.2d 885 (1989).

When there was undisputed evidence that defendant entered the 12-year old victim's house with the intent to engage in sexual activity and that defendant sat nude on the victim's bed while the victim was in the bed, a rational trier of fact could have concluded beyond a reasonable doubt that the defendant was guilty of criminal attempt to commit child molestation. Garmon v. State, 192 Ga. App. 250, 384 S.E.2d 278 (1989).

Indictment for attempted child molestation was sufficient without alleging the specific intent of child molestation under O.C.G.A. § 16-6-4. Livery v. State, 233 Ga. App. 332, 503 S.E.2d 914 (1998).

Indictment for attempted child molestation alleging that defendant took a substantial step toward commission of the crime of child molestation by: (1) engaging in sexually-explicit conversations over the internet; and (2) driving to an arranged meeting place was not fatally defective in that it failed to allege the commission of a

crime. *Dennard v. State*, 243 Ga. App. 868, 534 S.E.2d 182 (2000).

Evidence that defendant undressed the defendant and a 14-year-old child and then climbed into bed with the child was more than sufficient to sustain defendant's conviction of criminal attempt to commit child molestation in violation of O.C.G.A. §§ 16-4-1, 16-6-4(a). *Colbert v. State*, 255 Ga. App. 182, 564 S.E.2d 787 (2002).

Evidence was sufficient to support conviction for attempted child molestation under O.C.G.A. §§ 16-4-1 and 16-6-4(a) where defendant: (1) wrapped defendant's body around a child so as to restrain the child's arms; (2) rubbed and kissed the child's back, placing defendant's feet in the child's crotch; and (3) asked where the child had been all of defendant's life. *Tanner v. State*, 259 Ga. App. 94, 576 S.E.2d 71 (2003).

Evidence supported defendant's attempted child molestation conviction as defendant showered a 13-year-old victim with gifts and marijuana to induce the child to have sexual intercourse with the defendant. *Leaptrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Defendant was properly ordered to register as sex offender because the convictions constituted criminal offenses against a victim who was a minor, pursuant to O.C.G.A. § 42-1-12(a)(9)(B) and because attempt convictions pursuant to O.C.G.A. § 16-4-1 were covered within the registration requirement; defendant was convicted of criminal attempt to commit child molestation and criminal attempt to entice a child for indecent purposes, in violation of O.C.G.A. §§ 16-6-4(a) and 16-6-5(a), respectively, as defendant communicated over the Internet with a police officer who was disguised as a 14-year-old child, and arranged to meet the alleged child, and the fact that an actual child was not involved did not negate the offense or the need for the registration, as there was no impossibility defense. *Spivey v. State*, 274 Ga. App. 834, 619 S.E.2d 346 (2005).

Because sufficient evidence was presented which showed that the defendant took substantial steps to arouse the defendant's own sexual desires in soliciting

both the defendant's child and the child's cousin, showing the cousin indecent photos, discussing masturbation with both, and trying to kiss the child between the legs, the defendant's attempted child molestation convictions were upheld on appeal. *Carey v. State*, 281 Ga. App. 816, 637 S.E.2d 757 (2006).

Rational trier of fact could have found the defendant guilty of attempted child molestation beyond a reasonable doubt because whether the defendant's actions were immoral or indecent and done with the requisite intent were questions for the jury. *Machado v. State*, 300 Ga. App. 459, 685 S.E.2d 428 (2009).

Evidence that the defendant, age 35, met a girl online whom the defendant believed was 15, that the defendant made numerous comments about how the defendant could get in trouble or go to jail, that the defendant engaged in sexually explicit conversations and directed the child to pornography sites showing black men having sex with white women, that the defendant drove to an arranged meeting place, and, that, when officers appeared, the defendant fled, was sufficient to convict defendant of violating O.C.G.A. §§ 16-4-1 (attempt), 16-6-4 (child molestation), 16-6-5 (enticement of a child), and 16-10-24 (obstruction). *Smith v. State*, 306 Ga. App. 301, 702 S.E.2d 211 (2010).

Law enforcement had probable cause to arrest the defendant for attempted enticement of a minor, in violation of O.C.G.A. § 16-6-4 and 18 U.S.C. § 2422(b), when the defendant initiated contact with undercover officers after reading a Craig's list post submitted by two girls, ages fourteen and fifteen, made telephone calls to the alleged girls, and rented a motel room to meet the girls. *United States v. Slaughter*, No. 4:10-CR-24-HLM-WEJ, 2011 U.S. Dist. LEXIS 37502 (N.D. Ga. Mar. 1, 2011).

Evidence that the defendant raised the subject of masturbation with the child victim and asked her to perform that act upon him was sufficient to support his conviction of attempted child molestation. *Pendley v. State*, No. A10A2301, 2011 Ga. App. LEXIS 283 (Mar. 25, 2011).

**Admissibility of evidence of similar or connected offenses against children**

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**dren.** — In child molestation cases, evidence of other similar or connected sexual offenses against children is admissible to corroborate testimony of victim as well as to show lustful disposition of defendant. *Ballweg v. State*, 158 Ga. App. 576, 281 S.E.2d 319 (1981); *Walls v. State*, 166 Ga. App. 503, 304 S.E.2d 547 (1983); *Pittman v. State*, 178 Ga. App. 693, 344 S.E.2d 511 (1986).

Sexual molestation of young children, regardless of sex or type of act, is sufficient similarity to make evidence admissible. *Phelps v. State*, 158 Ga. App. 219, 279 S.E.2d 513 (1981).

Testimony of two witnesses about defendant's molestation of them when they were children, such incidents having occurred 11 and six years before trial, were properly admitted, where the prior incidents were extremely similar to the offenses for which defendant was tried and convicted. *Childs v. State*, 177 Ga. App. 257, 339 S.E.2d 311 (1985).

Trial court did not err in admitting, as a similar transaction, testimony that the defendant raped the defendant's sister-in-law when the sister-in-law was 15 years old and was not then in the protected age of minority. *Ryan v. State*, 226 Ga. App. 180, 486 S.E.2d 397 (1997).

Evidence of defendant's prior conviction for lewd and lascivious assault on a minor was admissible to prove the defendant's "intent to arouse or satisfy the sexual desires of either the child or the person." *Blackwell v. State*, 229 Ga. App. 452, 494 S.E.2d 269 (1997).

In a prosecution of defendant for molestation of the defendant's 12-year-old stepnephew, evidence that the defendant molested the defendant's five- or six-year-old stepsister nine or ten years earlier when the defendant was a juvenile was admissible. *Gilham v. State*, 232 Ga. App. 237, 501 S.E.2d 586 (1998).

Trial court did not abuse its discretion in admitting defendant's federal conviction for receiving child pornography through the mail as well as evidence of molesting an 11-year-old child as similar transactions in defendant's trial under O.C.G.A. § 16-6-4 for molesting a

13-year-old child. *Hoffman v. State*, 259 Ga. App. 131, 576 S.E.2d 102 (2003).

When three prior incidents and the current child molestation charges against the defendant all involved the defendant going to locations frequented by children and exposing the defendant's genitals to them, the prior incidents were sufficiently similar to be admitted as similar transaction evidence in defendant's trial for child molestation; the fact that the prior incidents, unlike the current ones, did not involve touching the child victims did not mean that the prior incidents were not sufficiently similar to the current ones to be admitted as there was no requirement that the prior crime or transaction had to be absolutely identical in every respect. *Hostetler v. State*, 261 Ga. App. 237, 582 S.E.2d 197 (2003).

Defendant's convictions for child molestation, aggravated child molestation, and two counts of cruelty to children in the first degree, in violation of O.C.G.A. §§ 16-5-70(b) and 16-6-4(a), (c), as well as the defendant's conviction for attempt to commit rape, were supported by evidence, including testimony by the defendant's two grandchildren who were the victims of the instant crimes, as well as the introduction of similar transaction evidence, including sex offense convictions and similar acts by defendant against other minor victims; evidence of the similar transaction was properly admitted, as any issue as to its remoteness went to the weight of the evidence, not its admissibility. *Shorter v. State*, 271 Ga. App. 528, 610 S.E.2d 162 (2005).

Evidence of defendant's prior sexual battery of a juvenile was properly admitted in defendant's trial for child molestation and attempted child molestation of a nine-year-old child to show defendant's lustful disposition toward molesting young children because several years earlier, defendant had pled nolo contendere to charges arising out of the touching the breast of a 16-year-old child and placing a hand on defendant's genitals. *Cook v. State*, 276 Ga. App. 803, 625 S.E.2d 83 (2005).

Trial court properly admitted evidence of defendant's prior child molestation conviction in a trial on a similar charge, as it

was a similar transaction that was admitted for the purpose of showing defendant's course of conduct, lustful disposition, and bent of mind in dealing with children. *Copeland v. State*, 276 Ga. App. 834, 625 S.E.2d 100 (2005).

Defendant's child molestation conviction was upheld on appeal, as supported by sufficient evidence that defendant grabbed the victim's hand and rubbed it against the defendant's genitals, along with the similar transaction evidence presented by the victim's older sibling that defendant had previously touched the sibling high on the sibling's leg and on the sibling's chest in such a way that the sibling felt uncomfortable, and that on one occasion, defendant placed the sibling's hand on the defendant's genitals; moreover, the trial court properly admitted the latter evidence to establish defendant's state of mind, lustful disposition, and intent to commit the charged act. *Cowan v. State*, 279 Ga. App. 532, 631 S.E.2d 760 (2006).

During a defendant's trial for aggravated child molestation and related charges, evidence of the defendant's sexual misconduct against two younger children at the age of 12 was improperly admitted because it was more prejudicial than probative; there was no logical connection between the charged offenses and the prior misconduct because no pattern of continuous conduct or periods of incarceration between the incidents were shown, the defendant was a child when the previous events occurred and an adult at the time of the charged events, and no sexual misconduct was alleged to have occurred in the intervening years. *Maynard v. State*, 282 Ga. App. 598, 639 S.E.2d 389 (2006).

Because the defendant's prior sexual abuse of a young male relative was sufficiently similar to the sexual abuse of a young female relative, which was the subject of the convictions the defendant appealed from, to make evidence of that prior abuse admissible, no abuse of discretion resulted from the admission of that evidence to warrant reversal of convictions for both child molestation and aggravated child molestation. *Howard v. State*, 287 Ga. App. 214, 651 S.E.2d 164 (2007).

In a prosecution for aggravated sexual battery and aggravated child molestation involving a 12-year-old child, evidence that the defendant had sexual intercourse with a 15-year-old child shortly before committing the charged crimes was properly admitted as the evidence was relevant to show bent of mind, course of conduct, and to corroborate the victim's testimony; the prejudicial effect of the evidence did not outweigh the probative value. *Martin v. State*, 294 Ga. App. 117, 668 S.E.2d 549 (2008).

When the defendant appealed the defendant's conviction on multiple counts of violating O.C.G.A. §§ 16-6-3, 16-6-4, 16-6-5, and 16-6-5.1, the defendant unsuccessfully argued that the trial court erred in admitting two similar transactions. As to the first similar transaction, the defendant induced any alleged error in that defendant's own counsel was the first to elicit the testimony of that transaction, and as to the second transaction, the trial court did not clearly err in finding that, because the transaction involved a sexual act by the defendant in the defendant's counseling office with a female whom the defendant was counseling, the transaction was sufficiently similar to one of the crimes at issue which alleged a sexual act by the defendant in the defendant's counseling office with a female. *Evans v. State*, 300 Ga. App. 180, 684 S.E.2d 311 (2009), cert. denied, No. S10C0215, 2010 Ga. LEXIS 304 (Ga. 2010).

Even though it involved boys, a prior child molestation conviction was properly admitted as similar transaction evidence in defendant's child molestation trial involving defendant's granddaughter because the prior conviction involved children, and the fact that the conviction was remote in time only affected the conviction's weight and credibility, and not the conviction's admissibility. *Waters v. State*, 303 Ga. App. 187, 692 S.E.2d 802 (2010).

**Failure to hold Rule 31.3(B) hearing before admitting similar transaction evidence error.** — In a child molestation case, the trial court's failure to hold a hearing under Ga. Unif. Super. Ct. R. 31.3(B) before admitting similar transaction evidence concerning the defendant's alleged abuse of other children was not

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harmless error. As the only direct testimony came from the victim, there was no physical evidence of abuse, and the defendant did not testify, it could not be said that the similar transaction evidence did not contribute to the verdict. *Sheppard v. State*, 294 Ga. App. 270, 669 S.E.2d 152 (2008).

**Admissibility of evidence of similar sex act against adult.** — Admission of testimony of similar sex acts with a prior adult victim to indicate a likelihood a defendant performed the same sex acts that the child victim claimed was not error since the state made the three showings necessary for that similar transaction evidence: (1) proper purpose; (2) commission of a separate offense; and (3) similarity of the separate and charged offense. *Kingsley v. State*, 268 Ga. App. 729, 603 S.E.2d 78 (2004).

**Evidence of similar or connected sexual offenses against adults.** — In a child molestation and aggravated sexual battery prosecution, evidence that before assaulting adult victims, defendant grabbed the victim by the back of the victim's hair or held the victim's neck, was properly admitted as "other transactions" evidence, since defendant used a similar method to control the child victim before sexually assaulting the victim; this evidence was relevant to show the defendant's course of conduct and rebut the defendant's defense of fabrication. That the prior acts involved adults did not preclude their admission as similar transactions. *Helton v. State*, 268 Ga. App. 430, 602 S.E.2d 198 (2004).

Defendant was charged with, *inter alia*, child molestation and cruelty to children for touching a 15-year-old child's genital area and breast, putting defendant's mouth on the child's breast, and calling the child sexually repulsive names. It was proper to admit similar transaction evidence showing that the defendant had inappropriately touched an 18-year-old's bare leg and called that victim similar sexually repulsive names as it showed the defendant's bent of mind to inappropriately touch young people of the opposite sex. *Murray v. State*, 293 Ga. App. 516, 667 S.E.2d 382 (2008).

In convictions of child molestation and aggravated child molestation under O.C.G.A. § 16-6-4 and of aggravated sexual battery under O.C.G.A. § 16-6-22.2(b), evidence of two prior similar transactions was properly admitted because even though both victims were 18, they were substantially younger than defendant, who was 35 years old at that time, and both of the similar transaction incidents involved similar sexual deviancy as the instant case. *Woods v. State*, 304 Ga. App. 403, 696 S.E.2d 411 (2010).

**Questioning defendant's character witnesses as to knowledge of defendant's other crimes allowed.** — In a trial for child molestation the trial court did not err by allowing the state to ask witnesses who had testified as to defendant's good reputation if they were aware that defendant had been convicted of child molestation in 1959. It is not error for the state to ask a character witness on cross-examination if the witness has heard, or is "aware," that defendant had been convicted of certain crimes, particularly where evidence of such prior conviction is offered into evidence either at the time of, or subsequent to, cross-examination of the witness. *Eubanks v. State*, 180 Ga. App. 355, 349 S.E.2d 244 (1986).

**Questioning defendant as to later arrest reversible error.** — Permitting the prosecutor to ask defendant if defendant had been arrested on a sex charge subsequent to the incident in question at defendant's trial for child molestation and enticing a child for indecent purposes was reversible error, where the sole issue in the case was the credibility of defendant and the alleged victim. *Thomas v. State*, 178 Ga. App. 674, 344 S.E.2d 496 (1986).

**Evidence of victim's age sufficient.** — In a child molestation case, there was sufficient evidence that the victim was under 16 at the time of the incidents in question; the victim had testified that the victim was 14 or 15 when the defendant started touching the victim inappropriately and that the incidents happened when the victim was in the eighth grade, a time at which the victim said that the victim was 15. *Boynton v. State*, 287 Ga. App. 778, 653 S.E.2d 110 (2007).

There was sufficient evidence to support a defendant's conviction for child molestation, although no one testified as to the child victim's age at the bench trial, as the trier of fact was permitted to deduce that the victim was under the age of 16 by its observation of the victim's childlike demeanor and prepubescent body in the videotaped interview, which took place only two days after the incident in question. *Day v. State*, 293 Ga. App. 543, 667 S.E.2d 392 (2008).

**Evidence of victim's reputation for nonchastity is inadmissible.** — To extent that alleged evidence, sought to be introduced by defendant, concerning general reputation and character of victim, dealt with victim's reputation for nonchastity, it was inadmissible at trial prosecution for child molestation. *Lively v. State*, 157 Ga. App. 419, 278 S.E.2d 67 (1981).

Evidence of a prior molestation or previous sexual activity on the part of the victim is not relevant in a child molestation case to show either the victim's reputation for nonchastity or the victim's preoccupation with sex. *Hall v. State*, 196 Ga. App. 523, 396 S.E.2d 271 (1990).

Absent a showing of relevance, evidence of a child's past sexual history, including acts committed by persons other than the accused, is inadmissible. This is true whether the evidence is contained in defendant's admission or otherwise. *Stancil v. State*, 196 Ga. App. 530, 396 S.E.2d 299 (1990).

**Past sexual experience of child irrelevant as to defendant's guilt.** — Since knowledge of a crime gained through being a victim of that crime at the hands of others can have no relevance to the issue of guilt or innocence of the defendant on trial, the past sexual experience of a child in a molestation case is irrelevant to the issue of whether the molestation was committed by the defendant on trial. *Chastain v. State*, 180 Ga. App. 312, 349 S.E.2d 6 (1986), aff'd, 257 Ga. 54, 354 S.E.2d 421 (1987).

Inquiry into victim's past sexual experiences was properly refused, even where a physician testified that in examining the victim it was obvious the victim had been sexually active. *Worth v. State*, 183 Ga.

App. 68, 358 S.E.2d 251 (1987).

**Evidence of prior unrelated sexual molestation admissible.** — Evidence of a prior unrelated sexual molestation of the victim was admissible to establish other possible causes for the behavioral symptoms exhibited by the child, which were described as typical child sexual abuse accommodation syndrome and to explain the medical testimony regarding the victim's injuries. *Hall v. State*, 196 Ga. App. 523, 396 S.E.2d 271 (1990).

Evidence of another similar transaction involving defendant consisting of both words and actions, in the child's presence, including touching of the child, was properly admitted, despite any dissimilarity from the act charged; the sexual abuse of young children, regardless of the sex of the victims or the nomenclature or type of acts or other conduct perpetrated upon them, was of sufficient similarity to make the evidence admissible. *Joiner v. State*, 265 Ga. App. 395, 593 S.E.2d 936 (2004).

Trial court's error in not permitting the defendant to show that the spouse's minor child, whom the defendant was charged with molesting, made an allegation of molestation with respect to another individual that the child later denied, was harmless given the overwhelming evidence against defendant, including the facts that there was photographic evidence that the child was molested in the defendant's bedroom, that the spouse and the child's uncle both identified the child in the photographs, that a Polaroid camera like that used to take the photographs was found in defendant's home, that the spouse had testified that the spouse had not left the child alone in the house with any person other than defendant, and that the photographs were found in a house owned by defendant in a file containing personal items. *Holloway v. State*, 278 Ga. App. 709, 629 S.E.2d 447 (2006).

**Evidence of child victim's past boyfriends may be excluded.** — Although the rape shield statute, O.C.G.A. § 24-2-3, did not require the exclusion of evidence of a child molestation victim's past boyfriends and difficult past because the charge was not an aggravated charge, the trial court was authorized to evaluate the relevance of any evidence and exclude

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the evidence on that basis. *Cantu v. State*, 304 Ga. App. 655, 697 S.E.2d 310 (2010).

**Conflicts in victim's statements pre-trial and at trial.** — When in a pretrial statement, the victim testified that the defendant fondled the victim, but at trial the victim testified that the story was made up, the jury was authorized to believe the victim's pretrial statements rather than the in-court disavowal; thus, the evidence was sufficient to authorize a rational trier of fact to find the defendant guilty of child molestation beyond a reasonable doubt. *Lee v. State*, 250 Ga. App. 110, 550 S.E.2d 696 (2001).

**Evidence and victim's statement later recanted.** — Evidence in the form of a videotape of the defendant's daughter playing with anatomically correct dolls following defendant's arrest for sexually assaulting his girlfriend and daughter, together with the girlfriend's testimony and statements the daughter made to investigators following defendant's arrest, was sufficient to find defendant guilty of child molestation beyond a reasonable doubt, even though the daughter later recanted her statements. *Higgins v. State*, 251 Ga. App. 175, 554 S.E.2d 212 (2001).

O.C.G.A. § 24-3-16 does not require the child to corroborate the hearsay testimony, and conflicts between the videotaped statement and the testimony of the child at trial do not necessarily render the former inadmissible but rather present a question of credibility of the witness to be resolved by the trier of fact; despite a child victim's apparent recantation of the child's accusations of molestation at trial, sufficient evidence supported convictions of child molestation and aggravated child molestation where the victim described the molestation in a pre-trial videotaped interview, where an expert witness testified that children may recant testimony with regard to sexual abuse for reasons unrelated to falsity, including embarrassment and fear, and a doctor also testified that the doctor's examination of the victim revealed "unusual" findings that would have caused the doctor to inquire regarding sexual abuse if they had appeared on a routine exam. *Amerson v. State*, 268 Ga. App. 855, 602 S.E.2d 857 (2004).

There was sufficient evidence to support defendant's conviction for child molestation of the victim, the defendant's seven year old child, because a rational trier of fact could have concluded beyond a reasonable doubt that the victim's fear of punishment and the other parent's disapproval caused the victim to recant. The jury was authorized to believe the victim's videotaped testimony, corroborated by the victim's statements to the doctor who examined the victim, that the victim's parent had, on numerous occasions, touched the victim's genitals, rather than the victim's in-court disavowal. *King v. State*, 268 Ga. App. 707, 603 S.E.2d 54 (2004).

In addition to the substantive evidence of defendant's guilt, provided by the victim's prior inconsistent statements, evidence of women's sexy clothing found in defendant's hotel room, which the victim said that defendant had purchased, and information downloaded from an Internet site detailing the pimping lifestyle, was sufficient evidence to authorize a rational trier of fact to find defendant guilty of aggravated child molestation, statutory rape, and pimping. *Lewis v. State*, 278 Ga. App. 160, 628 S.E.2d 239 (2006).

**Trial court was within the court's discretion in restricting cross-examination of the victim** in a child molestation case regarding the fact that when she was five and nine years old she slept in a bed with an uncle when the conviction rested upon the testimony of the parties and did not involve expert testimony or the child abuse syndrome. *Chastain v. State*, 257 Ga. 54, 354 S.E.2d 421 (1987).

When the trial court refused evidence of the child's asserted unusual sexual proclivity, apparently offered to show the child initiated the sexual encounters and fabricated the evidence upon being rejected by the child's step-grandfather, there was no abuse of discretion by the trial court in its limitation of the defendant's cross-examination on this point. *Deyton v. State*, 182 Ga. App. 73, 354 S.E.2d 625 (1987).

No abuse of discretion resulted from the admission of testimony from the investigating officer, the child victim's mother, and the child victim's sister, about the

alleged child molestation committed by the juvenile as: (1) the child was available to testify; (2) cross-examination of the child victim in the judge's chambers was attempted, but proved unsuccessful; and (3) the judge ruled that no further purpose would be served by having the child examined in the open courtroom. In the Interest of S.S., 281 Ga. App. 781, 637 S.E.2d 151 (2006).

**Evidence of victim's disciplinary problems in school is irrelevant.** — Trial court did not err in granting state's motion in limine, which sought to prevent defendant from introducing victim's school records in attempt to show that the victim had disciplinary problems, since such evidence was absolutely irrelevant to any issue in prosecution for child molestation. *Lively v. State*, 157 Ga. App. 419, 278 S.E.2d 67 (1981).

**No Crawford violation.** — In a delinquency proceeding on a charge of child molestation, even assuming that a police officer's statements were wrongly admitted, said testimony was merely cumulative of other properly admitted testimony presented by both the child's mother and the child's sister, and said admission did not require reversal of the court's adjudicatory findings. In the Interest of S.S., 281 Ga. App. 781, 637 S.E.2d 151 (2006).

**No ex post facto violation.** — Defendant's contention on appeal that a sentence of life imprisonment as a recidivist child molester under O.C.G.A. § 16-6-4(b) rendered that statute an unconstitutional ex post facto law was rejected as the fact that the defendant's prior conviction yielded an increased punishment did not convert the statute into an unconstitutional ex post facto law; rather, the statute punished offenders only for a future offense, which punishment was rationally enhanced by the prior conviction. *Williams v. State*, 284 Ga. App. 255, 643 S.E.2d 749 (2007).

**It was not error to admit a taped interview of the victim** by the police almost one year after the alleged offense, where defendant's counsel attacked the veracity of the victim, defendant had the opportunity to confront the victim and cross-examine the victim under oath

about the victim's out-of-court statement, and the out-of-court statement was cumulative to that of the victim on the witness stand. *Lynn v. State*, 181 Ga. App. 461, 352 S.E.2d 602 (1986).

**Victim's testimony alone sufficient to sustain conviction.** — Victim's testimony alone was sufficient to sustain convictions for child molestation and aggravated child molestation when, inter alia, the victim testified that defendant had fondled and performed oral sex on the victim and had forced the victim to reciprocate in performing oral sex on the defendant. *Spradlin v. State*, 262 Ga. App. 897, 587 S.E.2d 155 (2003).

**Victim's prior inconsistent statements.** — Conviction for child molestation can rest upon prior inconsistent statements of the victim alone. *Weeks v. State*, 187 Ga. App. 307, 370 S.E.2d 344 (1988), aff'd, 258 Ga. 662, 374 S.E.2d 532 (1988).

Victim's videotaped statement that the molestation "hurt" the victim was sufficient to support a conviction of aggravated child molestation involving injury to the child under O.C.G.A. § 16-6-4(c), even though at trial the victim could not remember whether the molestation hurt. It was permissible to introduce a forgetful witness's prior consistent statement when the witness testified at trial and was subject to cross-examination. *Waters v. State*, 288 Ga. App. 260, 653 S.E.2d 849 (2007).

**Testimony of mother** as to son's complaint held admissible. *Walls v. State*, 166 Ga. App. 503, 304 S.E.2d 547 (1983).

**Testimony by mother of victim** concerning allegations made by her child to her against defendant was properly admitted, where the court considered atmosphere, circumstances, spontaneity, and demeanor in judging the reliability of the statement. *Ortiz v. State*, 188 Ga. App. 532, 374 S.E.2d 92, cert. denied, 188 Ga. App. 912, 374 S.E.2d 92 (1988).

**Testimony of defendant's adult daughters.** — Trial court properly allowed two of defendant's adult daughters to testify that defendant had molested them when they were young girls. *Ortiz v. State*, 188 Ga. App. 532, 374 S.E.2d 92, cert. denied, 188 Ga. App. 912, 374 S.E.2d 92 (1988).

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**Testimony of defendant's spouse.** — Defendant failed to make a strong showing that the trial court improperly relied upon defendant spouse's hearsay testimony in finding that defendant was a danger to the community and in sentencing defendant to 20 years to serve for defendant's first child molestation offense under O.C.G.A. § 16-6-4(b); defendant failed to rebut the presumption that a trial judge sitting without a jury separated the legal evidence from facts not properly in evidence in reaching a decision. *Ingram v. State*, 262 Ga. App. 304, 585 S.E.2d 211 (2003).

**Evidence was sufficient for the jury to find a defendant guilty of child molestation** beyond a reasonable doubt as it was within the jury's province to reject the defendant's defense denying the crime with regard to the victim as well as with regard to the witnesses who testified as to similar transactions with the defendant. The testimony of the victim was corroborated by an investigator and a forensic interviewer, who testified as to what the victim had told had occurred; the victim's statements were corroborated by the sheriff's investigator; and the jury was entitled to consider the victim's out-of-court statements as substantive evidence under the Child Hearsay Statute, O.C.G.A. § 24-3-16. *Lamb v. State*, 293 Ga. App. 65, 666 S.E.2d 462 (2008).

Trial court did not err in ruling that the state could compel the defendant's wife to testify even though she was not a witness to the specific act charged, child molestation, because the wife testified that she did not know that the defendant had been applying ointment to the victim, and that evidence was sufficiently relevant to the molestation acts charged against the defendant so that the wife's testimony was compellable under O.C.G.A. § 24-9-23(b). *O'Neal v. State*, 304 Ga. App. 548, 696 S.E.2d 490 (2010).

**Evidence of defendant's sexual arousal.** — Defendant's argument that there was no evidence of her sexual arousal was rejected where she had participated in the sex acts themselves, continually and frequently invited the boy to

come to her home and business, picked the boy up at his home, permitted the boy to spend the night at her house, had constant and lengthy telephone conversations when apart, bestowed gifts on the boy, and when asked, the boy said that two or three times the defendant "would say it feels good." *Branam v. State*, 204 Ga. App. 205, 419 S.E.2d 86 (1992).

Although sexual gratification is an element of the crime, it could be inferred from the fact that the defendant exposed himself to a child that he had the intent to arouse or satisfy his sexual desires. *Andrew v. State*, 216 Ga. App. 427, 454 S.E.2d 542 (1995).

Trial court did not err in denying defendant's motion for directed verdict on the charge of aggravated child molestation, because the evidence was sufficient to allow a jury to find that defendant had the requisite intent for aggravated child molestation, as the fact that defendant expected a drug dealer to give defendant and defendant's child crack cocaine in exchange for their sexual favors did not exclude a finding that the defendant also intended the sexual acts to arouse or satisfy defendant or defendant's sexual desires. *Odom v. State*, 267 Ga. App. 701, 600 S.E.2d 759 (2004).

**Admission of photographs depicting defendant and another male lying on bed** kissing each other was harmless error since the admission did not contribute to the verdict in the case. *Roose v. State*, 182 Ga. App. 748, 356 S.E.2d 675 (1987).

**Sexually explicit magazines found at defendant's home** were admissible into evidence since the victim identified the magazines as the ones defendant showed the victim prior to molesting the victim. *Henson v. State*, 182 Ga. App. 617, 356 S.E.2d 556 (1987).

Regardless of whether magazines and tapes found at defendant's home corroborated the victim's testimony, they were admissible to show defendant's "state of mind and lustful disposition." *Johnson v. State*, 231 Ga. App. 823, 499 S.E.2d 145 (1998).

**Sexually explicit material found in defendant's possession** was not admissible where it was offered for the purpose

of showing defendant's lustful disposition in general and was not linked to the crime charged, that is, sexual contact with a child. Frazier v. State, 241 Ga. App. 125, 524 S.E.2d 768 (1999).

In a prosecution for a sexual offense, evidence of sexual paraphernalia found in defendant's possession is inadmissible unless it shows defendant's lustful disposition toward the sexual activity with which defendant is charged or defendant's bent of mind to engage in that activity; a videotape showing defendant offering drugs to persons in exchange for oral sex was admissible in defendant prosecution for child molestation and aggravated child molestation where it was used to show defendant's usual course of conduct in procuring sexual activity and where the victim testified that defendant had offered the victim drugs in exchange for oral sex. Mooney v. State, 266 Ga. App. 587, 597 S.E.2d 589 (2004).

**Victim's testimony regarding "hurt" did not require medical corroboration.** — In a prosecution for aggravated child molestation, the victim's testimony that it hurt when the defendant molested her with his finger was sufficient to prove physical injury. It was not necessary for her testimony to be corroborated by medical evidence. Baker v. State, 228 Ga. App. 32, 491 S.E.2d 78 (1997).

Defendant's conviction of aggravated child molestation, O.C.G.A. § 16-6-4, was appropriate. The victim's testimony indicating the molestation was painful sufficed to prove the element of physical injury; in such case, medical evidence was not required to corroborate the victim's testimony. Mangham v. State, 291 Ga. App. 696, 662 S.E.2d 789 (2008).

**Evidence of uncharged crime properly admitted.** — In a child molestation prosecution under O.C.G.A. § 16-6-4(a), it was not error to admit evidence that the defendant placed the defendant's sexual organ "on" a child's genitals—the act charged in the indictment—simply because that evidence also indicated that some penetration may have occurred or that the defendant also may have touched the child's genitals, which were uncharged crimes as the evidence was relevant to prove the charged crime. Ortiz v. State,

295 Ga. App. 546, 672 S.E.2d 507 (2009), cert. denied, No. S09C0803, 2009 Ga. LEXIS 269 (Ga. 2009).

**Evidence of child molestation.** — Evidence that the defendant had gotten on the bed with 13-year-old child, lifted her dress, placed his private parts directly against the skin of the child's thighs and accomplished an orgasm amply supported the verdict that the defendant was guilty of child molestation. Van Pelt v. State, 87 Ga. App. 103, 73 S.E.2d 115 (1952).

Evidence was sufficient to authorize a trier of fact to find proof of appellant's guilt of child molestation beyond a reasonable doubt. Patterson v. State, 212 Ga. App. 257, 441 S.E.2d 414 (1994).

When the seven-year-old victim testified to touching of her vaginal area on several occasions, other witnesses testified to her having told them of this contact, and the state played a video of the victim discussing the facts underlying the charges which corroborated her trial testimony, the evidence was sufficient to sustain a conviction for aggravated child molestation and child molestation. Chastain v. State, 236 Ga. App. 542, 512 S.E.2d 665 (1999).

Eight-year-old girl's testimony that defendant pulled her panties down and tried to put his penis inside her "private part" was sufficient to convict defendant of child molestation under O.C.G.A. § 16-6-4(a), where the police officer who interviewed the girl testified that she specifically referred to her vagina as her "private part." Hayes v. State, 252 Ga. App. 897, 557 S.E.2d 468 (2001).

Child molestation conviction was affirmed upon evidence that defendant twice attempted to penetrate his daughter's anus with his penis; furthermore, her testimony did not require corroboration. Knight v. State, 258 Ga. App. 480, 574 S.E.2d 606 (2002).

Evidence was sufficient to convict defendant of child molestation, even if much of the evidence was hearsay repetition of the child's out-of-court statements, as defendant failed to argue that the evidence did not satisfy the reliability criteria set forth in O.C.G.A. § 24-3-16. Brown v. State, 267 Ga. App. 826, 600 S.E.2d 774 (2004).

Defendant's convictions for child moles-

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tation, attempted statutory rape, and burglary were supported because: (1) the defendant entered the 14-year-old victim's room through a window, uninvited; (2) the defendant told the victim to push the victim's bed against the door; (3) the defendant removed the victim's underwear and the defendant's own pants and laid on top of the victim, but the victim prevented the defendant from penetrating the victim; (4) the defendant fondled the victim's breasts and touched the victim's nipples; and (5) on a prior occasion, defendant made the victim touch the defendant's genitals with the victim's hand. *Leapfrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Jury could have inferred from defendant's actions in rubbing the genitals of an eight-year-old victim and kissing the victim's face that the defendant acted with intent to arouse or satisfy the defendant's sexual desires; inconsistencies in the victim's testimony did not render the evidence insufficient to support defendant's conviction of child molestation. *Duvall v. State*, 273 Ga. App. 143, 614 S.E.2d 234 (2005).

Evidence was sufficient to sustain the defendant's convictions for aggravated sodomy and aggravated child molestation where the child testified that the defendant made the child perform oral sex and penetrated the child anally, and the record showed opportunity, consistent allegations by the victim to multiple parties, and deception by the defendant when asked about the charged offenses during a polygraph examination. *Guzman v. State*, 273 Ga. App. 819, 616 S.E.2d 142 (2005).

Evidence supported the defendant's child molestation conviction when: (1) the defendant's 15-year-old grandchild testified that defendant molested the child in the defendant's home and in the defendant's pickup truck between the time the child was in kindergarten until about the time the child was in the sixth grade by fondling and inserting the defendant's finger into the child; (2) a physician testified that the physician found physical evidence that was consistent with penetration and sexual abuse; (3) an older grand-

child testified that the older grandchild was molested by the defendant 25 years ago; and (4) evidence was presented that the defendant molested the defendant's five-year-old great-grandchild. *Delk v. State*, 274 Ga. App. 261, 619 S.E.2d 310 (2005).

Sufficient evidence supported defendant's conviction for child molestation in violation of O.C.G.A. § 16-6-4 because the nine-year-old victim testified that defendant touched the victim improperly and inserted the defendant's genitals into the victim, and a physician who examined the victim testified that the victim exhibited signs of subjection to repeated sexual contact. *Alvarez v. State*, 276 Ga. App. 105, 622 S.E.2d 453 (2005).

Convictions for child molestation, aggravated child molestation, and statutory rape were upheld as: (1) sufficient evidence was presented, via the three victims' testimony, to support the convictions; (2) testimony from one of the defendant's other children concerning similar transactions committed against the child was properly admitted in order to show the defendant's bent of mind and lustful disposition towards the defendant's own children; and (3) the defendant's trial counsel was not ineffective. *McCoy v. State*, 278 Ga. App. 492, 629 S.E.2d 493 (2006).

Convictions of child molestation and aggravated child molestation were supported by sufficient evidence since the four minor victims testified about various sexual acts that the defendant had committed against them, including touching their genitals with the defendant's fingers, mouth, genitals, and a vibrator; three of the children told a school counselor about the sexual abuse, and all four victims told a Department of Family and Children Services case manager how the defendant had sexually molested them. *Clements v. State*, 279 Ga. App. 773, 632 S.E.2d 702 (2006).

Child molestation and aggravated child molestation convictions were upheld because: (1) sufficient evidence established the reliability of a child's hearsay statement to the child's aunt, and said statement was supported by other evidence; (2) any claimed Brady violation was waived

and did not entitle defendant to a new trial; (3) denial of defendant's motion for a mistrial was harmless error given the strong evidence supporting defendant's guilt; and (4) testimony from an unlicensed psychologist was admissible, as the mere fact that the state's expert witness was not a licensed psychologist did not affect the admissibility of said testimony. *Nelson v. State*, 279 Ga. App. 859, 632 S.E.2d 749 (2006).

Defendant's convictions for aggravated child molestation and two counts of child molestation were supported by sufficient evidence, including the child victim's testimony that the defendant licked the victim's genitals, and masturbated in front of the victim twice; additionally, a videotape of the victim's interview by a case coordinator was played for the jury, and a detective testified regarding another interview of the victim, each describing acts of molestation by the defendant. *Berman v. State*, 279 Ga. App. 867, 632 S.E.2d 757 (2006).

Testimony presented by an 11-year-old child victim as to the defendant's act of oral sodomy, which was corroborated by the outcry witnesses and a doctor who examined the victim, was sufficient to permit the jury to find the defendant guilty of aggravated child molestation. *Frankmann v. State*, 281 Ga. App. 1, 635 S.E.2d 272 (2006).

Although one conviction against the defendant for aggravated child molestation, in violation of O.C.G.A. § 16-6-4(a), was sustained because it was based on sufficient evidence of his ongoing sexual conduct against one of the minor daughters, another conviction on the same charge had to be reversed because there was no evidence to establish venue; the reversed charge was based on the defendant's having kissed one of the daughters on the lips, but there was no evidence that established when or when the incident occurred and the conduct was not ongoing. *Cardenas v. State*, 282 Ga. App. 473, 638 S.E.2d 866 (2006).

Evidence was sufficient to sustain a defendant's convictions on two counts of aggravated child molestation, although the defendant denied the allegations and numerous witnesses testified on the de-

fendant's behalf; viewed in support of the verdict, there was evidence that the defendant and the 15-year-old victim had a relationship that began with romantic feelings on the victim's part toward the defendant, progressed to kissing and petting, and finally led to sexual intercourse and oral sodomy on numerous occasions. *Maynard v. State*, 282 Ga. App. 598, 639 S.E.2d 389 (2006).

In a child molestation case, the trial court did not err in denying the defendant's motion for a directed verdict on two counts; a victim's statement that the defendant had touched her "chest" supported allegations that the defendant had touched her "breast," and allegations that the defendant had touched a victim's vagina were supported by the victim's statement that the defendant had touched "all my private stuff" and her pointing between her legs to indicate where the defendant had touched her. *Cherry v. State*, 283 Ga. App. 700, 642 S.E.2d 369 (2007).

Trial court's admission of the defendant's actions towards a victim during a night when she was visiting his daughter and sleeping at their home were properly admitted without notice and a hearing under Ga. Unif. Super. Ct. R. 31.3, as all of the actions were part of the res gestae of the defendant's child molestation crime, in violation of O.C.G.A. § 16-6-4, that resulted from his exposure of his penis to the victim; evidence of a prior difficulty between the defendant and the victim that occurred a week prior to the criminal incident was also properly admitted without notice and a hearing, as the evidence was admissible to show the defendant's motive, intent, and bent of mind in committing the act against the victim which resulted in the charge. *Hammontree v. State*, 283 Ga. App. 736, 642 S.E.2d 412 (2007).

Rational trier of fact could have found defendant guilty of child molestation against two victims beyond a reasonable doubt; defendant inserted a smooth, hard, pudding-covered object that one victim said felt like a finger into the victim's mouth seven times, and the other victim testified that the victim "heard a zipper," and defendant then touched the victim's lips with an unknown object. *Ayers v.*

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State, 286 Ga. App. 898, 650 S.E.2d 370 (2007), cert. denied, 2008 Ga. LEXIS 117 (Ga. 2008).

In defendant's conviction for child molestation, the trial court properly denied defendant's motion for directed verdict of acquittal as sufficient evidence existed based on testimony of the child victim's parent, who testified as to discovery of defendant on top of the victim; further evidence in support of defendant's conviction included the child's videotaped police interviews describing what happened. Lopez v. State, 291 Ga. App. 210, 661 S.E.2d 618 (2008).

Child molestation conviction was supported by sufficient evidence that during the middle of the night the defendant entered the bedroom where the 10-year-old victim was staying, laid down beside and behind the victim, rubbed the victim's back until the defendant's hand went down the victim's pants, pulled up the victim's pajama top, rubbed the victim's stomach area until the defendant's hand went under the victim's waistband and began toward the victim's private area, and only stopped when the victim demanded the defendant do so, at which time the defendant admitted the wrongfulness of the actions; a jury could have found such actions immoral and indecent and done with the intent to sexually arouse the defendant. Kolar v. State, 292 Ga. App. 623, 665 S.E.2d 719 (2008).

Evidence that a defendant forced himself on one young child and had intercourse with the child and that the defendant disciplined that child and the child's two siblings by forcing the children to take their clothes off, whipping the children with a belt, and beating or choking the children was sufficient to convict the defendant of child molestation, O.C.G.A. § 16-6-4(a), and cruelty to children, O.C.G.A. § 16-5-70(b). Williams v. State, 293 Ga. App. 617, 668 S.E.2d 21 (2008).

Victim's trial testimony and evidence about the victim's outcry established that the defendant had the victim touch the defendant's sex organ and that the defendant ejaculated on the victim's face. This evidence authorized the jury to find the

defendant guilty of two counts of child molestation in violation of O.C.G.A. § 16-6-4(a). Stillwell v. State, 294 Ga. App. 805, 670 S.E.2d 452 (2008), cert. denied, No. S09C0493, 2009 Ga. LEXIS 222 (Ga. 2009).

Evidence supported a conviction of child molestation under O.C.G.A. § 16-6-4(a). The seven-year-old victim's testimony that the defendant showed the victim the defendant's "private part," corroborated by the testimony of witnesses to whom the child reported the incident soon thereafter was competent evidence, even though contradicted, to support the state's case. Brown v. State, 295 Ga. App. 542, 672 S.E.2d 514 (2009).

There was sufficient evidence to support a defendant's convictions for aggravated child molestation, child molestation, and false imprisonment with regard to allegations that the defendant forced a romantic friend's minor child to perform oral sex on the defendant several times over a three year period, based on the testimony of the victim (which alone was sufficient), the videotaped forensic interview of the victim, the testimony of the police investigator and the victim's mother concerning what the victim told them, as well as the testimony of the victim's siblings, who were eyewitnesses to one incident. Further, the testimony of the victim that the defendant locked the victim in the house and would not let the victim leave supported the conviction on the false imprisonment charge. Finally, the trial court was not required to merge the defendant's false imprisonment and aggravated child molestation convictions since the false imprisonment and aggravated child molestation were proven by different acts. Metts v. State, 297 Ga. App. 330, 677 S.E.2d 377 (2009).

Evidence, including that defendant had access and opportunity to infect a victim at least two weeks prior to her exhibiting symptoms, and that the victim's immediate outcry was consistent with her statement to a doctor identifying defendant, and excluding the hypothesis that the victim's father was present prior to the onset of the victim's symptoms, was sufficient to convict defendant of aggravated child molestation in violation of O.C.G.A.

§ 16-6-4(c). Zuniga v. State, 300 Ga. App. 45, 684 S.E.2d 77 (2009), cert. denied, No. S10C0169, 2010 Ga. LEXIS 125 (Ga. 2010).

Evidence was sufficient to convict a defendant of child molestation in violation of O.C.G.A. § 16-6-4(a)(1), although the four-year-old victim testified at trial that the defendant had not done anything to the victim. The jury could believe the forensic evidence that the victim's DNA was under the defendant's fingernails and the child's videotaped statement. McIntyre v. State, 302 Ga. App. 778, 691 S.E.2d 663 (2010).

Victim, who was age eighteen at the time of trial, testified that between the ages of seven and fourteen, the defendant molested her, putting his hand and his penis into her vagina and touching her all over her body. This evidence supported the defendant's convictions for child molestation, aggravated child molestation, and aggravated sexual battery. Wilson v. State, 304 Ga. App. 623, 697 S.E.2d 275 (2010).

Evidence was sufficient to support the jury's findings that the defendant committed the offense of child molestation, O.C.G.A. § 16-6-4(a)(1), because the jury was authorized to infer that the defendant was kissing the victim on the mouth when the victim testified that they were kissing, and the evidence was sufficient to show that the defendant violated the statute prohibiting child molestation in at least two of the ways alleged in the indictment, which charged the defendant with kissing the victim on the mouth, exposing the defendant's privates to and having intercourse with the victim, who was under 16 years of age, with intent to arouse and satisfy their sexual desires; the defendant also arguably violated O.C.G.A. § 16-6-4(a)(1) by "dirty dancing" with the victim, which the defendant admitted to doing while testifying in the defendant's own defense. Judice v. State, 308 Ga. App. 229, 707 S.E.2d 114 (2011).

**Evidence part of res gestae.** — Although the indictment alleged that the act of aggravated child molestation occurred when defendant "placed his mouth upon the genitalia of [the victim]," the other acts of sodomy were properly admitted as

a part of the res gestae of defendant's continued sexual exploitation of the victim. Burton v. State, 212 Ga. App. 100, 441 S.E.2d 470 (1994).

**Exposure to child constitutes child molestation.** — When the evidence and all inferences therefrom demonstrated that the defendant exposed his penis on three separate occasions to three different female children under the age of 14 years in order to satisfy his own sexual desires, the evidence was sufficient to find defendant guilty of child molestation. Bentley v. State, 179 Ga. App. 287, 346 S.E.2d 98 (1986).

Evidence that defendant exposed his penis to the child victim was alone sufficient for conviction. Bowman v. State, 227 Ga. App. 598, 490 S.E.2d 163 (1997).

Evidence was sufficient to support a conviction for child molestation since the victim observed the defendant put the defendant's hand on the defendant's genitals and begin disrobing, and the defendant acknowledged that the defendant touched the defendant's exposed genitals in the child's presence, though the defendant asserted the defendant was merely adjusting the defendant after using the bathroom; although the evidence showed that the defendant was unsuccessful in an attempt to coax the child to look at the defendant's exposed genitals, the defendant's conduct was rendered no less culpable by the victim's good judgment in turning the victim's head away. Arnold v. State, 249 Ga. App. 156, 545 S.E.2d 312 (2001).

Evidence from the four victims that the defendant on three separate occasions followed the victims home from school, talked to the victims about sex, and exposed himself to the victims, along with evidence of prior similar transactions committed by the defendant in two different states for the limited purpose of showing the defendant's intent, bent of mind, and course of conduct, was sufficient to support the defendant's conviction of four counts of child molestation. Damare v. State, 257 Ga. App. 508, 571 S.E.2d 507 (2002).

Evidence that the 15-year-old victim was between 100 and 200 feet away from defendant's house when the victim saw

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defendant stand at the window with the defendant's hand on the defendant's genitals and making a jerking motion was sufficient to sustain defendant's conviction for child molestation. Rainey v. State, 261 Ga. App. 888, 584 S.E.2d 13 (2003).

Substantial evidence linked the defendant to a child molestation offense which occurred when a person entered a grocery store bathroom and inserted the person's genital's through a hole in a toilet stall partition while the eight-year-old victim was seated inside, including evidence that the victim, the victim's cousin, and the victim's parent saw the perpetrator leaving the store and heading towards a beer van, evidence that the defendant drove such a van with a beer logo, called at the store as part of the defendant's job, and that the defendant knew about the hole in the bathroom partition, the victim's description of the perpetrator as wearing an electronic device, and a detective's testimony that the defendant wore such a device as part of the defendant's job, the parent's identification of the defendant's shirt as that worn by the perpetrator, and the parent's identification of the defendant at trial; additionally, knowledge of the victim's age was not an element of the crime of child molestation, and the conviction was supported by sufficient evidence including the defendant's admission that the defendant was near the restroom, although the defendant denied entering the restroom, the victim's testimony that the perpetrator entered the bathroom after the victim went in, because the victim heard the door squeak as the door opened, heard footsteps, and this was the only time the victim heard the door open, and photographs showing the close proximity of the beer aisle to the restrooms, as well as photographs showing that the interior of the toilet stall was visible through the approximately 4-inch hole in the partition as well as under the partition, which was 16 or 18 inches from the floor. Bennett v. State, 279 Ga. App. 371, 631 S.E.2d 402 (2006).

**Engaging in sexually explicit conversation with child.** — Crime of child molestation cannot be committed when

the only contact between the accused and the alleged victim was by telephone. Vines v. State, 269 Ga. 438, 499 S.E.2d 630 (1998).

**Watching sexually explicit videotapes with child.** — In a prosecution based on the defendant's forcing a minor to watch sexually explicit videotapes with the defendant, the state was not required to prove that the tapes were "obscene" and "harmful to minors" under definitions pertaining to the distribution of harmful materials to children. Additionally, the defendant's claimed First Amendment right to possess and view the tapes was not a defense. Stroeingen v. State, 226 Ga. App. 410, 486 S.E.2d 670 (1997).

**An anatomically correct diagram representing the victim's body** was relevant evidence and properly admitted into evidence. Pittman v. State, 178 Ga. App. 693, 344 S.E.2d 511 (1986).

**Evidence sufficient for conviction.** — See Sprayberry v. State, 174 Ga. App. 574, 330 S.E.2d 731 (1985); Busby v. State, 174 Ga. App. 536, 330 S.E.2d 765 (1985); Kilgore v. State, 177 Ga. App. 656, 340 S.E.2d 640 (1986); Jones v. State, 178 Ga. App. 15, 342 S.E.2d 5 (1986); Beard v. State, 178 Ga. App. 265, 342 S.E.2d 751 (1986); Smith v. State, 178 Ga. App. 300, 342 S.E.2d 769 (1986); Castillo v. State, 178 Ga. App. 312, 342 S.E.2d 782 (1986); Grant v. State, 178 Ga. App. 398, 343 S.E.2d 422 (1986); Ezell v. State, 178 Ga. App. 400, 343 S.E.2d 792 (1986); Crawford v. State, 178 Ga. App. 739, 344 S.E.2d 533 (1986); Peavy v. State, 179 Ga. App. 397, 346 S.E.2d 584 (1986); Bell v. State, 180 Ga. App. 170, 348 S.E.2d 712 (1986); White v. State, 180 Ga. App. 185, 348 S.E.2d 728 (1986); Newsome v. State, 180 Ga. App. 243, 348 S.E.2d 759 (1986); Hall v. State, 181 Ga. App. 92, 351 S.E.2d 236 (1986); Johns v. State, 181 Ga. App. 510, 352 S.E.2d 826 (1987); Crump v. State, 183 Ga. App. 43, 357 S.E.2d 863 (1987); In re J.B., 183 Ga. App. 229, 358 S.E.2d 620 (1987); Patten v. State, 184 Ga. App. 152, 361 S.E.2d 203 (1987); Adams v. State, 186 Ga. App. 599, 367 S.E.2d 871 (1988); Westbrook v. State, 186 Ga. App. 493, 368 S.E.2d 131, cert. denied, 186 Ga. App. 919, 368 S.E.2d 131 (1988); Ward v. State, 186 Ga. App. 503, 368 S.E.2d 139 (1988);

Weeks v. State, 187 Ga. App. 307, 370 S.E.2d 344 (1988); Johncox v. State, 189 Ga. App. 188, 375 S.E.2d 139 (1988); Burgess v. State, 189 Ga. App. 790, 377 S.E.2d 543 (1989); Blanton v. State, 191 Ga. App. 454, 382 S.E.2d 133 (1989); Howard v. State, 191 Ga. App. 408, 382 S.E.2d 149 (1989); Gilbert v. State, 191 Ga. App. 574, 382 S.E.2d 630, cert. denied, 191 Ga. App. 922, 382 S.E.2d 630 (1989); McCormick v. State, 228 Ga. App. 467, 491 S.E.2d 903 (1997); Goss v. State, 228 Ga. App. 411, 491 S.E.2d 859 (1997); Watson v. State, 230 Ga. App. 79, 495 S.E.2d 305 (1998); Wilson v. State, 230 Ga. App. 195, 496 S.E.2d 746 (1998); Wand v. State, 230 Ga. App. 460, 496 S.E.2d 771 (1998); Duncan v. State, 232 Ga. App. 157, 500 S.E.2d 603 (1998); Fields v. State, 233 Ga. App. 609, 504 S.E.2d 777 (1998); Burrage v. State, 234 Ga. App. 814, 508 S.E.2d 190 (1998); Osborne v. State, 239 Ga. App. 308, 521 S.E.2d 226 (1999), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007); Griffin v. State, 240 Ga. App. 494, 523 S.E.2d 910 (1999); Akins v. State, 241 Ga. App. 120, 526 S.E.2d 157 (1999); Vasquez v. State, 241 Ga. App. 512, 527 S.E.2d 235 (1999); Baker v. State, 241 Ga. App. 666, 527 S.E.2d 266 (1999); Brinson v. State, 243 Ga. App. 50, 530 S.E.2d 798 (2000); In re J.D., 243 Ga. App. 644, 534 S.E.2d 112 (2000); Wyatt v. State, 243 Ga. App. 882, 534 S.E.2d 431 (2000); Woods v. State, 244 Ga. App. 359, 535 S.E.2d 524 (2000); Sewell v. State, 244 Ga. App. 449, 536 S.E.2d 173 (2000); McCorkle v. State, 245 Ga. App. 505, 538 S.E.2d 161 (2000); Jones v. State, 247 Ga. App. 43, 543 S.E.2d 72 (2000); Millsap v. State, 247 Ga. App. 623, 544 S.E.2d 530 (2001); Brownlow v. State, 248 Ga. App. 366, 544 S.E.2d 474 (2001); In re J.R., 248 Ga. App. 333, 546 S.E.2d 67 (2001); Seidenfaden v. State, 249 Ga. App. 314, 547 S.E.2d 578 (2001); Frady v. State, 245 Ga. App. 832, 538 S.E.2d 893 (2000); Honeycutt v. State, 245 Ga. App. 819, 538 S.E.2d 870 (2000); Jowers v. State, 245 Ga. App. 773, 538 S.E.2d 853 (2000); Robinson v. State, 272 Ga. 752, 533 S.E.2d 718 (2000); Greulich v. State, 263 Ga. App. 552, 588 S.E.2d 450 (2003); McMillian v. State, 263 Ga. App. 782, 589 S.E.2d 335 (2003); Blevins v.

State, 270 Ga. App. 388, 606 S.E.2d 624 (2004); Watson v. State, 299 Ga. App. 702, 683 S.E.2d 665 (2009); Bazin v. State, 299 Ga. App. 875, 683 S.E.2d 917 (2009).

There was sufficient evidence from which the jury could find beyond a reasonable doubt that the defendant had intercourse repeatedly with his 11-year-old stepdaughter (Count 1) and had committed an act of sodomy on her (Count 2) thereby authorizing a conviction of two counts of child molestation. Pegg v. State, 183 Ga. App. 668, 359 S.E.2d 678 (1987).

Evidence was sufficient to support the conviction of the defendant for molestation of his 14 year old daughter given the number of incidents, the defendant's act of soon thereafter masturbating, his warning to his daughter to keep the incidents quiet, and his statement to an investigator that he touched his daughter in order to determine if she had been the victim of sexual abuse by another man. McEntyre v. State, 247 Ga. App. 881, 545 S.E.2d 391 (2001).

Evidence was sufficient to support the conviction of defendant for aggravated child molestation under O.C.G.A. § 16-6-4(a) and one count of child molestation under O.C.G.A. § 16-6-4(c). Baker v. State, 252 Ga. App. 238, 555 S.E.2d 899 (2001).

Evidence that defendant masturbated in front of three victims, all under the age of 16, for defendant's own sexual gratification and that defendant fondled them or forced them to perform sex acts on him was sufficient to support the convictions against defendant for child molestation. Goins v. State, 257 Ga. App. 406, 571 S.E.2d 195 (2002).

Trial court's admission of recall evidence that defendant threatened a witness, a neighbor of the victims, when defendant was leaving the stand was not error; even if the admission of the recall testimony was in error, it was harmless as the evidence was overwhelming to support a conviction for child molestation, burglary, and criminal trespass since: (1) two victims and one mother of a victim, all with a sufficient opportunity to observe defendant, identified defendant in a pre-trial photographic lineup and at trial; (2) the neighbor also identified defendant;

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(3) a victim and the neighbor knew defendant by first name preceding the incident; (4) a victim and the neighbor noticed defendant wearing the clothes discovered in a victim's home the night of the incident; and (5) the state presented evidence that defendant had committed similar acts previously. *Rubi v. State*, 258 Ga. App. 815, 575 S.E.2d 719 (2002).

Sufficient evidence supported defendant's conviction on two counts of aggravated child molestation, as it was enough for a rational trier of fact to find defendant guilty beyond a reasonable doubt of having had the child victim perform sex acts on defendant's genitals with the victim's mouth and having performed sex acts on the child victim's vagina with defendant's mouth. *Smith v. State*, 259 Ga. App. 736, 578 S.E.2d 295 (2003).

Evidence supported the jury's decision rejecting defendant's claims of accident or mistake and a lack of criminal intent and supported defendant's child molestation conviction. *Black v. State*, 261 Ga. App. 263, 582 S.E.2d 213 (2003).

Evidence was sufficient to support defendant's convictions on two counts of child molestation, where defendant engaged in sexual activity with a minor. *Dowd v. State*, 261 Ga. App. 306, 582 S.E.2d 235 (2003).

Testimony by the detective and the child that the child had recounted occasions on which defendant put the defendant's hands on the victim's genitals and other private parts, and that defendant had woken the victim up once by poking the defendant's private parts in the victim's behind, was sufficient for a rational trier of fact to find defendant guilty beyond a reasonable doubt of child molestation by inserting an unknown object in the victim's rectum. *Mayo v. State*, 261 Ga. App. 314, 582 S.E.2d 482 (2003).

Victim's testimony that the victim had sexual intercourse with defendant, that the defendant placed the defendant's finger in the victim's genitals, placed the defendant's hand on the victim's genitals, placed the defendant's mouth on the victim's breast, and placed the defendant's mouth on the victim's mouth, established

the offenses of aggravated sexual battery pursuant to O.C.G.A. § 16-6-22.2, incest pursuant to O.C.G.A. § 16-6-22, and child molestation. *Falak v. State*, 261 Ga. App. 404, 583 S.E.2d 146 (2003).

Evidence that defendant touched the victim inappropriately showed that the jury could have concluded that defendant was guilty of child molestation. *Frazier v. State*, 261 Ga. App. 508, 583 S.E.2d 188 (2003).

Conviction for child molestation by making a child touch defendant's genitals was upheld where force was shown through the victim's testimony that defendant was mean to the victim and the victim's siblings, kicked them, hit them in the head, and yelled a lot. *Branesky v. State*, 262 Ga. App. 33, 584 S.E.2d 669 (2003).

Evidence was sufficient to support a child molestation conviction where defendant's eight year old stepchild testified that defendant "put his private in my private," that the defendant moved the defendant's body while inside the child, that the defendant hurt the victim's "private," where the victim circled the appropriate places on anatomically correct drawings which were admitted into evidence, testified that defendant put the defendant's "private" in the victim's mouth on more than one occasion, where eventually the victim told the victim's parent, the victim's babysitter, and the victim's doctor about these events, and where a physical examination revealed redness and swelling around the victim's genitals, which, the physician testified, could have been caused by trauma. *Torres v. State*, 262 Ga. App. 309, 585 S.E.2d 228 (2003).

Although the defendant's stepchild and the child's friend had not reported the defendant's sexual acts involving them during an earlier welfare investigation and the stepchild only told of the sexual acts after the child's parent refused to let the child move in with the child's other biological parent, such went to the childrens' credibility, which was for the jury to determine, and the evidence was sufficient to support the defendant's conviction for child molestation and statutory rape. *Williams v. State*, 263 Ga. App. 22, 587 S.E.2d 187 (2003).

After a 12-year-old child told the child's parent that defendant had just raped the child; hours after the alleged rape, a detective found defendant's checkbook in the abandoned house where the victim said the rape occurred, and a check had been written from the checkbook earlier that day; and a doctor who examined the victim within hours of the incident found abrasions and tenderness consistent with the victim's description of what had occurred, the appellate court found the evidence sufficient to support defendant's convictions of rape, statutory rape, aggravated child molestation, and child molestation. *Weathersby v. State*, 263 Ga. App. 341, 587 S.E.2d 836 (2003).

Evidence was sufficient to find defendant guilty of child molestation even when the evidence consisted primarily of the victim's testimony and the statements of the victim's sibling; the testimony of a single witness was generally sufficient to establish a fact, and the jury clearly resolved the conflicts against defendant. *McGhee v. State*, 263 Ga. App. 762, 589 S.E.2d 333 (2003).

Trial court correctly allowed three adults to testify about out-of-court statements which a four-year-old child made to them even though the child was unresponsive when the child was asked questions in court, and the appellate court found that the child's statements alleging that defendant placed the defendant's finger inside the child's genitals, when considered with evidence that the child had gonorrhea, and similar transaction evidence that defendant molested the defendant's own child, was sufficient to sustain the defendant's convictions for child molestation and aggravated sexual battery. *Bell v. State*, 263 Ga. App. 894, 589 S.E.2d 653 (2003).

Victim's testimony, which was supported by statements the victim made to family, friends, and investigators regarding sexual acts the defendant committed upon the victim, together with the medical findings of the pediatrician who examined the victim were completely consistent with the victim's allegation of abuse by sexual intercourse; therefore, the evidence was more than sufficient to authorize a rational trier of fact to find the defendant

guilty beyond a reasonable doubt of child molestation and aggravated child molestation. *Wilkins v. State*, 264 Ga. App. 524, 591 S.E.2d 445 (2003).

Evidence was sufficient to overcome defendant's assertion that the defendant had no sexual contact with the 15 year old victim where: (1) defendant offered the 15-year-old victim a ride to the victim's house, but instead took the victim to the defendant's own home; (2) the victim was able to describe certain peculiarities of defendant's genitals and pubic area; (3) the jury was shown pictures that conformed to the victim's description; and (4) similar transaction evidence was introduced where a previous victim testified that defendant had sexually assaulted the victim in the victim's car after the victim gave the defendant a ride to the defendant's house. *Taylor v. State*, 264 Ga. App. 665, 592 S.E.2d 148 (2003).

Defendant's child's testimony on retrial that defendant had repeatedly touched child's breasts and genitals with defendant's hands, and that on one occasion defendant had touched child's genitals with defendant's mouth, was sufficient evidence to support defendant's convictions. *Putnam v. State*, 264 Ga. App. 810, 592 S.E.2d 462 (2003).

Child molestation and aggravated child molestation, in violation of O.C.G.A. § 16-6-4(a) and (c), respectively, were upheld based upon the evidence presented from the victim that defendant placed the defendant's finger into the victim's genitals and moved it around, causing the victim physical harm, and by touching the defendant's genitals on the victim's genitals; evidence of prior false accusations made by the victim, and a later recantation by the victim, did not render the evidence insufficient. *Cheek v. State*, 265 Ga. App. 15, 593 S.E.2d 55 (2003).

Child molestation and aggravated child molestation convictions were upheld where the trial court properly denied a defense motion for a continuance, fashioned an alternative remedy allowing defendant access to an alleged similar transaction witness' statement, and limited the state's ability to challenge it, and defendant failed to prove that defendant's trial counsel was ineffective. *Joiner v. State*, 265 Ga. App. 395, 593 S.E.2d 936 (2004).

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Evidence was sufficient to convict defendant of sexual battery and child molestation, even though the defendant was acquitted of rape, where the 13-year old victim testified that the defendant pulled off the victim's shorts and forced the defendant's genitals into the victim's genitals despite the victim's protests. The jury was entitled to believe the victim's testimony in whole or in part, and it could have concluded that the defendant placed the defendant's genitals on the victim's genitals (as alleged in the child molestation indictment), but that no penetration occurred, so there was no rape. *Dorsey v. State*, 265 Ga. App. 597, 595 S.E.2d 106 (2004).

Evidence supporting the finding that defendant penetrated the victim's genitals, causing physical injury, was sufficient to sustain convictions for child molestation and aggravated child molestation. *Sailor v. State*, 265 Ga. App. 645, 595 S.E.2d 335 (2004).

Aggravated child molestation, child molestation, enticing a child for indecent purposes, and aggravated sodomy convictions were all supported by sufficient evidence provided by the victims detailing the inappropriate touching and anal penetration committed by defendant, and confirmed by the examining experts. *Wilkerson v. State*, 267 Ga. App. 585, 600 S.E.2d 677 (2004).

Evidence was sufficient to support defendant's conviction of child molestation where: (1) the victim testified that defendant inappropriately touched the victim, and showed the victim rented and "home-made" pornographic movies to teach the victim about sex; (2) a social services worker testified that the child drew the body parts defendant touched on a "gingerbread drawing," and said that defendant and defendant's love interest acted out what was on the pornographic videos in front of the child; (3) a psychologist testified that the evaluation of the child was consistent with possible sexual abuse; and (4) an investigator testified that defendant, in a signed statement, admitted the inappropriate touching and showing of the pornographic movies to the child.

*Brown v. State*, 267 Ga. App. 826, 600 S.E.2d 774 (2004).

Evidence was sufficient to sustain a child molestation conviction where the seven-year-old child of defendant's step-sibling testified that defendant came into the victim's room while the victim was sleeping, pulled down the victim's underwear, and rubbed soap on the victim's genitals, where the victim also told police in a prior statement that the victim thought that defendant put the defendant's finger inside the victim's genitals, where the victim described the incident to the victim's parent, the victim's grandparent, and later a social worker in a taped interview, and where, when the parent first confronted defendant, the defendant acted nonchalantly in the face of the accusations, rather than being surprised or defensive. *Holloway v. State*, 268 Ga. App. 300, 601 S.E.2d 753 (2004).

Evidence was sufficient to support child molestation convictions where the child's parent found defendant, naked, with the child's head in the defendant's lap, and in testimony and taped interviews played at trial, the 10-year-old child victim said that defendant, inter alia, had the victim place the victim's hand on the defendant's genitals, tried to put the defendant's genitals in the victim's "privates" while they were clothed, held the victim and moved the victim up and down the defendant's body between the defendant's legs, and tried to put the defendant's genitals in the victim's mouth. *Duncan v. State*, 269 Ga. App. 4, 602 S.E.2d 908 (2004).

Convictions of child molestation and aggravated child molestation were affirmed where the four-year-old child victim told several people that defendant had touched or inserted defendant's fingers in the child's genitals, and a doctor's examination found indications that someone inserted their fingers into the victim's genitals. *Howard v. State*, 268 Ga. App. 558, 602 S.E.2d 295 (2004).

Evidence that the defendant bathed a victim without the victim's parent's knowledge, photographed the victim in the nude without the parent's knowledge, masturbated with a victim's underwear, and placed nude photos of the victim between pages of a pornographic magazine

was sufficient to support a child molestation conviction. *Phillips v. State*, 269 Ga. App. 619, 604 S.E.2d 520 (2004).

When a victim testified that defendant locked the victim in the defendant's bedroom, threw the victim onto the defendant's bed, placed the defendant's genitals on the victim's "bottom," and made "moving" motions, and told a police officer, who testified, that defendant grabbed the victim's buttocks immediately before this incident, and a nurse testified that a medical examination of the victim revealed injuries consistent with the victim's allegations, the evidence was sufficient to allow a jury to find defendant guilty beyond a reasonable doubt of both aggravated child molestation, as to the first incident, and child molestation, as to grabbing the victim's buttocks, and further allowed the jury to find that defendant committed these acts for the defendant's own sexual arousal. *Payne v. State*, 269 Ga. App. 662, 605 S.E.2d 75 (2004).

Sufficient evidence, including testimony from the child victim identifying defendant's vehicle, evidence of defendant's DNA matching that of the victim and expert testimony that the frequency of such occurrence was approximately one in two billion in the Caucasian population, and similar transaction evidence, supported defendant's kidnapping with bodily injury, rape, aggravated sodomy, aggravated child molestation, aggravated assault, and first-degree cruelty to children convictions. *Morita v. State*, 270 Ga. App. 372, 606 S.E.2d 595 (2004).

Evidence was sufficient to support defendant's conviction for aggravated child molestation, which involved an act of sodomy, by placing the defendant's genitals in the victim's anus because the victim testified that the defendant "put the defendant's private in [the victim's] butt." *Neal v. State*, 271 Ga. App. 283, 609 S.E.2d 204 (2005).

Evidence was sufficient to support defendant's convictions for child molestation by touching the victim's genitals with the defendant's hand because the victim testified that defendant pulled down the victim's underwear and touched the victim between the victim's legs in the victim's "private area" with the defendant's

mouth, genitals, and finger. *Neal v. State*, 271 Ga. App. 283, 609 S.E.2d 204 (2005).

Evidence was sufficient to support defendant's convictions for child molestation by touching a child's anus with defendant's genitals because the child testified that defendant "put his private in [the child's] butt." *Neal v. State*, 271 Ga. App. 283, 609 S.E.2d 204 (2005).

Evidence was sufficient to support defendant's convictions for child molestation by causing a child to touch the defendant's genitals because the child testified that defendant told the child to touch the defendant's genitals and placed the child's hand on it. *Neal v. State*, 271 Ga. App. 283, 609 S.E.2d 204 (2005).

Evidence was sufficient to support defendant's convictions for child molestation by causing a child to touch defendant's genitals because a child testified that defendant made the child touch [defendant's] "private." *Neal v. State*, 271 Ga. App. 283, 609 S.E.2d 204 (2005).

Victim's testimony that the defendant touched the victim's genitals, alone, supported the defendant's conviction for child molestation; further, the victim's testimony was corroborated by the victim's outcry and by physical evidence of molestation. *Howse v. State*, 273 Ga. App. 252, 614 S.E.2d 869 (2005).

There was sufficient evidence to support defendant's convictions for child molestation, aggravated child molestation, statutory rape, and incest, in violation of O.C.G.A. §§ 16-6-4, 16-6-4(c), 16-6-3, and 16-6-22, respectively, because defendant's step-child gave detailed testimony as to the continuing sexual conduct that defendant inflicted on the child over a period of years, as the testimony from just that witness was sufficient to support the convictions, pursuant to O.C.G.A. § 24-4-8; further, there was corroborative testimony from a friend of the step-child who witnessed at least one incident, and from an aunt who testified that the older step-child had sat in defendant's lap and that the defendant rubbed the older step-child's legs, which was properly admitted for purposes of corroboration, bent of mind, lustful disposition toward children, and motive. *Lewis v. State*, 275 Ga. App. 41, 619 S.E.2d 699 (2005).

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Defendant's conviction of child molestation, O.C.G.A. § 16-6-4(a), was supported by sufficient evidence, based on testimony by the child, who was under the age of 16 and was the defendant's step-child, that the defendant had fondled the child's breast, and other testimony offered at trial. *Lugo v. State*, 275 Ga. App. 354, 620 S.E.2d 591 (2005).

Evidence supported the defendant's conviction for aggravated child molestation and aggravated sexual battery because: (1) the 11-year-old victim testified that the defendant put the defendant's hand on the victim's private part, put the defendant's finger in the victim's private part, put the defendant's mouth on the victim's private part, and put the victim's mouth on the defendant's private part, "he came, whatever you call it;" (2) when the prosecutor asked the victim whether by that the victim meant that "stuff came out of his private part," the victim responded yes; and (3) in a videotaped pretrial interview, the victim explained that the victim was using the term "private part" to mean penis or vagina. *Maddox v. State*, 275 Ga. App. 869, 622 S.E.2d 80 (2005).

Child victim's testimony and corroboration testimony by "outcry" witnesses were sufficient to find defendant guilty of child molestation under O.C.G.A. § 16-6-4(a). *Rosser v. State*, 276 Ga. App. 261, 623 S.E.2d 142 (2005).

Evidence supported a conviction for child molestation where: (1) the victim testified that the defendant touched the victim's genitals from the outside of the victim's clothing while the victim sat in front of the defendant on a four-wheeler; (2) another child testified that the defendant touched the child the same day; and (3) the jury did not believe the defendant's explanation that if the touching occurred, it was accidental. *Collins v. State*, 276 Ga. App. 358, 623 S.E.2d 192 (2005).

Evidence supported the defendant's conviction of child molestation and criminal attempt to commit child molestation because: (1) the nine-year-old victim testified that, on multiple occasions, the de-

fendant fondled the victim's breasts and private parts; (2) the victim further testified that the defendant attempted to have the victim touch the defendant's genitals; and (3) the victim initially informed the victim's parent of the defendant's actions and shortly thereafter repeated the details of the incidents to a therapist and two child services agency case workers. *Cook v. State*, 276 Ga. App. 803, 625 S.E.2d 83 (2005).

Thirteen-year-old victim's testimony that when the victim was sleeping, defendant pulled down the victim's pants and underwear and performed oral sex on the victim, and that testimony was corroborated by defendant's love interest who observed the incident, was sufficient evidence to support defendant's conviction for aggravated child molestation, in violation of O.C.G.A. § 16-6-4(c), as there was sufficient evidence to establish that defendant committed "sodomy," as that term was defined under O.C.G.A. § 16-6-2(a); accordingly, the trial court properly denied defendant's motion for a judgment of acquittal pursuant to O.C.G.A. § 17-9-1. *Steverson v. State*, 276 Ga. App. 876, 625 S.E.2d 476 (2005).

Defendant's kissing of the eight-year-old victim and performance of oral sex on the victim, which was observed by the victim's parent upon the parent's return to the defendant's residence, was sufficient evidence to support a conviction for aggravated child molestation. *Hines v. State*, 277 Ga. App. 404, 626 S.E.2d 601 (2006).

Evidence was sufficient to support a conviction for aggravated child molestation, in violation of O.C.G.A. § 16-6-4(a) and (c), which was based on an act of sodomy, as whether the defendant's conduct in touching the victim's genitals with the defendant's mouth was an immoral or indecent act performed with the intent to arouse or satisfy the defendant's or the victim's sexual desires was a question within the jury's province. *Lester v. State*, 278 Ga. App. 247, 628 S.E.2d 674 (2006).

Evidence was sufficient to support a conviction for aggravated child molestation under O.C.G.A. § 16-6-4 because the three-year-old victim reported the abuse to numerous adults; testified at trial that

the defendant touched the victim's private area with the defendant's finger, that the defendant would not stop when the victim asked the defendant to do so, and that the touching hurt; and the medical evidence showed that the victim had sustained an injury consistent with molestation. *Iles v. State*, 278 Ga. App. 895, 630 S.E.2d 148 (2006).

Defendant's conviction for child molestation was supported by sufficient evidence, including the testimony of the child victim, the defendant's stepchild, who was in the seventh grade at the time of trial, that the defendant molested the child when the child was in the third, fourth and fifth grades, that in the most recent incident, the defendant called the child into the defendant's bedroom and told the child they were going to have sex, that the child said they were not, and left the room, that the defendant went into the child's bedroom and wrestled with the child until they fell onto the bed, that the defendant pulled the child's clothing off and tried to insert the defendant's genitals into the child's genitals, but was only partially able to do so, and that there were other incidents in which the defendant had sex with the child or inserted the defendant's finger into the child's genitals; additionally, a doctor concluded that the child's injuries were consistent with partial penetration of the genitals, the child reported the most recent incident to a teacher, a social worker, and a police officer, and the child's videotaped statement was admitted into evidence. *Harris v. State*, 279 Ga. App. 241, 630 S.E.2d 853 (2006).

Evidence was sufficient to support a conviction of aggravated child molestation since the child victim testified that when the child was five-years-old, defendant "put his private in my mouth and peed in it, and made me swallow it," since, among other witnesses, the child's father and stepmother testified about what the child told them about the incident, since a detective testified about an interview with the child about the incident, and since the state introduced a videotape of the interview into evidence and played it to the jury. *Tyler v. State*, 279 Ga. App. 809, 632 S.E.2d 716 (2006), cert. denied, 2006 Ga.

LEXIS 810 (Ga. 2006); overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Defendant's child molestation convictions were upheld on appeal as: (1) sufficient evidence presented by the victims and investigating witnesses, despite defendant's contrary testimony, supported the convictions; (2) sufficient similarities in the two charges supported their joinder for trial; and (3) no abuse of discretion resulted from the admission of two videotaped interviews of both victims. *Milton v. State*, 280 Ga. App. 179, 633 S.E.2d 606 (2006).

Evidence supported a defendant's conviction for child molestation as: (1) the victim testified that the defendant touched the victim on the victim's "private part"; (2) the victim reported the abuse to the victim's parent and the police; (3) any discrepancies in the victim's statements or contradictions in the evidence presented credibility questions for the jury to resolve; (4) Georgia law did not require corroboration of a child molestation victim's testimony; and (5) given that the allegations did not include penetration, the lack of medical evidence to corroborate the victim's molestation was not exculpatory. *Tadic v. State*, 281 Ga. App. 58, 635 S.E.2d 356 (2006).

Evidence that the defendant touched the defendant's grandchild in a sexual manner on several occasions, the defendant's admission to police that the defendant had fondled the grandchild, and the defendant's efforts to lure the grandchild into sexual situations with chocolate while attempting to secure the grandchild's silence sufficed to sustain the defendant's convictions of five counts of child molestation under O.C.G.A. § 16-6-4(a). *Haynes v. State*, 281 Ga. App. 81, 635 S.E.2d 370 (2006).

Evidence was sufficient to support a sexual exploitation of children charge because the victims' testimony, although the testimony varied as to details, was consistent throughout that it was the defendant who touched the children and the defendant who took photographs of the children, and the interviewers stated that the girls did not appear to be coached; although one of the victims refused to testify

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at trial, the victim told a psychologist that the victim was afraid of the defendant, and the jury viewed the forensic interview of that victim and could make the jury's own determinations as to the victim's credibility. Vaughn v. State, 307 Ga. App. 754, 706 S.E.2d 137 (2011).

Evidence from a defendant's 12-year-old stepdaughter in the form of a statement to police that she felt the defendant pull down her pants and put his penis in her rear end, then felt liquid on her buttocks, while she pretended to remain asleep, was sufficient to convict the defendant of child molestation in violation of O.C.G.A. § 16-6-4(a), although the stepdaughter did not testify to all the details at trial. Hines v. State, 307 Ga. App. 807, 706 S.E.2d 156 (2011).

Because there was sufficient evidence, including the child victims' testimonies, that a defendant had the requisite intent and that he performed oral sex on the child victims, and put his penis in their mouths and on their anuses, the defendant was properly convicted of aggravated child molestation and child molestation under O.C.G.A. § 16-6-4. Sanders v. State, 308 Ga. App. 303, 707 S.E.2d 538 (2011).

There was competent evidence to support the defendant's convictions for aggravated child molestation, O.C.G.A. § 16-6-4(c), and child molestation, O.C.G.A. § 16-6-4(a)(1), because the victim's step-uncle and one of the forensic interviewers proffered evidence that the defendant sexually molested the victim pursuant to the Child Hearsay Act, O.C.G.A. § 24-3-16; although the victim testified that the defendant touched the victim in a way that the victim did not like, the victim did not provide any details about those incidents, but both the step-uncle and the forensic interviewer testified that the victim disclosed that the defendant touched the victim's privates with the defendant's hand and the defendant's own privates and forced the victim to place the victim's mouth on the defendant's privates, and the jury resolved any credibility or inconsistency issues against the defendant. Westbrooks v. State, No.

A11A0167, 2011 Ga. App. LEXIS 347 (Apr. 21, 2011).

**Evidence sufficient to sustain conviction.** — Defendant's child molestation and aggravated child molestation convictions were upheld on appeal as supported by sufficient evidence taken from the victim's testimony; the victim's forensic interview and medical examination by a registered nurse; and similar transaction evidence showing defendant's motive, intent, and bent of mind. Rodriguez v. State, 281 Ga. App. 129, 635 S.E.2d 402 (2006).

Despite allegations that: (1) the victim's testimony was contradicted by the victim's parent; and (2) the victim had a motive to lie about the defendant, the appeals court refused to disturb the jury's determination as to the evidence given the jury's province to resolve the conflicts in the evidence; hence, the defendant's cruelty to children and attempted aggravated and child molestation convictions were upheld on appeal. Chalker v. State, 281 Ga. App. 305, 635 S.E.2d 890 (2006).

Defendant's convictions for aggravated child molestation and sexual exploitation of children were supported by the evidence based on the testimony of two minor victims that they engaged in numerous acts of oral and anal sex with the defendant, their identification of themselves in numerous photographs and several videos taken from the defendant's computer files, which depicted them engaging in sexually explicit conduct, and the sexually explicit photographs and video recordings. Walthall v. State, 281 Ga. App. 434, 636 S.E.2d 126 (2006).

Sufficient evidence supported the convictions of enticing a child for indecent purposes under O.C.G.A. § 16-6-5 and of three counts of child molestation under O.C.G.A. § 16-6-4; the victim and the victim's younger sister specifically testified that the defendant committed the acts described in the indictment, and other testimony corroborated this testimony. Mikell v. State, 281 Ga. App. 739, 637 S.E.2d 142 (2006).

Sufficient evidence supported the defendant's convictions of aggravated child molestation under O.C.G.A. § 16-6-4(c), attempted aggravated sodomy under O.C.G.A. §§ 16-4-1 and 16-6-2(a), and

statutory rape under O.C.G.A. § 16-6-3(a); the victim testified that the defendant put the defendant's privates inside the victim's privates and attempted to put the defendant's privates in the victim's behind, and the nurse practitioner testified that the physical examination of the victim indicated injuries consistent with the victim's testimony. *Anderson v. State*, 282 Ga. App. 58, 637 S.E.2d 790 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Sufficient evidence supported the defendant's convictions of three separate counts of child molestation under O.C.G.A. § 16-6-4(a) as there was sufficient identification testimony to convict; the victim testified that the victim knew the defendant, the victim referred to the perpetrator of the offenses by the defendant's first name, and the victim testified that the victim spent the summer with the defendant and others. *Clark v. State*, 282 Ga. App. 248, 638 S.E.2d 397 (2006).

Sufficient identification evidence supported the defendant's convictions of four counts of aggravated child molestation under O.C.G.A. § 16-6-4(b), three counts of child molestation under O.C.G.A. § 16-6-4(a), and two counts of enticing a child for indecent purposes under O.C.G.A. § 16-6-5; the victim testified that the victim knew the defendant, that the defendant and the victim's mother lived together, and that the perpetrator's name was the defendant's first name. *Clark v. State*, 282 Ga. App. 248, 638 S.E.2d 397 (2006).

Defendant's child molestation conviction was upheld on appeal as: (1) the defendant waived error as to the admission of the victim's statements at trial, including those made in a videotape; (2) the victim's statements contained in the videotape were evidence of prior difficulties, admissible without notice and without a pretrial hearing; (3) after the trial court agreed to give a curative instruction on the wife-beating evidence, counsel withdrew a request for such an instruction on grounds that it would focus too much attention on a very brief statement; and (4) trial counsel was not ineffective. *Campbell v. State*, 282 Ga. App. 854, 640 S.E.2d 358 (2006).

Verdict convicting a defendant of child molestation under O.C.G.A. § 16-6-4(a) was supported by sufficient evidence; viewed in the light most favorable to the verdict, the record showed that, after watching pornographic movies at the home of the six-year-old victim, the defendant penetrated the victim's vagina with a finger while the victim's parent was asleep on a couch. *Pendley v. State*, 283 Ga. App. 262, 641 S.E.2d 174 (2006).

Given the testimony provided by the victim about the repeated acts performed by and for the defendant over a period of months, the fact that the defendant was giving money to the victim's cousin as an incentive not to tell anyone about the acts, and evidence that the defendant played a sexually explicit video for the victim and the victim's cousin, the defendant's child molestation and aggravated child molestation convictions were upheld on appeal. *Hunter v. State*, 282 Ga. App. 355, 638 S.E.2d 804 (2006).

Defendant's aggravated child molestation and aggravated sodomy convictions were upheld on appeal as supported by sufficient evidence including: (1) the testimony from both victims, which was corroborated by an investigator and a treating doctor; and (2) similar transaction evidence of the defendant's oral and anal molestation of other minor siblings, which was introduced for the purpose of showing a course of conduct, intent, and bent of mind toward sexual behavior with young relatives, and not to impugn the defendant's character. *Chauncey v. State*, 283 Ga. App. 217, 641 S.E.2d 229 (2007).

Because sufficient evidence was supplied via the testimony from the child victim, and the witnesses who corroborated said testimony, to support the defendant's aggravated sexual battery and child molestation convictions, despite any alleged inconsistencies, the convictions were upheld as was the denial of the defendant's motions for an acquittal and a new trial. *Lilly v. State*, 285 Ga. App. 427, 646 S.E.2d 512 (2007).

Trial court upheld the defendant's statutory rape and child molestation convictions despite a challenge to the date-range period relating to the child molestation charge as sufficient evidence from the vic-

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tim, which was supported by both the victim's mother and an examining nurse, supported the conviction; further, the defendant admitted to the victim's mother that sexual intercourse with the victim had occurred before. *Northern v. State*, 285 Ga. App. 303, 645 S.E.2d 701 (2007).

There was sufficient evidence to support the defendant's convictions of child molestation, kidnapping with bodily injury, kidnapping, and aggravated assault, when the defendant, who lived with an ex-girlfriend and her teenage daughter, called them into a bedroom and bound the ex-girlfriend's arms, legs, and mouth with duct tape, threatened the women with a hatchet, and led the daughter to another bedroom where the defendant duct-taped her hands and feet and forced her to have intercourse with him. *Phillips v. State*, 284 Ga. App. 683, 644 S.E.2d 535 (2007).

Given the testimony offered by both victims and their father, and a taped telephone conversation between the father and the defendant, during which the defendant asked the father to apologize to the victims, sufficient evidence supported the defendant's two child molestation convictions. *Head v. State*, 285 Ga. App. 471, 646 S.E.2d 699 (2007).

Evidence was sufficient to convict the defendant of three counts of aggravated child molestation when the victim, who was five or six when the incidents occurred, stated that the defendant had put his penis into the victim's "behind" or "bottom"; any inconsistency in the victim's statements was a matter of credibility for the jury to resolve. *Prudhomme v. State*, 285 Ga. App. 662, 647 S.E.2d 343 (2007).

Given the evidence supporting the defendant's aggravated child molestation conviction including that: (1) the defendant sodomized the victim; (2) witnesses knew that the defendant had an interest in performing oral sex; and (3) the trial court properly limited the defendant's cross-examination to only relevant matters, the conviction was upheld on appeal and the trial court did not err in denying the defendant a new trial. *Gaines v. State*, 285 Ga. App. 654, 647 S.E.2d 357 (2007).

On appeal from a child molestation and

aggravated child molestation conviction, the testimony and statements from the child victim and the witnesses who testified to the acts was sufficient to enable a rational trier of fact to determine that the defendant committed an indecent and immoral act by touching the victim's vaginal area with the intent to arouse the defendant's sexual desires; in addition, the testimony of an examining doctor was sufficient to enable a rational trier of fact to determine that the defendant physically injured the victim. *Cortez v. State*, 286 Ga. App. 170, 648 S.E.2d 488 (2007).

Because the evidence supported the finding that the defendant attempted to penetrate the 13-year-old victim's vagina with his penis, touched her breasts with his hands and his mouth, and told her to perform oral sex on him, the evidence was sufficient to authorize the jury's verdict as to each of his convictions for aggravated child molestation and for child molestation; it was not necessary that the victim's evidence be corroborated, and her credibility was a matter for the jury. *Foster v. State*, 286 Ga. App. 250, 649 S.E.2d 322 (2007), cert. dismissed, 2007 Ga. LEXIS 875 (Ga. 2007).

Because sufficient evidence as to venue and of the remaining elements of the crime was presented by the child victim, via both recorded and trial testimony, the child molestation convictions entered against both the defendants under both O.C.G.A. §§ 16-2-20 and 16-6-4 were upheld on appeal. *Newman v. State*, 286 Ga. App. 353, 649 S.E.2d 349 (2007).

In a child molestation case involving four teenagers, the inconsistencies in the teenagers' statements did not mean that there was insufficient evidence to support the defendant's convictions; contradictions or issues of credibility were for the jury to resolve. *Kirat v. State*, 286 Ga. App. 650, 649 S.E.2d 786 (2007), cert. denied, 2007 Ga. LEXIS 745 (Ga. 2007).

There was sufficient evidence, including testimony by the victim and similar transaction evidence involving incidents that took place years before, to support a defendant's convictions of sexual battery, child molestation, and aggravated child molestation; the victim, who testified to various acts the defendant performed

upon the victim, stated when confronted with inconsistencies in the victim's testimony that the victim had been on drugs during that period because the victim was trying to forget everything, and any inconsistencies in the victim's testimony were for the jury to resolve. *Boynton v. State*, 287 Ga. App. 778, 653 S.E.2d 110 (2007).

Evidence was sufficient to support a defendant's convictions of child molestation, aggravated child molestation, and aggravated sexual battery after the five-year-old victim stated that the defendant had made her perform an oral act on his penis, that he had put his mouth on her vagina, and that he had stuck his finger in her vagina and anus; furthermore, the victim's seven-year-old sibling reported that the defendant had been lying on a bed in the same room as the victim, that the defendant had chased the sibling into the sibling's room and told the sibling to stay in bed until that night, and that the sibling saw "something bad" happen to the victim. *Herring v. State*, 288 Ga. App. 169, 653 S.E.2d 494 (2007), cert. denied, 2008 Ga. LEXIS 205 (Ga. 2008).

Evidence was sufficient to support a defendant's conviction of two counts of aggravated child molestation with regard to the defendant's daughter and the daughter's friend. The daughter, who was interviewed after a teacher became concerned about a poem she had written, told social services personnel that the defendant had sodomized her several years before by inserting his penis inside of her anus; her disclosures led to questioning of the friend, who had not had contact with the daughter for years, who began to cry immediately after the subject of molestation was broached, and who stated that the defendant had inserted his penis inside her anus while she was attending a slumber party at the daughter's house. *French v. State*, 288 Ga. App. 775, 655 S.E.2d 224 (2007).

Evidence was sufficient to convict defendant of child molestation and aggravated child molestation under O.C.G.A. § 16-6-4 and of aggravated sexual battery under O.C.G.A. § 16-6-22.2(b) because the state provided testimony corroborating the victim's statements that when the defendant was supposed to babysit the

victim after school, defendant regularly abused the victim at the victim's home, in the defendant's car, in a park, in a vacant house, and two motels by touching the victim, making the victim perform oral sex on the defendant, by sodomizing the victim, by making the victim wear thong underwear, and by taking cellular telephone photographs of the victim naked. *Woods v. State*, 304 Ga. App. 403, 696 S.E.2d 411 (2010).

Trial court did not err in convicting the defendant of child molestation in violation of O.C.G.A. § 16-6-4 because the victim's video interview with Department of Family and Children Services case workers, which was played for the jury, and the victim's testimony in court were sufficient to permit a rational trier of fact to find the defendant guilty beyond a reasonable doubt; the interview showed the victim saying that the defendant touched the victim where the defendant was not supposed to, and at the trial, the victim was sometimes hesitant to testify but did ultimately testify that the defendant touched the victim between the victim's legs with the defendant's hand. *Kay v. State*, 306 Ga. App. 666, 703 S.E.2d 108 (2010).

Evidence was sufficient to authorize the jury to find the defendant guilty of aggravated child molestation in violation of O.C.G.A. § 16-6-4(c) because the victim testified that the abuse was long term and ongoing, that the abuse had escalated to include oral sex, and that the defendant had generally done the same thing on each occasion. *Arnold v. State*, 305 Ga. App. 45, 699 S.E.2d 77 (2010).

Defendant's convictions for aggravated child molestation, aggravated assault, enticing a child for an indecent purpose, kidnapping, false imprisonment, cruelty to children, burglary, theft by taking, and striking an unattended vehicle were authorized because at trial the defendant was positively identified as the perpetrator of the crimes; a nurse and doctor testified that the victim had an injury that was consistent with the molestation allegation, and a videotape depicted the defendant driving a maintenance truck that the defendant did not have authority to take. *Bearfield v. State*, 305 Ga. App. 37, 699 S.E.2d 363 (2010).

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Evidence from a defendant's own statement that the defendant touched the fourteen-year-old victim's vagina and became aroused was sufficient to convict the defendant of child molestation in violation of O.C.G.A. § 16-6-4(a)(1). *Goss v. State*, 305 Ga. App. 497, 699 S.E.2d 819 (2010).

Evidence was sufficient to support the defendant's conviction for molesting a four-year-old girl because the victim testified that the defendant had touched her on her "front private" under her clothes, and defendant admitted doing the same thing; inconsistencies in their testimony merely presented an issue for the jury, not the court of appeals. *Fife v. State*, 306 Ga. App. 425, 702 S.E.2d 454 (2010).

**Kissing as sufficient evidence of molestation.** — Evidence supported a defendant's child molestation conviction as the defendant was a 51-year old man and kissed an unrelated 10-year-old boy on the mouth while the two were swimming together within the context of a relationship involving other acts of molestation; the jury could infer that the defendant kissed the boy with the intent to gratify the defendant's sexual desires. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

**Victims do not need technical or statutory language to describe acts.** — Evidence was sufficient to support convictions of child molestation and cruelty to children under O.C.G.A. §§ 16-6-4 and 16-5-70. From the testimony of the four-year-old victim, the victim's parent, and an interviewer, the jury was authorized to find that the victim used the word "tutu" to refer to the child's vaginal area, where the child said the defendant touched the child; it was completely unreasonable to require witnesses to describe the acts constituting the commission of a crime in statutory or technical language in order to prove the commission of such acts. *Brookshire v. State*, 288 Ga. App. 766, 655 S.E.2d 332 (2007).

On appeal from convictions for two counts of child molestation and two counts of aggravated sodomy, no reason for reversal was found because: (1) sufficient evidence was presented in support of the

convictions, making the trial court's denial of an acquittal proper; (2) the time that counsel had to prepare for trial was adequate, thus diminishing the need for a continuance; (3) the defendant's statement to police was not made upon a promise of reward or hope of benefit; and (4) the defendant failed to show that the outcome of the trial would have been different but for counsel's alleged deficiencies. *Robbins v. State*, 290 Ga. App. 323, 659 S.E.2d 628 (2008).

Evidence was sufficient to support convictions of aggravated child molestation and of child molestation when an eight-year-old child's grandparent discovered the defendant and the child in bed together and when the child told her parent, a physician, and others that the defendant had touched her vagina. *Lancaster v. State*, 291 Ga. App. 347, 662 S.E.2d 181 (2008).

Defendant's conviction for child molestation was supported by sufficient evidence based on the testimony of the victim, defendant's child, and other witnesses, which confirmed the child's allegations that defendant had assaulted the child, and it was for the jury to determine the child's credibility. *Crane v. State*, 291 Ga. App. 414, 662 S.E.2d 225 (2008).

In defendant's trial for child molestation, despite no physical evidence to corroborate the allegations, there was sufficient evidence to support defendant's conviction based on the testimony of the victim, the victim's taped statement, the testimony of the victim's siblings, and defendant's confession. *Simmons v. State*, 291 Ga. App. 642, 662 S.E.2d 660 (2008).

Evidence supported the defendant's convictions of rape under O.C.G.A. § 16-6-1(a)(2), aggravated sexual battery under O.C.G.A. § 16-6-22.2, and two counts of child molestation under O.C.G.A. § 16-6-4(a) with regard to his daughter, who was seven at the time. The victim testified that the defendant touched her vagina with his hand and insisted that she touch his penis with her hand; a detective testified that the victim told him that the defendant touched her on her vagina with his hands, fingers, and penis and that he asked her to touch his penis; another detective, who conducted a

videotaped interview with the victim, testified that the victim told her that she had sex with the defendant on multiple occasions; in the interview, the victim stated that the defendant pulled her pants down and put his penis inside her vagina and that he put his hand inside her vagina; and the victim's mother and grandmother testified to similar statements by the victim. Osborne v. State, 291 Ga. App. 711, 662 S.E.2d 792 (2008), cert. denied, 2008 Ga. LEXIS 783 (Ga. 2008).

Evidence was sufficient to support the defendant's convictions of child molestation and aggravated child molestation when the victim stated that beginning when the victim was nine, the defendant repeatedly forced the victim to have anal sex and oral sex and a physician found that the victim lacked virtually all anal tone, which was consistent with multiple episodes of anal intercourse. Mullis v. State, 292 Ga. App. 218, 664 S.E.2d 271 (2008).

Testimony of a 10-year-old child that the defendant had put the defendant's mouth, tongue, and penis on the child's privates, and testimony from the child's parent that the parent saw the defendant, nude, engaged in sexual conduct near the child, was sufficient to convict the defendant of aggravated child molestation under O.C.G.A. § 16-6-4(c). Linto v. State, 292 Ga. App. 482, 664 S.E.2d 856 (2008).

Evidence was sufficient to allow the jury to convict defendant of child molestation, O.C.G.A. § 16-6-4(a), based on an allegation in the indictment that defendant touched the victim on the victim's buttocks because the victim testified that the defendant touched the victim "everywhere" on the victim's body. Dew v. State, 292 Ga. App. 631, 665 S.E.2d 715 (2008).

As there was evidence that the defendant repeatedly touched a nine-year old child on the child's genitalia, the jury was authorized to infer that the defendant committed these acts with the requisite criminal intent, and defendant was properly convicted of child molestation in violation of O.C.G.A. § 16-6-4(a). Whitaker v. State, 293 Ga. App. 427, 667 S.E.2d 202 (2008).

There was sufficient evidence to support a defendant's conviction for child molesta-

tion based on a witness testifying that as the witness was in a shopping center parking lot, the witness observed the defendant perform an immoral and indecent act upon the child victim by kissing the child and placing the defendant's hands into the child's pants. Milan v. State, 293 Ga. App. 398, 667 S.E.2d 267 (2008).

Evidence that the defendant grabbed a 15-year-old's head and pushed the child's head toward the defendant's genitals, put the defendant's hands on the victim's genital area and breast, and the defendant's mouth on the victim's breast, was sufficient to convict the defendant of child molestation and attempted aggravated child molestation. Murray v. State, 293 Ga. App. 516, 667 S.E.2d 382 (2008).

Victim's trial testimony and evidence about the victim's outcry established that the defendant placed the defendant's sex organ in the victim's mouth. This evidence authorized the jury to find the defendant guilty of aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). Stillwell v. State, 294 Ga. App. 805, 670 S.E.2d 452 (2008), cert. denied, No. S09C0493, 2009 Ga. LEXIS 222 (Ga. 2009).

Sufficient evidence was presented to convict a defendant of aggravated child molestation under O.C.G.A. § 16-6-4(b) based on the 13-year-old victim's testimony that the defendant forced vaginal intercourse upon the victim, causing her vagina to bleed from lacerations to the hymen; the testimony of the defendant's girlfriend, who walked in on the defendant leaning the defendant's body between the victim's naked thighs while on a couch; and the testimony of the nurse who examined the victim and found the lacerations, which indicated sexual penetration. Bell v. State, 294 Ga. App. 779, 670 S.E.2d 476 (2008).

Sufficient evidence supported an adjudication of delinquency for committing aggravated child molestation even though no corroborative biological evidence was found on the victim's clothing; competent evidence was presented by testimony of the six-year-old victim and a physician, who found redness around the victim's anus that indicated trauma, that appellant juvenile committed an act of anal sodomy. In the Interest of M.B., 295 Ga. App. 51, 670 S.E.2d 881 (2008).

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With regard to a defendant's convictions on one count of enticing a child for indecent purposes, ten counts of child molestation, one count of aggravated child molestation, and three counts of cruelty to children in the first degree, regarding actions the defendant took toward the three children and what the children were forced to do to each other by gunpoint while the defendant was a babysitter for the children, the state proved the charged offenses beyond a reasonable doubt based on the testimony of the three victims and the victims' videotaped forensic interviews. It was within the province of the jury to disbelieve the defendant's testimony that the defendant did not commit the charged crimes. *Sullivan v. State*, 295 Ga. App. 145, 671 S.E.2d 180 (2008), cert. denied, No. S09C0624, 2009 Ga. LEXIS 215 (Ga. 2009).

Testimony that the defendant attempted to have intercourse with three children, exposed the defendant's nude body to one child, fondled one child's chest and another's genital area; and the defendant's statement that the defendant needed help to stop doing "things to kids" was sufficient to convict the defendant of three counts of child molestation under O.C.G.A. § 16-6-4(a). *Inman v. State*, 295 Ga. App. 461, 671 S.E.2d 921 (2009).

There was sufficient evidence to support a defendant's convictions for rape, incest, statutory rape, and child molestation against one of the defendant's children and a stepchild based on the defendant's repeated engagement in sexual intercourse with the children at various times while one was 12 to 16 years old and the other was 16 to 19 years old, and evidence of a letter threatening suicide on the defendant's part and apologizing for the actions against the children was also introduced against the defendant. However, the conviction on the charge of aggravated sexual battery against the stepchild was in error and required reversal since the state failed to introduce direct or circumstantial evidence sufficient to prove beyond a reasonable doubt that the defendant violated O.C.G.A. § 16-6-22.2 by penetrating that child's sexual organ with

a replica penis. *Connelly v. State*, 295 Ga. App. 765, 673 S.E.2d 274 (2009), cert. denied, No. S09C0892, 2009 Ga. LEXIS 260 (Ga. 2009).

There was sufficient evidence to support the defendant's conviction for aggravated child molestation in violation of O.C.G.A. § 16-6-4(c) based on the 11-year-old victim's testimony regarding the defendant's actions while the victim was sleeping over at the victim's aunt's home; the defendant's claim that the defendant did not molest the victim was within the jury's credibility evaluation. *Lucas v. State*, 295 Ga. App. 831, 673 S.E.2d 309 (2009).

Evidence was sufficient for any rational trier of fact to find the defendant guilty beyond a reasonable doubt of child molestation. A child testified at trial that the defendant touched the child "in the private" with the defendant's hand and with a towel after the child told the defendant that the child was itching; the child told the defendant to stop, but the defendant refused. *Pareja v. State*, 295 Ga. App. 871, 673 S.E.2d 343, aff'd, 286 Ga. 117, 686 S.E.2d 232 (2009).

Sufficient evidence existed to convict a defendant of child molestation under O.C.G.A. § 16-6-4(a) because a jury could infer that the defendant had open and intentional sexual intercourse with the minor victim's father in the presence of the victim based on the testimony of the victim that, while the father, who was nude, was performing oral sex on the victim, the defendant, who was not wearing shorts or underwear, came into the bedroom, got on top of the father, and moved up and down. *Mote v. State*, 297 Ga. App. 13, 676 S.E.2d 379 (2009).

Sufficient evidence existed to support a defendant's convictions for incest and child molestation with regard to actions the defendant took toward the defendant's own children based on the children's recorded police interviews that were played for the jury; the testimony from a licensed clinical social worker who was admitted as an expert in child sexual abuse and the abuse's effect on children; and the testimony of the pediatric nurse practitioner who examined the victims and stated that, although the victims' physical exams were normal, the results were consistent

with their reports of sexual abuse. The victims' testimony, standing alone, would have been sufficient to support the convictions; therefore, the trial court did not err by denying the defendant's motion for a directed verdict. *Hubert v. State*, 297 Ga. App. 71, 676 S.E.2d 436 (2009).

Sufficient evidence supported a defendant's convictions for aggravated child molestation under O.C.G.A. § 16-6-4(c) and three counts of child molestation under O.C.G.A. § 16-6-4(a) because the 13-year-old victim testified that, after repeatedly injecting the victim with methamphetamine, the defendant engaged in various sexual acts with the victim, including fondling the victim's breasts and engaging in intercourse; the defendant's roommate testified that the roommate saw the victim perform oral sex on the defendant. *Moe v. State*, 297 Ga. App. 270, 676 S.E.2d 887 (2009).

Evidence was sufficient to support convictions of child molestation, O.C.G.A. § 16-6-4(a), aggravated child molestation, O.C.G.A. § 16-6-4(c), and sodomy, O.C.G.A. § 16-6-2, because, in addition to the victim's testimony that the defendant had engaged in sexual intercourse and sodomy with the victim, there was physical evidence that supported the victim's testimony that the victim had been abused; the jury was authorized to believe the testimony of the victim as well as the expert witness who testified on behalf of the state. *Roberts v. State*, 297 Ga. App. 672, 678 S.E.2d 137 (2009).

Trial court properly denied a defendant's motion for a new trial and convicted the defendant on one count of child molestation with regard to the defendant's conduct of allowing an adult to have sexual intercourse with a 15-year-old victim at the defendant's home as the defendant failed to meet the burden of establishing ineffective assistance of counsel. *Carrie v. State*, 298 Ga. App. 55, 679 S.E.2d 30 (2009).

Convictions of aggravated child molestation, O.C.G.A. § 16-6-4(c), and child molestation, O.C.G.A. § 16-6-4(a), were supported by sufficient evidence under circumstances in which the nine-year-old victim testified that the defendant inserted the defendant's penis into the vic-

tim's vagina and bottom on more than one occasion, that the defendant also touched the victim's vagina, bottom, and breasts with the defendant's hands, the victim's breasts with the defendant's tongue, and, while in the victim's presence, touched the defendant's own penis with the defendant's hands; the victim made similar allegations to the detective who investigated the case, describing sexual acts performed by the defendant and stating that the defendant "would shake" or "choke" the defendant's penis in the victim's presence. A medical examination of the victim's anus revealed trauma consistent with recent penetration and the victim's 13-year old brother testified that the brother caught the defendant unzipping the defendant's pants near the victim, who was on hands and knees on the floor, naked from the waist down. *Garduno v. State*, 299 Ga. App. 32, 682 S.E.2d 145 (2009).

Whether the defendant's conduct in putting the defendant's private part in a child's face was an immoral or indecent act performed with the intent to arouse or satisfy the defendant's sexual desires was a question for the jury. Therefore, the evidence was sufficient to convict the defendant of child molestation. *Hobbs v. State*, 299 Ga. App. 521, 682 S.E.2d 697 (2009).

Although a 15-year-old victim did not use technical language, her description of oral sex with defendant, a 30-year-old male, was sufficient to support a conviction of aggravated child molestation under O.C.G.A. § 16-6-4(a). *Flewelling v. State*, 300 Ga. App. 505, 685 S.E.2d 758 (2009).

Child testified that, when the child was 11, the defendant forced the child by threats to engage in sex on multiple occasions; the child's parents testified as to the child's outcry statements to the parents. This evidence was sufficient to support the defendant's convictions of three counts of aggravated child molestation. *Hibbs v. State*, 299 Ga. App. 723, 683 S.E.2d 329 (2009), cert. denied, No. S10C0056, 2010 Ga. LEXIS 159 (Ga. 2010).

Prisoner's sufficiency of the evidence claim under 28 U.S.C. § 2254 was properly denied because, although the jury

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rejected testimony of forcible rape by a 13-year-old victim, the jury was free to accept testimony stating that the victim had sexual intercourse and performed oral sex on the prisoner and proof of consent was not required under O.C.G.A. §§ 16-6-2, 16-6-3, and 16-6-4 for the offenses of statutory rape and aggravated child molestation. *Dorsey v. Burnette*, No. 08-13700, 2009 U.S. App. LEXIS 5771 (11th Cir. Mar. 18, 2009) (Unpublished).

Evidence was sufficient to support a conviction of child molestation under O.C.G.A. 16-6-4(a) because the 15-year-old victim admitted to having sex with defendant on several occasions and that, on several of those occasions, the defendant had supplied the victim with crack cocaine, which they had smoked together. *Watson v. State*, 302 Ga. App. 619, 691 S.E.2d 378, cert. denied, U.S. , 131 S. Ct. 328, 178 L. Ed. 2d 213 (2010).

Testimony of the victim's mother and therapist, a videotape of the victim describing the incident, and the fact that defendant fled the country after a police interview provided sufficient evidence for a child molestation conviction. *Waters v. State*, 303 Ga. App. 187, 692 S.E.2d 802 (2010).

**Evidence was insufficient to support a conviction** under an indictment which charged that defendant molested the victim when defendant "fondled" the victim's genitals because the victim never testified that defendant fondled or even touched the victim's genitals. *Woods v. State*, 244 Ga. App. 359, 535 S.E.2d 524 (2000).

Evidence did not support a conviction for aggravated child molestation where there was no evidence that the defendant placed the defendant's mouth on the victim's genitals, as alleged in the indictment. *Jackson v. State*, 274 Ga. App. 26, 619 S.E.2d 294 (2005).

**Corroboration and sufficiency of evidence.** — Testimony of the victim, corroborated by evidence of her outcry to her grandmother, and the direct evidence of eyewitnesses was sufficient to authorize the jury's verdict that defendant commit-

ted child molestation beyond a reasonable doubt. *Turner v. State*, 223 Ga. App. 448, 477 S.E.2d 847 (1996).

**No fatal variance.** — Evidence supported a defendant's conviction for child molestation as there was not a fatal variance between the indictment and the evidence presented at trial since there was evidence that the defendant molested the victim when the defendant's teenaged child baby-sat the victim in June 2004, even though there was also evidence that the defendant's teenaged child only baby-sat for the victim once, in 2002. *Tadic v. State*, 281 Ga. App. 58, 635 S.E.2d 356 (2006).

Defendant argued that a child molestation indictment charged the defendant with touching a child's genital area with the defendant's sexual organ, but the evidence showed that the touching was with the defendant's hand. The difference between the defendant's touching the child's private area with the defendant's hand as opposed to the defendant's private part was not a fatal variance as it would not have misled the defendant in defending against the molestation charge. *Flores v. State*, 298 Ga. App. 574, 680 S.E.2d 609 (2009), cert. denied, No. S09C1796, 2010 Ga. LEXIS 27 (Ga. 2010).

Testimony by the defendant's child that the defendant put the defendant's sex organ "in my face" in a specific month and year authorized the jury to find that the defendant committed child molestation in the required time frame. Therefore, there was no fatal variance between the allegations of the indictment and the proof at trial. *Hobbs v. State*, 299 Ga. App. 521, 682 S.E.2d 697 (2009).

There was no fatal variance between an indictment charging the defendant with child molestation and the proof at trial because although the evidence differed somewhat from the allegation in the indictment, there was no material difference; the law does not require a showing that the victim was touched beneath his or her clothing, and the issue of whether the touching was sexual in nature is for the jury to decide. *Kay v. State*, 306 Ga. App. 666, 703 S.E.2d 108 (2010).

**Failure to preserve lab sample evidence did not warrant dismissal.** —

Trial court's order dismissing an indictment charging the defendant with rape, incest, aggravated child molestation, and child molestation on grounds that the state improperly failed to preserve lab samples taken from the victim was reversed because the defendant failed to show that the failure was the result of bad faith on the part of the state or the police, and the value of the sample to the defendant was only potentially exculpatory. *State v. Brady*, 287 Ga. App. 626, 653 S.E.2d 72 (2007).

**Evidence sufficient for conviction of aggravated child molestation involving oral sodomy and child molestation.** *Deyton v. State*, 182 Ga. App. 73, 354 S.E.2d 625 (1987).

**Evidence sufficient for conviction of aiding and abetting child molestation.** — Trial court properly denied a defendant's motion under O.C.G.A. § 17-9-1(a) for an acquittal in the defendant's trial for aiding and abetting a housemate in committing acts of aggravated child molestation against the defendant's children, because there was ample evidence that the defendant acquiesced in and encouraged the acts of child molestation by forcing the children to sleep in the same room with the housemate although the children objected. *Valentine v. State*, 301 Ga. App. 630, 689 S.E.2d 76 (2009).

**Reliability hearing required.** — Defendant's child molestation conviction was reversed as given that the child victim was three-years-old, that the victim gave inconsistent statements, that the victim might have been coached by defendant's estranged spouse, that law enforcement was involved in the child's interviews, that 75 out-of-court hearsay statements of the child were introduced by the state, and that the child hearsay statements formed the bulk of the evidence against defendant, a pretrial Gregg hearing on the reliability of the statements was required under O.C.G.A. § 24-3-16. *Ferreri v. State*, 267 Ga. App. 811, 600 S.E.2d 793 (2004).

**Proof of victim's age.** — In a prosecution for child molestation, even though the state was not restricted to the dates stated in the indictment, it was nevertheless required to prove that the victim was

under the age of 16, because that was an essential element of the crime. *Terrell v. State*, 245 Ga. App. 291, 536 S.E.2d 528 (2000).

**Directed verdict of acquittal unwarranted** as: (1) the credibility of the child victim and any conflicts in the trial testimony were matters solely within the province of the jury to decide; (2) physical findings were not required to corroborate the charges of child molestation, aggravated sexual battery, and aggravated child molestation; and (3) the victim's testimony alone was sufficient to authorize the jury to find the defendant guilty of the crimes charged under the standard of *Jackson v. Virginia*. *Hutchinson v. State*, 287 Ga. App. 415, 651 S.E.2d 523 (2007).

**Defense counsel not ineffective in child molestation case.** — In a child molestation prosecution, the defendant contended defendant's trial counsel was deficient in failing to attack the validity of the search warrant used to obtain a DNA sample as the supporting affidavit failed to disclose that the victims' outcry was made to their parent shortly after the parent lost primary custody of the parent's other child. This claim failed because even if this evidence had been included, the victim's statement to the affiant that the defendant fathered the victim's child was sufficient to support the warrant. *Farris v. State*, 293 Ga. App. 674, 667 S.E.2d 676 (2008).

With regard to a defendant's convictions for false imprisonment, rape, and aggravated child molestation arising from allegations that the defendant sexually molested a 9-year-old relative, the defendant failed to meet the burden of establishing that the defendant received ineffective assistance of counsel as to trial counsel's alleged failure to proffer the defendant's anticipated testimony regarding the victim's alleged sexual behavior as the term "hot" as used by the defendant regarding the victim was explained by the officer who interviewed the defendant as meaning that the defendant believed that the victim was sexually active with another, thus, the jury was made aware of what the defendant meant by the term, as opposed to being left with the mistaken impression that the defendant found the victim sexu-

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ally attractive. Additionally, the defendant failed to establish any prejudice with regard to the contention that trial counsel provided ineffective assistance by not objecting or moving for a mistrial regarding a fellow inmate's testimony and a letter regarding the defendant's future dangerousness as the court found that the record showed that trial counsel did object and was overruled. Furlow v. State, 297 Ga. App. 375, 677 S.E.2d 412 (2009).

**Defendant was properly sentenced for both sodomy and child molestation** since the indictment as drawn charged defendant specifically with two separate and different sexual acts, and the child molestation was proved without any reference to the act of sodomy and was factually and legally distinct from sodomy. Garrett v. State, 188 Ga. App. 176, 372 S.E.2d 506 (1988).

**Sentencing for child molestation and rape.** — In defendant's trial on charges of child molestation and statutory rape, the trial court did not err by imposing separate sentences for each crime because the evidence showed that defendant committed both crimes on multiple occasions. Little v. State, 260 Ga. App. 87, 579 S.E.2d 84 (2003).

Defendant's sentence to 20-year concurrent terms (10 to serve, 10 on probation), each, for aggravated child molestation and child molestation fell within the sentencing ranges under former O.C.G.A. § 16-6-4 for crimes committed between October 1992 and December 1994 and was not void. Reynolds v. State, 272 Ga. App. 91, 611 S.E.2d 750 (2005).

**Mandatory child molestation sentence.** — Mandatory sentence for aggravated child molestation of 10 years without parole pursuant to O.C.G.A. §§ 16-6-4(d)(1) and 17-10-6.1 was not cruel and unusual punishment as applied to the defendant, despite the fact that the defendant was 18 years old at the time of the act and the victim was only 4 years younger. Widner v. State, 280 Ga. 675, 631 S.E.2d 675 (2006).

**Chemical castration sentence unauthorized.** — Sentence of chemical castration was unauthorized for the defen-

dant's convictions of, inter alia, rape and aggravated sodomy. Johnson v. State, 280 Ga. App. 341, 634 S.E.2d 134 (2006).

**Sentence violated minimum sentencing requirements.** — After defendant was convicted on three counts of aggravated child molestation and nine counts of child molestation, the trial court erred as a matter of law in merging the three aggravated child molestation convictions into the child molestation convictions, thereby violating the minimum sentencing requirements under O.C.G.A. § 17-10-6.1(a). Graham v. State, 239 Ga. App. 429, 521 S.E.2d 249 (1999).

**Sentence not excessive.** — Sentence of defendant who was convicted of a single count of child molestation to 14 years confinement to serve seven years and the remainder probated was not excessive. Jones v. State, 247 Ga. App. 43, 543 S.E.2d 72 (2000).

Trial court's imposition of a 10-year probated sentence on a count of aggravated child molestation was null and void; O.C.G.A. § 16-6-4(d)(1) imposed a 10-year minimum sentence for the offense, and under O.C.G.A. § 17-10-6.1(b), because the offense was a serious violent felony, no portion of the 10-year sentence was to be probated. Priest v. State, 281 Ga. App. 89, 635 S.E.2d 377 (2006).

**Increased sentence on retrial was not vindictive.** — Defendant's increased sentence after a retrial for child molestation was not vindictive because the sentencing court's rationale, which was the defendant's additional convictions of child molestation in a similar pattern of aligning himself with a young girl's mother, rebutted any presumption of vindictiveness, and the sentence was within the allowable range pursuant to O.C.G.A. § 16-6-4(b)(1). Frazier v. State, 302 Ga. App. 346, 691 S.E.2d 247 (2010).

**Crimes involving different conduct did not merge for sentencing.** — Crimes contained in counts one and two did not merge for sentencing purposes because they involved different conduct, specifically, count one required proof that defendant kissed and sucked on the victim's neck, while count two required proof that defendant wrestled with the victim on a bed and removed the victim's under-

wear. Lunsford v. State, 260 Ga. App. 818, 581 S.E.2d 638 (2003).

**Probation condition vague and overly broad.** — Probation condition requiring defendant not to be in the presence of a child under the age of 18 without the immediate presence of a supervisor could be applied to prohibit the defendant from shopping at any store without an approved supervisor, and as written could be applied in ways not related to sentencing objectives and therefore that condition of probation is vacated. Tyler v. State, 279 Ga. App. 809, 632 S.E.2d 716 (2006), cert. denied, 2006 Ga. LEXIS 810 (Ga. 2006); overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007).

**Failure to advise defendant of requirement to register as sex offender.**

— Trial court erred in denying the defendant's motion to withdraw the defendant's guilty plea to two counts of child molestation because the defendant's trial counsel failed to advise the defendant that entering a plea of guilty to child molestation would necessitate that the defendant comply with the requirements of the state's sex offender registry statute, O.C.G.A. § 42-1-12; the defendant was subject to the sex offender registration requirements at the time that the defendant entered into defendant's plea, the terms of the sex offender registry statute were succinct, clear, and explicit in setting forth the consequences of defendant's guilty plea, and defendant's trial counsel could have readily determined that defendant was required to register and conveyed that information to the defendant. Taylor v. State, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

**Good cause shown for extended period of supervised probation.** — Trial court did not err in sentencing the defendant to more than two years' supervised probation after a jury convicted the defendant of child molestation because the defendant's sentence to an extended period of supervised probation was pronounced after notice and hearing and for good cause shown as required by O.C.G.A. § 17-10-1(a)(2); the "good cause shown" was to protect children. O'Neal v. State, 304 Ga. App. 548, 696 S.E.2d 490 (2010).

**Sentences were well within statutory limits** of O.C.G.A. § 16-6-4(b), and

there was no reversible error because defendant voluntarily pled guilty to three counts of child molestation and there was no evidence that the trial court considered a presentence report or a medical exam in aggravation of punishment. Lynn v. State, 270 Ga. App. 867, 608 S.E.2d 542 (2004).

**Motion for new trial properly denied.**

— On appeal from two child molestation convictions, the defendant was properly denied a new trial because the admission of privileged testimony was not erroneous, and trial counsel was not ineffective by: (a) ignoring a consent order barring the state from introducing any written or oral admissions or statements the defendant made before and after a polygraph examination; (b) failing to assert the attorney-client privilege with respect to a polygraph expert's testimony; and (c) failing to adequately prepare a second polygraph expert who testified for the defense at trial; in fact, (1) counsel neither ignored the consent order nor performed deficiently when stipulating to the admission of the polygraph results; and (2) even assuming that counsel was deficient in failing to consult the defendant regarding the attorney-client privilege, the defendant failed to show a reasonable probability that the result would have been different in the absence of the second expert's cumulative testimony. Adesida v. State, 280 Ga. App. 764, 634 S.E.2d 880 (2006).

On retrial on one count of child molestation and two counts of aggravated child molestation, the defendant was not entitled to a new trial on grounds that trial counsel was ineffective in admitting notes generated by a forensic evaluator who interviewed the child victim as the defendant had previously been found guilty in the first trial in which the notes were not introduced. Mewborn v. State, 285 Ga. App. 187, 645 S.E.2d 669 (2007).

On appeal from a conviction for two counts of aggravated child molestation, the trial court did not err in denying the defendant a new trial as no abuse of discretion resulted in excluding evidence that one of the victims made prior false accusations of sexual abuse against an older cousin because such presented a credibility issue for the trial court to re-

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solve in analyzing whether there was a reasonable probability of falsity in the accusation. *Roberts v. State*, 286 Ga. App. 346, 648 S.E.2d 783 (2007).

Trial court properly denied the defendant's motion for a new trial on appeal from the defendant's convictions of child molestation and aggravated child molestation because: (1) venue was adequately shown by the testimony of a single witness; (2) the defendant's trial counsel was not ineffective by failing to prepare for trial, investigate the case, subpoena important documents, interview key witnesses, and object to damaging testimony; and (3) the defendant failed to show that the outcome of the trial would have been different but for counsel's alleged shortcomings. *Brooks v. State*, 286 Ga. App. 209, 648 S.E.2d 724 (2007).

**Admission of challenged evidence deemed harmless error.** — In a prosecution against the defendant for child molestation, enticing a child for indecent purposes, and exhibiting pornography to a minor, even if the appeals court assumed that the word "catheter" should have been redacted from what the defendant apparently conceded was an otherwise relevant list of items found in a search, the trial court's failure to do so was harmless error because it was highly improbable that such failure contributed to the verdict given the overwhelming evidence of the defendant's guilt. *Goldey v. State*, 289 Ga. App. 198, 656 S.E.2d 549 (2008).

In a child molestation prosecution, the victim's therapist testified that a caseworker told the therapist that the victim had made an outcry alleging sexual abuse by the defendant and that the victim's sibling may also have been abused. If admission of this testimony was error, the admission was harmless because the evidence was cumulative of evidence that had been properly admitted. *Ortiz v. State*, 295 Ga. App. 546, 672 S.E.2d 507 (2009), cert. denied, No. S09C0803, 2009 Ga. LEXIS 269 (Ga. 2009).

**Expert Testimony**

**Error in admitting social worker's opinion not harmless.** — It was error to

allow a social service worker to testify as to the social worker's opinion that the child had been molested, and such error could not be said to be harmless, where weight of evidence was not overwhelming and did not include medical or psychological testimony, and where charges were not made until long after the alleged incident and were then raised in the context of an acrimonious divorce action. *Putnam v. State*, 231 Ga. App. 190, 498 S.E.2d 340 (1998).

**Doctor may testify on "ultimate issue".** — Even if a doctor who had examined victim and testifies as an expert expresses an opinion on the "ultimate issue," i.e., the molestation of the child, such an opinion is appropriate in child molestation cases and there is no constitutional error which is reviewable, absent contemporaneous objection. *Pegg v. State*, 183 Ga. App. 668, 359 S.E.2d 678 (1987).

**Psychologist's testimony regarding victim's credibility.** — Trial court properly admitted testimony from a psychologist who treated an 11-year-old child after the child told several people that the victim's step-parent had molested the victim despite the child's previous episodes of lying. *Horne v. State*, 262 Ga. App. 604, 586 S.E.2d 13 (2003).

**Unlicensed psychologist.** — Testimony by an unlicensed psychologist was not rendered inadmissible in a prosecution for child molestation and attempted child molestation, based solely on a witness's lack of licensure, as Georgia law carved out an exception to the licensing requirements for those witnesses who, like the state's expert, were practicing under supervision in order to obtain a license. *Nelson v. State*, 279 Ga. App. 859, 632 S.E.2d 749 (2006).

**Registered nurse.** — In a prosecution on charges of both child molestation and aggravated child molestation, the trial court did not abuse the court's discretion in allowing an examining registered nurse to give an opinion that a child sex abuse victim's injuries were consistent with ones caused by penetration by a finger when, prior to testifying, the nurse outlined the relevant background, completion of a sexual assault nurse examiner's program and advanced pediatric training under the su-

pervision of a doctor involved in child abuse cases, and training and experience in performing numerous pelvic examinations on child abuse victims. Rodriguez v. State, 281 Ga. App. 129, 635 S.E.2d 402 (2006).

Trial court did not err in denying the defendant's motion in limine to exclude a nurse's testimony, stating that the victim's normal physical examination was consistent with claims of molestation, as the nurse simply testified that the victim's physical examination results were consistent with the allegations, and as such was a permissible expression of the expert's opinion. Noe v. State, 287 Ga. App. 728, 652 S.E.2d 620 (2007).

**Expert testimony regarding child sexual abuse accommodation syndrome** is properly admissible in appropriate cases. However, the state may not utilize the child sexual abuse profile as an affirmative weapon unless the defendant has placed defendant's own character in issue or raised some defense to which the syndrome is relevant. Allison v. State, 179 Ga. App. 303, 346 S.E.2d 380 (1986), rev'd on other grounds, 256 Ga. 851, 353 S.E.2d 805 (1987).

Testimony concerning the "child sexual abuse accommodation syndrome" was properly admitted, even though the existence of such a syndrome had not been established to a verifiable scientific certainty, since testimony concerning this syndrome has been permitted in numerous other child abuse cases in this state. Rolader v. State, 202 Ga. App. 134, 413 S.E.2d 752 (1991), cert. denied, 202 Ga. App. 907, 413 S.E.2d 752 (1992).

**Ineffective assistance in failure to object to psychologist's testimony.** — Defense counsel's failure to object to a psychologist's testimony that the psychologist's evaluation strongly suggested that the victim was sexually abused as alleged was ineffective assistance because, considered in context, the testimony improperly amounted to a factual conclusion regarding whether the child was sexually abused and whether the defendant was the abuser; the expert's opinion was not superfluous, but usurped the jury's authority. It was highly probable that the failure to object to this testimony contrib-

uted to the guilty verdict. Pointer v. State, 299 Ga. App. 249, 682 S.E.2d 362 (2009).

**Counsel not ineffective for failing to object to child therapist's testimony.** — Defendant did not establish that defendant's trial counsel was ineffective for failing to object to a child therapist's testimony on the ground that the testimony bolstered the child molestation victim's accusations because the therapist never expressly stated that the therapist believed the victim had been abused; although the defendant argued that the therapist's testimony was subject to that interpretation, the testimony the defendant cited did not address the ultimate issue before the jury or bolster the victim's credibility. O'Neal v. State, 304 Ga. App. 548, 696 S.E.2d 490 (2010).

#### Merging With Other Offenses

**Relation to rape and aggravated sodomy.** — Jury's verdict of not guilty of rape was not repugnant to and inconsistent with the verdicts of guilty for aggravated sodomy and child molestation. The elements of each of the three crimes charged are different, and the conduct related to each, as evidenced in this case, was also different, distinct, and separate. Hill v. State, 183 Ga. App. 654, 360 S.E.2d 4 (1987).

**Not lesser included offense of aggravated sodomy.** — Child molestation is not a lesser included offense of aggravated sodomy, either as a matter of law, under either O.C.G.A. § 16-1-6(2) or O.C.G.A. § 16-1-7(a), or as a matter of fact. Hill v. State, 183 Ga. App. 654, 360 S.E.2d 4 (1987).

**Defendant convicted on child molestation despite sodomy acquittal.** — Defendant's acquittal on a separate charge of aggravated sodomy did not require that defendant should also have been acquitted on an aggravated child molestation charge. Because there was evidence of physical injury to support the aggravated molestation charge, it was not necessary to prove sodomy to maintain the aggravated child molestation conviction. Baker v. State, 228 Ga. App. 32, 491 S.E.2d 78 (1997).

**Offense of aggravated sodomy did not factually merge into the offense**

### Merging With Other Offenses (Cont'd)

**of child molestation**, when one of the offenses was established by proof of the same or less than all the facts required to prove the other. *LeGallienne v. State*, 180 Ga. App. 108, 348 S.E.2d 471 (1986).

Child molestation in connection with the fondling of the victim's vagina did not merge with aggravated sodomy charges based on two acts of oral sex, where the acts of sodomy were not used to establish the child molestation charge. *Pressley v. State*, 197 Ga. App. 270, 398 S.E.2d 268 (1990).

Child molestation and aggravated sodomy are legally distinct and when the indictment for each offense is based on separate and distinct acts, the offenses do not merge. *Vest v. State*, 211 Ga. App. 882, 440 S.E.2d 765 (1994).

**Charge of two crimes for same described act.** — When the evidence showed that, at least as to two of the three victims, the defendant committed the illegal act charged in each pair of counts aggravated sodomy and aggravated child molestation on more than one occasion, but the indictment did not charge the defendant with separate and distinct acts but merely charged the defendant with two different crimes for the same described act, the defendant should have been sentenced for only one of the two offenses for which the defendant was convicted as to each of the three victims. This case is distinguishable from those cases in which the court has upheld the conviction and sentencing for separate crimes and rejected the defendant's claim of merger because the indictment charged the defendant with multiple, distinct offenses. *Lewis v. State*, 205 Ga. App. 29, 421 S.E.2d 339 (1992).

Defendant's aggravated child molestation charge merged with the aggravated sodomy charge, as both were based on the same act of sodomy; while defendant committed multiple acts of anal sodomy against one of the victims, the indictment did not charge defendant with separate and distinct acts but merely charged defendant with two different crimes for the same described act. *Wilkerston v. State*, 267 Ga. App. 585, 600 S.E.2d 677 (2004).

Aggravated sodomy count of the indictment in violation of O.C.G.A. § 16-6-2 should have merged into the aggravated child molestation count in violation of O.C.G.A. § 16-6-4 as both alleged that the defendant had the victim perform oral sex on the defendant. *Howard v. State*, 281 Ga. App. 797, 637 S.E.2d 448 (2006).

**Child molestation and sexual battery.** — Even though the facts in an indictment for child molestation were sufficient to charge the lesser offense of sexual battery, where the evidence presented demanded a finding of child molestation or nothing, the trial court did not err by refusing to charge on sexual battery. *Strickland v. State*, 223 Ga. App. 772, 479 S.E.2d 125 (1996).

Sexual battery can be a lesser included offense of child molestation in particular cases where the facts alleged in the indictment for child molestation also include all of the elements of sexual battery. *Strickland v. State*, 223 Ga. App. 772, 479 S.E.2d 125 (1996).

When the jury by the jury's verdict finds the defendant guilty of multiple offenses arising from the same conduct, the court does not err in convicting and sentencing the defendant for the greater offense after merging the lesser offenses into it. Conviction of both sexual battery and child molestation justified the merger of the battery offense into the molestation offense because the molestation offense was the greater offense; a defendant was properly sentenced as defendant's sentence was within the maximum prescribed for a first offense of child molestation. *Dorsey v. State*, 265 Ga. App. 597, 595 S.E.2d 106 (2004).

Because the evidence was sufficient to convict defendant of either sexual battery, in violation of O.C.G.A. § 16-6-22.1(b), or child molestation, in violation of O.C.G.A. § 16-6-4, the trial court was authorized to merge the lesser offense of sexual battery into the greater offense of child molestation. *Webb v. State*, 270 Ga. App. 817, 608 S.E.2d 241 (2004).

Since the question whether defendant committed sexual battery was not posed by the evidence presented, the trial court did not err when the court refused to charge the jury on sexual battery as a

lesser included offense of child molestation. *Walker v. State*, 279 Ga. App. 749, 632 S.E.2d 482 (2006).

Defendant's conviction for sexual battery by touching the victim's genital area merged with the defendant's conviction for child molestation by touching the victim's vagina, and the defendant's conviction for sexual battery by touching the victim's breast merged with the defendant's conviction for child molestation by touching the victim's breast. Therefore, the trial court erred in imposing a separate sentence on the jury's verdicts on these sexual battery counts. *Gunn v. State*, 300 Ga. App. 229, 684 S.E.2d 380 (2009).

Trial court properly declined to merge a sexual battery offense, O.C.G.A. § 16-6-22.1(b), into a child molestation offense under O.C.G.A. § 16-6-4. The sexual battery was established by evidence that the defendant touched the 15-year-old victim's breasts, and the child molestation proof included evidence of the separate act of touching the victim's stomach. *Haynes v. State*, 302 Ga. App. 296, 690 S.E.2d 925 (2010).

**Child molestation and aggravated sexual battery.** — Even though the defendant could be properly prosecuted for either crime, where the evidence shows a single act, the trial court erred in failing to merge the offenses for sentencing purposes. *Shamsuddeen v. State*, 255 Ga. App. 326, 565 S.E.2d 544 (2002).

Trial court properly refused to merge, for sentencing purposes, defendant's convictions for aggravated sexual battery and child molestation since the charged offense of aggravated sexual battery required proof of penetration, whereas the charged offense of child molestation did not. As a result, the separate acts were neither factually nor legally contained in the other respective count and, therefore, the offenses did not merge. *Daniel v. State*, 292 Ga. App. 560, 665 S.E.2d 696 (2008), cert. denied, 2008 Ga. LEXIS 891 (Ga. 2008).

**Simple battery not lesser included offense.** — Simple battery, as defined in O.C.G.A. § 16-5-23, is not a lesser crime included in the crime of child molestation as defined in O.C.G.A. § 16-6-4. *State v.*

*Stonaker*, 236 Ga. 1, 222 S.E.2d 354, cert. denied, 429 U.S. 833, 97 S. Ct. 98, 50 L. Ed. 2d 98 (1976).

Trial court's refusal to charge on simple battery as a lesser included offense of child molestation was not error, where the victim testified to defendant's commission of acts of fondling which, if believed by the jury, would clearly show that defendant had committed the crime of child molestation. *Brooks v. State*, 197 Ga. App. 194, 397 S.E.2d 622 (1990).

**Child molestation and enticing child for indecent purposes.** — When the appellant stands convicted under a two-count indictment charging the appellant with enticing a child for indecent purposes under O.C.G.A. § 16-6-5 and child molestation under O.C.G.A. § 16-6-4, one crime is not included within the other as a matter of law. *Williams v. State*, 156 Ga. App. 481, 274 S.E.2d 826 (1980).

Child molestation and enticement are separate offenses, and the combination of attempt with child molestation does not bring it within the purview of enticement. *Wittschien v. State*, 259 Ga. 448, 383 S.E.2d 885 (1989).

Child molestation and enticement counts merged as a matter of fact where the enticement counts of the indictment specifically alleged that defendant enticed the child for the purpose of child molestation and, thus, in order to prove the enticement counts, the prosecution had to prove all the facts used to prove the child molestation counts. *Wells v. State*, 222 Ga. App. 587, 474 S.E.2d 764 (1996).

Child molestation and enticement are distinct and separate offenses that are not included within each other as a matter of law, as the offense of enticement has an element of asportation not found in the offense of child molestation. *Veasey v. State*, 234 Ga. App. 795, 507 S.E.2d 799 (1998).

Charges of child molestation and enticement did not merge as a matter of fact under the circumstances of the case since the acts which constituted enticement were separate from and completed before the acts which constituted molestation. *Leon v. State*, 237 Ga. App. 99, 513 S.E.2d 227 (1999).

### Merging With Other Offenses (Cont'd)

**State was not required to charge a defendant with child molestation** in order to obtain a conviction for enticing a child for indecent purposes as those are two separate crimes involving different elements, and generally, enticement is completed before child molestation occurs. *Jackson v. State*, 274 Ga. App. 26, 619 S.E.2d 294 (2005).

**Charges on lesser offenses of public indecency and contributing to delinquency of minor** are not required where the uncontradicted evidence shows completion of the greater offense, child molestation. *Morton v. State*, 168 Ga. App. 18, 308 S.E.2d 41 (1983).

**Child molestation as lesser included offense of rape.** — Court's refusal to give defendant's requested charge on child molestation as a lesser included offense of rape was error requiring reversal of defendant's conviction for rape. *Pruitt v. State*, 258 Ga. 583, 373 S.E.2d 192 (1988), cert. denied, 493 U.S. 1093, 110 S. Ct. 1170, 107 L. Ed. 2d 1072 (1990).

When the jury was only authorized to find defendant either guilty or not guilty of the rape charges and there was no evidence authorizing the jury to return a guilty verdict on child molestation as a lesser included offense of rape, the trial court did not err in refusing to give defendant's requested jury charge. *Bailey v. State*, 209 Ga. App. 390, 433 S.E.2d 610 (1993).

Child molestation and statutory rape offenses did not merge where they were separate legal offenses, and because the victim reported at least two separate acts of sexual intercourse with the victim's step-parent. *McMillian v. State*, 263 Ga. App. 782, 589 S.E.2d 335 (2003).

**No merger if separate occasions.** — When the defendant sexually assaulted the two-year old victim on at least two separate occasions, there were two separate legal offenses that did not merge as a matter of law for sentencing purposes. *James v. State*, 268 Ga. App. 851, 602 S.E.2d 854 (2004).

Defendant's conviction for child molestation by touching a child's anus with

defendant's genitals and aggravated child molestation by placing defendant's genitals in the child's anus did not merge as the child testified that defendant put the defendant's "private" in the child's anus on four occasions. *Neal v. State*, 271 Ga. App. 283, 609 S.E.2d 204 (2005).

Trial court properly refused to merge a defendant's convictions as the offenses of aggravated child molestation and sexual exploitation of children were separate legal offenses and did not merge as a matter of law; the offenses did not merge as a matter of fact as: (1) the defendant was charged with five separate acts of aggravated child molestation, each of which was based on different facts; (2) the 35 convictions of sexual exploitation of children were based on the distinct actions of the defendant creating 32 separate sexually explicit photographic or video images and distributing three other sexually explicit images over the Internet; and (3) the defendant's creation of sexually explicit images of several of the sex acts that constituted the basis for the aggravated child molestation charges were separate actions warranting a separate charge and conviction, as the offenses of aggravated child molestation were completed separately and independently of the defendant photographing or videotaping the acts. *Walhall v. State*, 281 Ga. App. 434, 636 S.E.2d 126 (2006).

Because the record contained sufficient evidence of multiple acts committed against the victim by the defendant for the trier of fact to find the defendant guilty beyond a reasonable doubt of both aggravated child molestation and aggravated sodomy, the offenses did not merge as a matter of law or fact; thus, the evidence supporting one count was not "used up" in proving the other count. *Forbes v. State*, 284 Ga. App. 520, 644 S.E.2d 345 (2007).

**Molestation counts did not factually merge.** — Merger was not appropriate on counts eight, nine, and ten in the defendant's child molestation case: count eight accused the defendant of placing the defendant's penis against the genital area of the victim; count nine accused the defendant of having the victim lick the defendant's buttocks; and count ten accused

the defendant of placing the defendant's hand on the genital area of the victim. The evidence in the record established that each of these counts were separate and distinct crimes that were completed before the defendant perpetrated the next, and therefore, the crimes did not factually merge. *Sarratt v. State*, 299 Ga. App. 568, 683 S.E.2d 10 (2009).

**Lesser offense of cruelty to children** did not merge into the greater offenses of rape and aggravated child molestation, where the facts that the victim was threatened and terrorized, that she screamed in pain, and that she continued to experience pain and discomfort and would suffer from the venereal diseases she contracted from defendant forever were not needed to prove the elements of rape and aggravated child molestation. *Ranalli v. State*, 197 Ga. App. 360, 398 S.E.2d 420 (1990).

**Child molestation and attempted statutory rape.** — Trial court did not err in merging an attempted statutory rape charge into a child molestation charge, instead of merging the child molestation counts into the attempted statutory rape count; the evidence establishing that defendant fondled the victim's breasts was not used up in proving that the defendant removed their clothing and attempted penetration; accordingly, three child molestation charges were not subject to merger with the attempted statutory rape count. *Leaptrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Trial court did not err in merging an attempted statutory rape charge into a child molestation charge as the state was required to prove the commission of an immoral or indecent act (removing the victim's and defendant's clothing), the victim's age was less than 16, and defendant's intent to arouse or satisfy his own or the child's sexual desires; thus, the state used up the evidence that defendant committed attempted statutory rape in establishing that he committed child molestation. *Leaptrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

**Statutory rape.** — Conviction for child molestation merges into the crime of statutory rape and when there is a conviction for both the conviction and sentence for

the former crime must be reversed. *Coker v. State*, 164 Ga. App. 493, 297 S.E.2d 68 (1982).

Trial court did not err in instructing the jury that it could return a verdict on child molestation, where defendant had been indicted for statutory rape and the evidence showed that child molestation was a lesser included offense of statutory rape as a matter of fact. *Burgess v. State*, 189 Ga. App. 790, 377 S.E.2d 543 (1989), aff'd, 194 Ga. App. 179, 390 S.E.2d 92 (1990).

Double jeopardy was not involved by a jury verdict finding the defendant guilty of rape and child molestation based on the same conduct where the trial court merged the two counts and entered a judgment of conviction and a sentence only on the rape count. *Mackey v. State*, 235 Ga. App. 209, 509 S.E.2d 68 (1998).

Trial court erred when it convicted defendant of child molestation because facts which were used to prove child molestation were the same facts which proved statutory rape, and the court should have merged the child molestation conviction with the statutory rape conviction. *Dorsey v. State*, 265 Ga. App. 404, 593 S.E.2d 945 (2004).

Guilty verdict entered against a defendant on a charge of statutory rape, and a not guilty verdict against that same defendant on a charge of child molestation, stemming from the same act of intercourse with the victim, were not mutually exclusive or inconsistent, as the fact that the jury acquitted defendant of the child molestation charge did not make the evidence of statutory rape any less sufficient; further, even if the acquittal was inconsistent with the conviction, the inconsistency could not be used as an avenue to challenge the conviction, since the inconsistent-verdict rule was abolished in Georgia. *Perez-Hurtado v. State*, 275 Ga. App. 162, 620 S.E.2d 435 (2005).

Defendant's conviction of aggravated child molestation was not based on the same conduct that would have supported a conviction for statutory rape, so the rule of lenity was inapplicable. *Wilson v. State*, 279 Ga. App. 459, 631 S.E.2d 391 (2006), cert. denied, 2006 Ga. LEXIS 1036 (Ga. 2006).

While an indictment did not charge the

### Merging With Other Offenses (Cont'd)

defendant with statutory rape, O.C.G.A. § 16-6-3, the allegations of the indictment notified the defendant that statutory rape could have been considered a lesser included offense of the indicted crime of child molestation; since the defendant admitted that the defendant tried to place the defendant's genitals in the victim's genitals, and since the victim testified that "it hurt," a jury instruction on statutory rape as a lesser included offense of child molestation was proper. Stulb v. State, 279 Ga. App. 547, 631 S.E.2d 765 (2006).

Trial court properly denied defendant's request to have defendant's convictions for statutory rape and aggravated child molestation merged for sentencing purposes as the crimes were distinct offenses with different elements; testimony of the victim also authorized the jury to find that the crimes occurred on different occasions over a period of months, and therefore the crimes did not merge as a matter of either law or fact. Williams v. State, 291 Ga. App. 173, 661 S.E.2d 601 (2008).

Trial court did not err in refusing to merge a child molestation count with a statutory rape count because the evidence showed that the defendant had sexual intercourse with the victim on multiple occasions, and since the victim reported at least two separate acts of sexual intercourse, it could not be said that the convictions were based on the same conduct; therefore, a conviction and sentence could be authorized on both the child molestation charge and the statutory rape charge. Wilder v. State, 304 Ga. App. 891, 698 S.E.2d 374 (2010).

**Child molestation and incest.** — Defendant's child molestation in violation of O.C.G.A. § 16-6-4, rape in violation of O.C.G.A. § 16-6-1, and incest in violation of O.C.G.A. § 16-6-22 charges did not merge as a matter of law or fact because they were separate legal offenses and because the victim's testimony and other evidence showed that the victim suffered well over two separate acts of sexual intercourse and additional instances involving oral and anal sex with the defendant.

Allen v. State, 281 Ga. App. 294, 635 S.E.2d 884 (2006).

**Appellant was not convicted twice for same conduct as matter of fact** when the appellant was convicted of violating O.C.G.A. §§ 16-6-4 and 16-6-5. Williams v. State, 156 Ga. App. 481, 274 S.E.2d 826 (1980).

### Jury Issues and Instructions

**Whether touching is of sexual nature is a question for the jury.** — When the defendant teacher's evidence was that the defendant's touching of minor students was not of a sexual nature, the issue was one for the jury to decide. Walsh v. State, 236 Ga. App. 558, 512 S.E.2d 408 (1999).

**No claim of remaining juror confusion.** — In a child molestation case, where the jury was only to convict for conduct in the way and manner alleged in the indictment, which was an act with intent to arouse the defendant, not the child, but the statute covers both alternatives, the jury was not permitted to convict defendant on the child's sexual desires where the jury was recharged on the law, the jury election not to return to the courtroom with further questions, as it was told it could do, undercut any claim of remaining juror confusion. Branan v. State, 204 Ga. App. 205, 419 S.E.2d 86 (1992).

**Questions requiring prejudgment of case.** — Trial court abused the court's discretion by prohibiting defense counsel from asking prospective jurors whether the prospective jurors had strong feelings about child molestation, and if those feelings would impair their judgment or make it difficult for the prospective jurors to judge the case; but, this error was harmless given the overwhelming evidence of the defendant's guilt regarding the numerous acts of sodomy that the defendant engaged in with the defendant's child, the scientific evidence which linked the defendant's DNA to the semen found in the victim's mouth, and the defendant's attempt to allude the authorities until the defendant was apprehended in Tennessee. Meeks v. State, 269 Ga. App. 836, 605 S.E.2d 428 (2004).

**Charge to jury.** — It was error for the court to charge the jury on O.C.G.A.

§ 16-6-4 in the statute's entirety since the indictment charged the defendant only with committing aggravated child molestation by committing sodomy. *Perguson v. State*, 221 Ga. App. 212, 470 S.E.2d 909 (1996).

Trial court did not err in reciting O.C.G.A. § 16-6-4(a) in its entirety to the jury since the jury was informed of the exact offenses for which defendant had been charged and the court instructed the jury that defendant's guilt must be based upon the offenses as set forth in the indictment. *Buice v. State*, 239 Ga. App. 52, 520 S.E.2d 258 (1999), aff'd, 528 S.E.2d 788 (2000).

Because the trial court read the indictment to the jury, so that the jury was aware that the state alleged defendant caused physical injury to the victim, the court properly charged the jury by reading the portion of O.C.G.A. § 16-6-4 that applied in the case: causing physical injury to the child. *Ceasar v. State*, 239 Ga. App. 752, 521 S.E.2d 866 (1999).

Trial court properly limited the elements of the crime of child molestation to those charged in the indictment since it charged the jury with the text of O.C.G.A. § 16-6-4, read the indictment, and instructed that the jury must find that defendant committed the specific acts alleged in the indictment. *Roberson v. State*, 241 Ga. App. 226, 526 S.E.2d 428 (1999).

Contention that the trial court erred in charging a jury on the entire definition of aggravated child molestation under O.C.G.A. § 16-6-4(c), including that the offense could be committed through child molestation causing physical injury, when the indictment did not allege aggravated child molestation resulting from a sexual act that physically harmed the child, was rejected because sufficient limiting instructions were given to the jury, and thus, no danger existed that the charge might have misled the jury to believe that it could convict the defendant of aggravated child molestation based on facts not charged in the indictment. *Holloway v. State*, 278 Ga. App. 709, 629 S.E.2d 447 (2006).

Defendant's conviction for aggravated child molestation and the sentence imposed thereon was vacated because the

record showed that the trial court did not instruct the jury that physical harm to the victim was an essential element of the crime of aggravated child molestation as indicted; consequently, the trial court's charge was harmful as a matter of law because the charge authorized a conviction for aggravated child molestation upon proof of only the elements of child molestation. *Pitts v. State*, 287 Ga. App. 540, 652 S.E.2d 181 (2007).

Given that the exact date the charged child molestation offense was alleged to have been committed was not stated as a material allegation in the indictment, the trial court did not erroneously instruct the jury that the indicted offenses could be proven to have occurred at any time within the statute of limitations as the defendant failed to show either the deprivation of an alibi defense or a right to a fair trial resulted by issuing the instruction. *Brown v. State*, 287 Ga. App. 857, 652 S.E.2d 807 (2007), cert. denied, 2008 Ga. LEXIS 154 (Ga. 2008).

Because a child molestation indictment properly charged conjunctively that defendant's acts were taken with the intent to arouse and satisfy the sexual desires of the accused and the child, and the state proved one such method, the trial court's charge in the disjunctive pursuant to the language of O.C.G.A. § 16-6-4(a) was not error. *Martin v. State*, 299 Ga. App. 845, 683 S.E.2d 896 (2009).

Trial counsel was not ineffective for failing to request a limiting instruction specifying the state's burden to prove that the child molestation against the victim occurred in the manner alleged in the indictment because the trial court's jury instructions, as a whole, properly distinguished the acts upon which the child molestation offense was based and limited the jury's determination of the child molestation offense to those acts set forth in that count of the indictment. *Boatright v. State*, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

**Instruction on indictment for aggravated child molestation.** — Defendant, who was indicted for aggravated child molestation, was not convicted of a crime in a manner not charged in defendant's indictment on the basis that the

**Jury Issues and Instructions (Cont'd)**

trial court, after charging the jury with the relevant method, i.e., aggravated child molestation based on an act of sodomy, also gave a charge defining child molestation, which tracked the statutory language of O.C.G.A. § 16-6-4(a); the giving of this definitional charge was proper and there could be no error since the defendant was not indicted on a charge of child molestation or convicted thereof and was instead convicted of aggravated child molestation. *Robinson v. State*, 272 Ga. 752, 533 S.E.2d 718 (2000).

Testimony that the defendant's genitals touched the victim's "back private," although it never entered in the victim's anus, showed completion only of the greater offense of aggravated child molestation under O.C.G.A. § 16-6-4(c) and sodomy which was defined under O.C.G.A. § 16-6-2(a) as any sexual act involving the sex organs of one person and the mouth or anus of another; therefore, the trial court did not err in refusing to charge the jury on child molestation as a lesser included offense of aggravated child molestation. *Wright v. State*, 259 Ga. App. 74, 576 S.E.2d 64 (2003).

After charging a jury with the presumption of innocence and the state's burden of proof, a trial judge properly limited the charge by stating that if it believed defendant committed aggravated child molestation "as alleged in the indictment," it was authorized to find defendant guilty; as a result, the trial court properly denied defendant's motion for a new trial. *James v. State*, 268 Ga. App. 851, 602 S.E.2d 854 (2004).

Because an erroneous jury instruction on an offense of aggravated child molestation violated an inmate's due process rights by allowing the jury to convict in a manner not charged in the indictment, and the inmate's trial counsel was ineffective in failing to object to the instruction, the inmate was properly granted habeas relief. *Hall v. Wheeling*, 282 Ga. 86, 646 S.E.2d 236 (2007).

**Jury instruction on the definition of sodomy was necessary**, even though sodomy was not one of the offenses charged in the indictment, since sodomy

was an element of the offenses of aggravated child molestation, O.C.G.A. § 16-6-2(a), for which defendant was on trial. *Ramirez v. State*, 265 Ga. App. 808, 595 S.E.2d 630 (2004).

**Charge based on O.C.G.A. § 16-6-4(c).** — When the indictment charged the defendant only with aggravated child molestation by committing sodomy, an instruction based upon O.C.G.A. § 16-6-4(c) in its entirety did not have the effect of allowing the jury to convict the defendant of the offense based upon acts of molestation that physically injured the victim. *Hilliard v. State*, 226 Ga. App. 478, 487 S.E.2d 81 (1997).

**Erroneous instruction.** — Child molestation and aggravated sodomy are legally distinct, and when the indictment for each offense is based on separate and distinct acts, the offenses do not merge. *Howard v. State*, 200 Ga. App. 188, 407 S.E.2d 769, cert. denied, 200 Ga. App. 896, 407 S.E.2d 769 (1991).

When the defendant was charged with aggravated child molestation by causing physical injury and one count of sodomy, it was reversible error to read O.C.G.A. § 16-6-4(c) to the jury in the statute's entirety since the statute allowed the jury to convict the defendant for aggravated child molestation involving an act of sodomy instead of the method charged in the indictment. *Linson v. State*, 221 Ga. App. 691, 472 S.E.2d 690 (1996).

Without a limiting instruction directing the jury to consider only whether defendant committed aggravated child molestation in the manner specified in the indictment, a charge on the entire O.C.G.A. § 16-6-4(c) violated due process and the error could not be deemed harmless. *Skillern v. State*, 240 Ga. App. 34, 521 S.E.2d 844 (1999).

Trial court erred in defining aggravated child molestation by instructing the jury that the defendant could be convicted of violating O.C.G.A. § 16-6-4(c) if the defendant either sodomized or injured the victim, because the indictment alleged only an act of sodomy; the error was harmless, however, as evidence of both sodomy and injury was presented, and the final charge cured any defect in the challenged instruction. *Robertson v. State*, 278 Ga. App. 376, 629 S.E.2d 79 (2006).

Trial court's instruction of the jury on the entirety of O.C.G.A. § 16-6-4(c) when the aggravated child molestation charge was based on physical injury to a child was not a substantial error under O.C.G.A. § 5-5-24(c); the indictment was read to the jury, the indictment was sent with the jury for deliberations, and the jury was instructed that the state's burden was to prove every material allegation in the indictment and every essential element of each crime beyond a reasonable doubt. *Anderson v. State*, 282 Ga. App. 58, 637 S.E.2d 790 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

**Good character charge erroneous.** — In a prosecution for child molestation, a good character charge was erroneous as: 1) the charge failed to inform the jury that the defendant's good character was a substantive fact, and that evidence of good character had to be considered in connection with all other evidence; and 2) the charge failed to instruct the jury that good character in and of itself could be sufficient to create a reasonable doubt as to guilt. *Hobbs v. State*, 299 Ga. App. 521, 682 S.E.2d 697 (2009).

**Instructions sufficient to inform jury of specific intent.** — In a prosecution under O.C.G.A. § 16-6-4, counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to request a jury instruction on specific intent or in objecting to the trial court's failure to give such an instruction; the jury was adequately instructed on the specific intent of the crime of child molestation, as the trial court informed the jury that child molestation was a crime of specific intent by reading the indictment to the jury and by instructing the jury on the statutory definition of child molestation, the trial court charged the jury that intent was an essential element of the crime that the state had to prove beyond a reasonable doubt, and the trial court stated that the jury would have to acquit if the jury found that the subject incident occurred as a result of accident. *Malone v. State*, 277 Ga. App. 694, 627 S.E.2d 378 (2006).

**Failure to charge jury on statutory definition of child molestation** in the absence of a request was not reversible

error because the jury was charged on the statutory definition of enticing a child for indecent purposes; although the two crimes had different elements, a common element of each crime was that the defendant committed an "indecent act" to the victim or in the victim's presence. *Jackson v. State*, 274 Ga. App. 26, 619 S.E.2d 294 (2005).

**Withdrawn charge request properly not honored.** — Trial court did not err by failing to charge the jury that child molestation was a lesser included offense of rape since the defendant subsequently withdrew a written request for such a charge. *Brady v. State*, 206 Ga. App. 497, 426 S.E.2d 15 (1992).

**Erroneous charge** in indictment of aggravated child molestation did not mean that the jury could not convict defendant of child molestation as charged by the trial court. *Perry v. State*, 216 Ga. App. 661, 455 S.E.2d 607 (1995).

**Failure to charge definition of sodomy.** — Trial court's failure to charge, without written request, on the definition of "sodomy" was not reversible error, where the indictment specified the manner in which the alleged acts of sodomy had been committed and the evidence disclosed that defendant performed the acts of sodomy. *Floyd v. State*, 193 Ga. App. 17, 387 S.E.2d 16 (1989).

**Charge on delinquency of a minor.** — When the defendant allegedly had intercourse with a 14-year-old, the trial court did not err in failing to give a lesser included offense instruction regarding delinquency of a minor in violation of O.C.G.A. § 16-12-1(b)(1) in addition to the court's instructions on child molestation in violation of O.C.G.A. § 16-6-4(a). Delinquency of a minor was not a lesser included offense of child molestation as proof of one offense would not have served to prevent a conviction on the other pursuant to O.C.G.A. § 16-1-6 because the offenses shared no essential elements and were directed to different acts. *Slack v. State*, 265 Ga. App. 306, 593 S.E.2d 664 (2004).

**Charge tracking entire statute not error.** — Charge on a code section in the statute's entirety is not error when a part thereof is applicable and it does not ap-

**Jury Issues and Instructions (Cont'd)**

pear that the inapplicable part misled the jury or erroneously affected the verdict, such that the trial judge's charging of the jury with the definition of child molestation as contained within O.C.G.A. § 16-6-4 with a subsequent instruction charging that the defendant's guilt must be based upon the offenses set forth in the indictment was not reversible error. *Potts v. State*, 207 Ga. App. 863, 429 S.E.2d 526 (1993).

When the indicted act of child molestation was defendant's placing of his mouth on the penis of the victim, the giving of the entire section on aggravated child molestation did not mislead the jury or violate defendant's due process rights. *Rice v. State*, 243 Ga. App. 143, 531 S.E.2d 182 (2000).

**Instruction on lesser included offenses.** — Sexual battery was not a lesser included offense of statutory rape as a matter of law, and because the indictment charging defendant with statutory rape was narrowly drawn and the evidence did not support instructions allowing the jury to find defendant guilty of sexual battery or simple battery, the trial court did not err when it denied defendant's request to instruct the jury that sexual battery and simple battery were lesser included offenses of statutory rape. *Neal v. State*, 264 Ga. App. 311, 590 S.E.2d 168 (2003).

In a trial on a charge of child molestation, O.C.G.A. § 16-6-4(a), the trial court did not err by refusing to instruct the jury on sexual battery, O.C.G.A. § 16-6-22.1(b), as a lesser included offense, because under the facts of the case, which alleged that the defendant sexually abused a six-year-old child, the evidence presented to the jury offered the choice between the completed crime of child molestation or no crime. *Howell v. State*, 278 Ga. App. 634, 629 S.E.2d 398 (2006).

There was no evidence warranting a charge of sexual battery in the defendant's sexual molestation case, and the defendant's strategy was to attack the credibility of the victim; because the evidence did not authorize a charge on sexual battery as a lesser included offense, the defendant was not prejudiced by counsel's failure to

request a charge on the same. *McGruder v. State*, 279 Ga. App. 851, 632 S.E.2d 730 (2006).

Defendant was charged with child molestation and aggravated child molestation under O.C.G.A. § 16-6-4; the defendant denied having any sexual contact with the child and defense counsel argued that the charges were fabricated by the child's parent. As the evidence showed either the commission of the indicted crimes or no crimes at all, the defendant was not entitled to a charge on the lesser included offense of sexual battery under O.C.G.A. § 16-6-22.1(b). *Linto v. State*, 292 Ga. App. 482, 664 S.E.2d 856 (2008).

As the evidence in the defendant's criminal trial, if believed, would have supported defendant's conviction for the charged offense of aggravated child molestation, in violation of O.C.G.A. § 16-6-4(c), and the defendant denied that the incident occurred, there was no cause to instruct the jury on the lesser included offense of sexual battery; the evidence either showed a completed offense or no offense. *Lucas v. State*, 295 Ga. App. 831, 673 S.E.2d 309 (2009).

While a defendant claimed that trial counsel was ineffective for failing to request a jury instruction on the lesser included offense of child molestation under O.C.G.A. § 16-6-4(a) based on the defendant's denial of oral sodomy committed on the 14-year-old victim, trial counsel's all-or-nothing strategy regarding the prosecution for aggravated child molestation under O.C.G.A. § 16-6-4(c) was not unreasonable; trial counsel had elicited testimony by the victim that the initial written police statement contained no express reference to sodomy but stated that the victim and the defendant had kissed and cuddled, had elicited testimony from a security guard on cross-examination that the guard had not seen the victim adjust the victim's skirt by pulling it down when the victim stepped out of the car although that was what the guard claimed in a police statement, and had demonstrated that the surveillance camera had not captured anything below the mid-chest level of the car seats of the car in which the incident allegedly occurred. *Nguyen v. State*, 296 Ga. App. 853, 676 S.E.2d 246 (2009).

Because the defendant denied any contact with the victim, the trial court did not err in not charging on sexual battery as a lesser included offense of child molestation. *Hilliard v. State*, 298 Ga. App. 473, 680 S.E.2d 541 (2009).

To the extent the defendant sought review under O.C.G.A. § 17-8-58(b) of the trial court's charge to the jury on the jury's consideration of child molestation, attempted child molestation, and indecent exposure, there was no error because the trial court explained that the jury needed to consider all three offenses at the same time and properly explained how the jury would record the jury's verdict. *Machado v. State*, 300 Ga. App. 459, 685 S.E.2d 428 (2009).

#### **Videotape of interview between child victim and investigating officer.**

— Trial court did not abuse its discretion when it allowed the state to show the jury videotapes of interviews police made with children who accused defendant of touching their genitals, or when it allowed the children's parents to testify about statements their children made to them, and the appellate court held that evidence which showed that defendant touched the genitals of several children who were enrolled in tae kwon do classes defendant taught and that three children were sodomized was sufficient to sustain defendant's convictions on 18 counts of child molestation and three counts of aggravated child molestation. *Fiek v. State*, 266 Ga. App. 523, 597 S.E.2d 585 (2004).

After a defendant molested a nine-year-old child, a videotape of the child's interview by a detective was properly admitted under O.C.G.A. § 24-3-16 as a statement made by a child under the age of 14 years describing an act of sexual contact. Whether it also bolstered the child's trial testimony was immaterial. *Whitaker v. State*, 293 Ga. App. 427, 667 S.E.2d 202 (2008).

**Evidence sufficient to support instruction.** — Trial court's instruction to the jury on the statutory definition of aggravated child molestation was authorized by the evidence. *Bryson v. State*, 210 Ga. App. 642, 437 S.E.2d 352 (1993).

**Failure to provide statutory notice of intent to seek life imprisonment.** —

State's failure to provide statutory notice of their intent to seek life imprisonment with regard to a defendant charged with child molestation under O.C.G.A. § 16-6-4(b) meant that the maximum penalty for defendant was 30 years imprisonment, not life imprisonment. *Webb v. State*, 270 Ga. App. 817, 608 S.E.2d 241 (2004).

**Batson challenge.** — Trial court properly overruled defendant's Batson challenge and allowed five jurors to remain on the panel, and not be stricken for cause, as: (1) the challenged African-American juror was not similarly situated to the remaining jurors; and (2) each of the challenged jurors testified unequivocally that their prior experiences would not hamper their ability to serve as impartial jurors. *Cowan v. State*, 279 Ga. App. 532, 631 S.E.2d 760 (2006).

**Jury charge upheld.** — There was no reversible error, despite the defendant's argument on appeal that the trial court's charge to the jury on DNA evidence was incomplete and prejudicial as a matter of law, because: (1) a review of the record showed that the charge given by the court tracked the language set forth in the pattern charge and was otherwise a correct statement of law with respect to the collection and testing of DNA; and (2) the defendant's proposed jury charge was argumentative and composed primarily of evidentiary matters that were not proper for a jury instruction. Moreover, there was no request for the additional charge the defendant asserted was erroneously omitted present in the record. *Stanley v. State*, 289 Ga. App. 373, 657 S.E.2d 305 (2008).

Based on the jury instructions in the defendant's trial for child molestation, the trial court made it clear that the instructions applied to each of the seven counts; no reasonable juror would have understood that it was required to decide the verdict in an all or nothing fashion or that he or she was precluded from finding the defendant guilty of one or more counts and not guilty of others. The jury was not misled or confused. *Parker v. State*, 295 Ga. App. 859, 673 S.E.2d 334 (2009).

There was no due process violation regarding the trial court's charge on child molestation because the instructions

**Jury Issues and Instructions (Cont'd)**

cured any complained of problem with the charge since the charge as a whole limited the jury's consideration to the specific manner of committing the crime alleged in the indictment; the trial court read the indictment to the jury, instructed the jury that the state had the burden of proving every material allegation in the indictment beyond a reasonable doubt, and sent the indictment out with the jury during the jury's deliberations. Machado v. State,

300 Ga. App. 459, 685 S.E.2d 428 (2009).

**Jury charge on voluntary intoxication in child molestation case.** — Trial court's charge on voluntary intoxication in a child molestation case was not an improper comment on the evidence under O.C.G.A. § 17-8-57, given evidence from all three complainants that defendant was drinking Wild Turkey bourbon and the victim's testimony that the victim believed defendant was drunk. Bright v. State, 301 Ga. App. 204, 687 S.E.2d 208 (2009).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 42 Am. Jur. 2d, Infants, § 15 et seq. 50 Am. Jur. 2d, Lewdness, Indecency and Obscenity, § 16.

**Am. Jur. Proof of Facts.** — Liability of School Districts Under Common Law Tort Theories for the Sexual Molestation of a Student by a Teacher, 31 POF3d 261.

**C.J.S.** — 43 C.J.S., Infants, §§ 113, 120 et seq.

**ALR.** — Assault with intent to commit unnatural sex act upon minor as affected by latter's consent, 65 ALR2d 748.

Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who has passed the anniversary date of such age, 73 ALR2d 874.

Applicability, in proceedings under statutes relating to sexual psychopaths, of constitutional provisions for the protection of a person accused of crime, 34 ALR3d 652.

Sexual child abuser's civil liability to child's parent, 54 ALR4th 93.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 ALR4th 685.

Statute protecting minors in a specified age range from rape or other sexual activity as applicable to defendant minor within protected age group, 18 ALR5th 856.

Admissibility of expert testimony as to proper techniques for interviewing children or evaluating techniques employed in particular case, 87 ALR5th 693.

Validity, construction, and application of state statutes prohibiting child luring as applied to cases involving luring of child by means of electronic communications, 33 ALR6th 373.

**16-6-5. Enticing a child for indecent purposes.**

(a) A person commits the offense of enticing a child for indecent purposes when he or she solicits, entices, or takes any child under the age of 16 years to any place whatsoever for the purpose of child molestation or indecent acts.

(b) Except as provided in subsection (c) of this Code section, a person convicted of the offense of enticing a child for indecent purposes shall be punished by imprisonment for not less than ten nor more than 30 years. Any person convicted under this Code section of the offense of enticing a child for indecent purposes shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.

(c) If the victim is at least 14 but less than 16 years of age and the person convicted of enticing a child for indecent purposes is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor and shall not be subject to the sentencing and punishment provisions of Code Section 17-10-6.2. (Ga. L. 1950, p. 387, § 2; Ga. L. 1953, Nov.-Dec. Sess., p. 408, § 2; Code 1933, § 26-2020, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1984, p. 1495, § 2; Ga. L. 1992, p. 6, § 16; Ga. L. 1992, p. 2131, § 1; Ga. L. 1995, p. 957, § 5; Ga. L. 2006, p. 379, § 12/HB 1059.)

**Cross references.** — Actions for childhood sexual abuse, § 9-3-33.1. Computer pornography and child exploitation prevention, § 16-12-100.2. Visitation with minors by convicted sexual offenders while imprisoned, § 42-5-56.

**Editor's notes.** — Ga. L. 1992, p. 2131, § 2, not codified by the General Assembly, provides: "The amendment or repeal and reenactment of subsection (b) of Code Section 16-6-5 of the Official Code of Georgia Annotated by Section 1 of this Act shall not affect or abate the status as a crime of any act which occurred prior to the effective date of this Act [April 17, 1992] nor shall the prosecution of such crime be affected by the enactment of this Act."

Ga. L. 1995, p. 957, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Child Protection Act of 1995'."

Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with suffi-

cient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism

and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

**Law reviews.** — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article on 2006 amendment of this Code section, see 23 Georgia St. U.L. Rev. 11 (2006).

For note, "Pedophilia, Exhibitionism, and Voyeurism: Legal Problems in the Deviant Society," see 4 Ga. L. Rev. 149 (1969).

For comment, "Civil Contempt and Child Sexual Abuse Allegations: A Modern Solomon's Choice?", see 40 Emory L.J. 203 (1991).

## JUDICIAL DECISIONS

**Section not violative of due process.** — Ga. L. 1953, Nov.-Dec. Sess., p. 408, § 2 (see now O.C.G.A. § 16-6-5) did not violate the due process clause of U.S. Const., amend. 14 or Ga. Const. 1976, Art. I, Sec. I, Para. I (see Ga. Const. 1983, Art. I, Sec. I, Para. I) for failing to define in exact words what constitutes the conduct made punishable. *Millhollan v. State*, 221 Ga. 165, 143 S.E.2d 730 (1965).

**Section not objectionable because of plurality of subject matter.** — Since the subject of Ga. L. 1953, Nov.-Dec. Sess., p. 408, § 2 (see now O.C.G.A. § 16-6-5) is the taking or attempting to take immoral, improper, or indecent liberties with children, and all of the provisions of that section naturally connect and reasonably relate to that subject, it does not violate Ga. Const. 1976, Art. III, Sec. VII, Para. IV (see Ga. Const. 1983, Art. III, Sec. V, Para. III). *Millhollan v. State*, 221 Ga. 165, 143 S.E.2d 730 (1965).

**Statutory scheme to protect children under 14 (now 16).** — Former Code 1933, §§ 26-2018 through 26-2020 provide a general statutory scheme giving protection to both male and female children under the age of 14 (now 16), regardless of the offender's gender, and thus are not invalid as depriving this defendant of equal protection of the law. *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979) (see O.C.G.A. §§ 16-6-3 through 16-6-5).

**Phrase "indecent acts" is not so vague as to violate due process.** *Howell v. State*, 172 Ga. App. 805, 324 S.E.2d 754 (1984).

**Consent irrelevant.** — Child's consent would not vitiate a conviction for enticing a child for indecent purposes. *Coker v. State*, 164 Ga. App. 493, 297 S.E.2d 68 (1982).

**Various ways to violate section may be joined in one count in same indictment.** — Former Ga. L. 1953, Nov.-Dec. Sess., p. 408, § 2 (see now O.C.G.A. § 16-6-5) forbidding the taking of immoral or improper or indecent liberties with a child provides several ways in which it may be violated, not repugnant to each other, and they may be joined in one count in the same indictment. *Millhollan v. State*, 221 Ga. 165, 143 S.E.2d 730 (1965).

**Sufficiency of indictment.** — Trial court erred in granting the defendant's specific demurrer to an indictment charging the defendant with criminal attempt to entice a child for indecent purposes in violation of O.C.G.A. §§ 16-4-1 and 16-6-5(a) because the indictment contained the elements of the crime, informed the defendant of the charges against the defendant, and was specific enough to protect the defendant from double jeopardy, and the language in the indictment tracked the legislative language used in

and cited directly to § 16-6-5(a); the crime charged in and of itself alerted the defendant to the fact that the defendant was being accused of acting with the intent of engaging in illicit sexual conduct with a minor, and because the defendant was indicted with criminal attempt to commit the crime of enticing a child for indecent purposes, by definition, the defendant fell short of the crime's commission, and any evidence of defendant's criminal intent was necessarily implicit. *State v. Marshall*, 304 Ga. App. 865, 698 S.E.2d 337 (2010).

**Motion to suppress.** — Trial court erroneously suppressed the statements given by the defendant to law enforcement, because, given the totality of the circumstances apparent from the record, the defendant: (1) spoke clearly; (2) did not appear to be under the influence of alcohol or drugs; (3) appeared to understand what was read; (4) was not threatened or coerced in any way; (5) appeared very calm; (6) was not promised anything by police in exchange for defendant's cooperation; (7) did not appear to have any mental issues; (8) had only been detained for approximately 20 minutes before defendant was Mirandized; and (9) asked the investigator to come back to speak with defendant after a brief interruption in the interview; the mere fact that there was no written Miranda waiver or electronic recording of the same did not render said waiver involuntary. *State v. Hardy*, 281 Ga. App. 365, 636 S.E.2d 36 (2006).

**Enticement and intended motivation must be shown.** — Crime of enticing a child for indecent purposes requires the showing of a joint operation of the act of enticing a child and the intention to commit acts of indecency or child molestation. *Lasseter v. State*, 197 Ga. App. 498, 399 S.E.2d 85 (1990).

Although a conviction under O.C.G.A. § 16-6-5 need not be based upon evidence that an act of indecency or child molestation was accomplished or even attempted, a conviction must nevertheless be based upon some evidence that an act of indecency or child molestation was the intended motivation for the enticement. *Lasseter v. State*, 197 Ga. App. 498, 399 S.E.2d 85 (1990).

**Asportation an element.** — Enticing a child for indecent purposes, unlike the offense of aggravated sodomy, includes an element of asportation. *Dennis v. State*, 158 Ga. App. 142, 279 S.E.2d 275 (1981); *Thompson v. State*, 186 Ga. App. 471, 367 S.E.2d 320 (1988).

After the defendant showed a pornographic film to children and threatened the children if the children left or attempted to leave during the movie, the requirement of asportation in the crime of enticing a child for indecent purposes was not satisfied since there was no evidence that the defendant caused the children to move towards the place where the children would view the movie. *Bragg v. State*, 217 Ga. App. 342, 457 S.E.2d 262 (1995).

Although the defendant merely attempted to pull a child towards the defendant, any asportation, however slight, was sufficient to show the taking element of enticing a child for indecent purposes. *Hicks v. State*, 254 Ga. App. 814, 563 S.E.2d 897 (2002).

**Taking may involve force, enticement, or persuasion.** — The "asportation" element of the offense is satisfied whether the "taking" involves physical force, enticement, or persuasion. *Cimildoro v. State*, 259 Ga. 788, 387 S.E.2d 335 (1990).

Evidence supporting the conclusion that defendant enticed, lured or convinced the victim to go with defendant across a tool shed and onto a board and later into a bedroom for indecent purposes was sufficient to satisfy the "taking" element of the offense. *Cimildoro v. State*, 259 Ga. 788, 387 S.E.2d 335 (1990).

When one of two victims testified that they were playing in a house, and it was defendant's idea to go to defendant's workshop and defendant personally testified that defendant told the victims to go to the workshop because defendant "didn't want any interruptions," the asportation element was proved. *Smith v. State*, 210 Ga. App. 634, 437 S.E.2d 333 (1993).

Asportation element of enticing a child for indecent purposes under O.C.G.A. § 16-6-5(a) was met by the defendant's sending suggestive text messages to a 15-year-old friend of the defendant's daughter and offering the friend \$50 to

have sex with the defendant. The element of asportation was satisfied whether the taking involved physical force, enticement, or persuasion. *Kelley v. State*, 301 Ga. App. 43, 686 S.E.2d 810 (2009).

**Evidence of asportation.** — Requirement that evidence of asportation be proven was satisfied by the evidence that defendant chased the victim around the bus. *Sims v. State*, 212 Ga. App. 426, 442 S.E.2d 292 (1994).

Defendant's conviction for enticing a child for indecent purposes was supported by sufficient evidence as the evidence authorized the jury to find that defendant enticed the 15-year-old victim into an apartment under the false pretense that defendant needed to get something there but that the real reason was to engage in sexual contact based on defendant restraining the victim and attempting to engage in sexual contact. The evidence satisfied the element of asportation based on the evidence that defendant lured the victim to the apartment. *Moore v. State*, 291 Ga. App. 270, 661 S.E.2d 868 (2008).

**When there is ample evidence of asportation, evidence of enticement is immaterial.** — When there is ample evidence of defendant's taking the victim in defendant's motor vehicle to a place for purpose of indecent acts, it is immaterial whether there is also evidence of defendant's enticing, inviting, or persuading the victim to go with the defendant. *Dennis v. State*, 158 Ga. App. 142, 279 S.E.2d 275 (1981).

**Pushing the victim a distance of approximately 65 paces** was amply sufficient to satisfy the asportation element of O.C.G.A. § 16-6-5. *Morris v. State*, 179 Ga. App. 228, 345 S.E.2d 686 (1986).

**Inquiry into victim's past sexual experiences was properly refused**, even where a physician testified that in examining the victim it was obvious the victim had been sexually active. *Worth v. State*, 183 Ga. App. 68, 358 S.E.2d 251 (1987).

**Asking defendant about prior arrests.** — Permitting the prosecutor to ask defendant if defendant had been arrested on a sex charge subsequent to the incident in question at defendant's trial for child molestation and enticing a child for indecent purposes was reversible error, where

the sole issue in the case was the credibility of defendant and the alleged victim. *Thomas v. State*, 178 Ga. App. 674, 344 S.E.2d 496 (1986).

**Evidence of similar prior incident admissible.** — When defendant appealed defendant's conviction on multiple counts of violating O.C.G.A. §§ 16-6-3, 16-6-4, 16-6-5, and 16-6-5.1, defendant unsuccessfully argued that the trial court erred in admitting two similar transactions. As to the first similar transaction, defendant induced any alleged error in that defendant's own counsel was the first to elicit the testimony of that transaction, and as to the second transaction, the trial court did not clearly err in finding that, because it involved a sexual act by defendant in defendant's counseling office with a female whom defendant was counseling, it was sufficiently similar to one of the crimes at issue which alleged a sexual act by defendant in defendant's counseling office with a female. *Evans v. State*, 300 Ga. App. 180, 684 S.E.2d 311 (2009), cert. denied, No. S10C0215, 2010 Ga. LEXIS 304 (Ga. 2010).

**Evidence of similar incident proper.** — Evidence of similar transaction admissible where in both incidents defendant approached a young child on the street shortly after school hours and chased the victim when the victim withdrew. *Sims v. State*, 212 Ga. App. 426, 442 S.E.2d 292 (1994).

**Child molestation and enticing child for indecent purposes as included offenses.** — When the appellant stands convicted under a two-count indictment charging appellant with enticing a child for indecent purposes and child molestation, one crime is not included within the other as a matter of law. *Williams v. State*, 156 Ga. App. 481, 274 S.E.2d 826 (1980).

Child molestation and enticement are separate offenses, and the combination of attempt with child molestation does not bring it within the purview of enticement. *Wittschne v. State*, 259 Ga. 448, 383 S.E.2d 885 (1989).

Child molestation and enticement counts merged as a matter of fact where the enticement counts of the indictment specifically alleged that defendant enticed

the child for the purpose of child molestation and, thus, in order to prove the enticement counts, the prosecution had to prove all the facts used to prove the child molestation counts. *Wells v. State*, 222 Ga. App. 587, 474 S.E.2d 764 (1996).

Child molestation and enticing a child for indecent purposes are distinct and separate offenses that are not included within each other as a matter of law, as the offense of enticement has an element of asportation not found in the offense of child molestation. *Veasey v. State*, 234 Ga. App. 795, 507 S.E.2d 799 (1998).

Charges of child molestation and enticement did not merge as a matter of fact under the circumstances of the case since the acts which constituted enticement were separate from and completed before the acts which constituted molestation. *Leon v. State*, 237 Ga. App. 99, 513 S.E.2d 227 (1999).

**State was not required to charge a defendant with child molestation** in order to obtain a conviction for enticing a child for indecent purposes as those are two separate crimes involving different elements, and generally, enticement is completed before child molestation occurs. *Jackson v. State*, 274 Ga. App. 26, 619 S.E.2d 294 (2005).

**Enticing child for indecent purposes is not included in offense of aggravated sodomy.** — Enticing a child for indecent purposes, is not included in offense of aggravated sodomy, as each of these offenses involves proof of distinct essential elements. *Dennis v. State*, 158 Ga. App. 142, 279 S.E.2d 275 (1981).

**Attempt to entice child for immoral purposes.** — Although an indictment for attempting to commit the offense of enticing a child for indecent purposes did not allege actual asportation, it did allege that defendant arranged to meet the victim for the purpose of committing indecent acts and, accordingly, did not fail to allege the taking of a substantial step toward the commission of the crime. *Dennard v. State*, 243 Ga. App. 868, 534 S.E.2d 182 (2000).

Crime of enticing is complete when the defendant asports the victim with the intent to commit an indecent act, regardless of whether the act is actually committed;

when, however, the defendant attempts to entice a child but is unsuccessful with respect to the asportation element, the defendant is properly charged with criminal attempt. *Dennard v. State*, 243 Ga. App. 868, 534 S.E.2d 182 (2000).

Defendant was properly ordered to register as a sex offender because the convictions constituted criminal offenses against a victim who was a minor, pursuant to O.C.G.A. § 42-1-12(a)(9)(B), and because the attempt convictions, pursuant to O.C.G.A. § 16-4-1, were covered within the registration requirement; defendant was convicted of criminal attempt to commit child molestation and criminal attempt to entice a child for indecent purposes, in violation of O.C.G.A. §§ 16-6-4(a) and 16-6-5(a), respectively, as defendant communicated over the Internet with a police officer who was disguised as a 14-year-old child, and arranged to meet the alleged child, and the fact that an actual child was not involved did not negate the offense or the need for the registration as there was no impossibility defense. *Spivey v. State*, 274 Ga. App. 834, 619 S.E.2d 346 (2005).

**Statutory rape.** — The crime of enticing a child for indecent purposes is not included in the crime of statutory rape. *Coker v. State*, 164 Ga. App. 493, 297 S.E.2d 68 (1982).

**Evidence sufficient for conviction.** — Evidence was sufficient to authorize a rational trier of fact to find defendant guilty beyond a reasonable doubt of enticing a child for indecent purposes. *Sims v. State*, 212 Ga. App. 426, 442 S.E.2d 292 (1994).

Aggravated child molestation, child molestation, enticing a child for indecent purposes, and aggravated sodomy convictions were all supported by sufficient evidence provided by the victims detailing the inappropriate touching and anal penetration committed by defendant, and confirmed by the examining experts. *Wilkerson v. State*, 267 Ga. App. 585, 600 S.E.2d 677 (2004).

Evidence was sufficient to support a conviction for enticing a child for indecent purposes when the 10-year-old child victim testified that defendant called to the

victim, asked for a hug, and then held the victim captive while rubbing the victim against the defendant's naked genitalia. *Duncan v. State*, 269 Ga. App. 4, 602 S.E.2d 908 (2004).

Evidence supported defendant's enticing a child for indecent purposes conviction as defendant picked up the 14-year-old victim and took the victim to the defendant's love interest's bedroom; the love interest observed defendant stroking and fondling the victim's neck and ears; the victim's testimony that nothing improper occurred did not render the evidence insufficient to support the conviction. *Leaptrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Evidence supported a conviction for enticing a child for indecent purposes where the defendant requested that the victim leave the victim's own home, took the victim to the defendant's home, physically carried the victim to the defendant's bedroom, and, among other acts, placed the defendant's mouth on the victim's breasts. *Jackson v. State*, 274 Ga. App. 26, 619 S.E.2d 294 (2005).

Defendant's convictions for enticing a child for indecent purposes and solicitation of sodomy for money with a child under 17, in violation of O.C.G.A. §§ 16-6-5 and 16-6-15, respectively, were supported by the evidence as the defendant invited two young victims to the defendant's home, had one of the victims watch a pornographic videotape and propositioned both of the victims by discussing the victims' sexual history and sexual acts; it was clear that the element of asportation was satisfied when the defendant invited the victims to the defendant's home in order to entice the victims to engage in sexual acts. *Carolina v. State*, 276 Ga. App. 298, 623 S.E.2d 151 (2005).

Sufficient evidence supported the convictions of enticing a child for indecent purposes under O.C.G.A. § 16-6-5 and of three counts of child molestation under O.C.G.A. § 16-6-4; the victim and the victim's younger sister specifically testified that the defendant committed the acts described in the indictment, and other testimony corroborated this testimony. *Mikell v. State*, 281 Ga. App. 739, 637 S.E.2d 142 (2006).

Sufficient evidence supported the defendant's convictions of enticing a child for indecent purposes under O.C.G.A. § 16-6-5(a) and kidnapping under O.C.G.A. § 16-5-40(a); the victim testified that the defendant carried the victim into the defendant's bedroom and would not allow the victim to leave until the defendant had finished abusing the victim. *Anderson v. State*, 282 Ga. App. 58, 637 S.E.2d 790 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Sufficient identification evidence supported the defendant's convictions of four counts of aggravated child molestation under O.C.G.A. § 16-6-4(b), three counts of child molestation under O.C.G.A. § 16-6-4(a), and two counts of enticing a child for indecent purposes under O.C.G.A. § 16-6-5; the victim testified that the victim knew the defendant, that the defendant and the victim's mother lived together, and that the perpetrator's name was the defendant's first name. *Clark v. State*, 282 Ga. App. 248, 638 S.E.2d 397 (2006).

Because sufficient direct evidence was presented via the victim's testimony that the defendant improperly touched and digitally penetrated the victim's vagina, convictions upon charges of aggravated sodomy, aggravated child molestation, and other crimes arising from that contact were upheld on appeal; further, any error related to the admission of the victim's videotaped statement was harmless as such statement would have been admissible as *res gestae* or to prove the defendant's lustful disposition. *Morrow v. State*, 284 Ga. App. 297, 643 S.E.2d 808 (2007).

Defendant retrieved victims from their homes after misleading their parents regarding the reason for doing so and took them to defendant's house, hog-tied the victims, taped the victims' eyes and mouth, tickled the victims, and inserted an object into the victims' mouths; thus, the evidence supported the conclusion that defendant took the victims to defendant's house with the present intent of either molesting the children or engaging in indecent acts. *Ayers v. State*, 286 Ga. App. 898, 650 S.E.2d 370 (2007), cert. denied, 2008 Ga. LEXIS 117 (Ga. 2008).

With regard to a defendant's convictions on one count of enticing a child for indecent purposes, ten counts of child molestation, one count of aggravated child molestation, and three counts of cruelty to children in the first degree, regarding actions the defendant took toward three children and what the children were forced to do to each other by gunpoint while the defendant was a babysitter for the children, the state proved the charged offenses beyond a reasonable doubt based on the testimony of the three victims and the victims' videotaped forensic interviews. It was within the province of the jury to disbelieve the defendant's testimony that the defendant did not commit the charged crimes. *Sullivan v. State*, 295 Ga. App. 145, 671 S.E.2d 180 (2008), cert. denied, No. S09C0624, 2009 Ga. LEXIS 215 (Ga. 2009).

Defendant's convictions for aggravated child molestation, aggravated assault, enticing a child for an indecent purpose, kidnapping, false imprisonment, cruelty to children, burglary, theft by taking, and striking an unattended vehicle were authorized because at trial the defendant was positively identified as the perpetrator of the crimes; a nurse and doctor testified that the victim had an injury that was consistent with the molestation allegation, and a videotape depicted the defendant driving a maintenance truck that the defendant did not have authority to take. *Bearfield v. State*, 305 Ga. App. 37, 699 S.E.2d 363 (2010).

Evidence that the defendant, age 35, met a girl online whom the defendant believed was 15, that the defendant made numerous comments about how the defendant could get in trouble or go to jail, that the defendant engaged in sexually explicit conversations and directed the child to pornography sites showing black men having sex with white women, that the defendant drove to an arranged meeting place, and, that, when officers appeared, the defendant fled, was sufficient to convict defendant of violating O.C.G.A. §§ 16-4-1 (attempt), 16-6-4 (child molestation), 16-6-5 (enticement of a child), and 16-10-24 (obstruction). *Smith v. State*, 306 Ga. App. 301, 702 S.E.2d 211 (2010).

**Evidence insufficient for conviction.** — Defendant's convictions for entic-

ing a minor child under O.C.G.A. § 16-6-5 were reversed because there was no evidence that the defendant enticed, persuaded, or lured the child victims, the defendant's grandchildren, to the defendant's home or into any area of the house. Rather, the children were brought to the home voluntarily by their parents. *Henderson v. State*, 303 Ga. App. 531, 694 S.E.2d 185 (2010).

**Appellant was not convicted twice for same conduct as matter of fact** where convicted of violating former Code 1933, §§ 26-505 and 26-506. *Williams v. State*, 156 Ga. App. 481, 274 S.E.2d 826 (1980) (see O.C.G.A. §§ 16-6-4 and 16-6-5).

**Instructions did not cause prejudicial error.** — Trial court's jury charge on defendant's charges of enticing a child for indecent purposes and solicitation of sodomy for money with a child under 17, in violation of O.C.G.A. §§ 16-6-5 and 16-6-15, respectively, was not prejudicial to defendant, although the indictment against defendant charged defendant with committing acts in the conjunctive and the jury instructions allowed the jury to convict defendant for committing any of the acts, which were stated in the disjunctive, as proof that the crimes were committed in any of the separate ways or methods alleged in the indictment was sufficient to sustain the convictions. *Carolina v. State*, 276 Ga. App. 298, 623 S.E.2d 151 (2005).

**Admission of challenged evidence deemed harmless error.** — In a prosecution against the defendant for child molestation, enticing a child for indecent purposes, and exhibiting pornography to a minor, even if the appeals court assumed that the word "catheter" should have been redacted from what the defendant apparently conceded was an otherwise relevant list of items found in a search, the trial court's failure to do so was harmless error because it was highly improbable that such failure contributed to the verdict given the overwhelming evidence of the defendant's guilt. *Goldey v. State*, 289 Ga. App. 198, 656 S.E.2d 549 (2008).

**Venue.** — There was sufficient evidence of venue to support convictions for enticing child where it was shown that the

child was "enticed" in the county where the defendants were prosecuted, but the alleged act of indecency or child molestation occurred in another county. *Abreu v. State*, 206 Ga. App. 361, 425 S.E.2d 331 (1992).

**Sentence.** — There was no showing that the defendant's sentences for enticing a minor for indecent purposes, statutory rape, and contributing to the delinquency of a minor were vindictively enhanced in violation of Ga. Unif. Super. Ct. R. 33.6(B) after the defendant was allowed to revoke a guilty plea because, *inter alia*, the trial judge found that an enhanced sentence was warranted based on material differences between the facts presented regarding the nature of the crimes during the plea hearing and the trial; the concurrent sentences of 15 years to serve for enticing a minor for indecent purposes and statutory rape, plus 12 concurrent months for contributing to the delinquency of a minor were within statutory limits and valid. There was no absolute constitutional bar

to imposing a more severe sentence upon re-sentencing. *Hawes v. State*, 298 Ga. App. 461, 680 S.E.2d 513 (2009), cert. denied, No. S09C1769, 2010 Ga. LEXIS 15 (Ga. 2010).

**Cited in** *Butler v. State*, 132 Ga. App. 750, 209 S.E.2d 28 (1974); *Sanders v. State*, 145 Ga. App. 73, 243 S.E.2d 274 (1978); *Long v. State*, 150 Ga. App. 796, 258 S.E.2d 603 (1979); *Roman v. State*, 155 Ga. App. 355, 271 S.E.2d 21 (1980); *American Booksellers Ass'n v. Webb*, 590 F. Supp. 677 (N.D. Ga. 1984); *Roe v. State Farm Fire & Cas. Co.*, 188 Ga. App. 368, 373 S.E.2d 23 (1988); *Daniel v. State*, 194 Ga. App. 495, 391 S.E.2d 128 (1990); *Allstate Ins. Co. v. Jarvis*, 195 Ga. App. 335, 393 S.E.2d 489 (1990); *Emanuel v. State*, 196 Ga. App. 449, 396 S.E.2d 83 (1990); *Allen v. State*, 242 Ga. App. 367, 533 S.E.2d 401 (2000); *Selfe v. State*, 290 Ga. App. 857, 660 S.E.2d 727 (2008); *Finnan v. State*, 291 Ga. App. 486, 662 S.E.2d 269 (2008); *Phillips v. State*, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

## RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Corroboration of a Child's Sexual Abuse Allegation with Behavioral Evidence, 25 POF3d 189.

**ALR.** — White Slave Traffic Act (Mann Act) as affecting constitutionality or application of state statutes dealing with prostitution, 161 ALR 356.

Assault with intent to commit unnatural sex act upon minor as affected by latter's consent, 65 ALR2d 748.

Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who has passed the anniversary date of such age, 73 ALR2d 874.

Criminal liability for contributing to delinquency of minor by sexually immoral acts as affected by fact that minor was married at time of acts charged, 84 ALR2d 1254.

Applicability, in proceedings under statutes relating to sexual psychopaths, of constitutional provisions for the protec-

tion of a person accused of crime, 34 ALR3d 652.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 ALR4th 685.

Statute protecting minors in a specified age range from rape or other sexual activity as applicable to defendant minor within protected age group, 18 ALR5th 856.

Validity, construction, and application of state statutes prohibiting child luring as applied to cases involving luring of child by means of verbal or other nonelectronic communications, 35 ALR6th 361; 33 ALR6th 373.

**16-6-5.1. Sexual assault by persons with supervisory or disciplinary authority; sexual assault by practitioner of psychotherapy against patient; consent not a defense; penalty upon conviction for sexual assault.**

(a) As used in this Code section, the term:

- (1) "Actor" means a person accused of sexual assault.
- (2) "Intimate parts" means the genital area, groin, inner thighs, buttocks, or breasts of a person.
- (3) "Psychotherapy" means the professional treatment or counseling of a mental or emotional illness, symptom, or condition.
- (4) "Sexual contact" means any contact between the actor and a person not married to the actor involving the intimate parts of either person for the purpose of sexual gratification of the actor.
- (5) "School" means any educational program or institution instructing children at any level, pre-kindergarten through twelfth grade, or the equivalent thereof if grade divisions are not used.

(b) A person who has supervisory or disciplinary authority over another individual commits sexual assault when that person:

- (1) Is a teacher, principal, assistant principal, or other administrator of any school and engages in sexual contact with such other individual who the actor knew or should have known is enrolled at the same school; provided, however, that such contact shall not be prohibited when the actor is married to such other individual;
- (2) Is an employee or agent of any probation or parole office and engages in sexual contact with such other individual who the actor knew or should have known is a probationer or parolee under the supervision of the same probation or parole office;
- (3) Is an employee or agent of a law enforcement agency and engages in sexual contact with such other individual who the actor knew or should have known is being detained by or is in the custody of any law enforcement agency;
- (4) Is an employee or agent of a hospital and engages in sexual contact with such other individual who the actor knew or should have known is a patient or is being detained in the same hospital; or
- (5) Is an employee or agent of a correctional facility, juvenile detention facility, facility providing services to a person with a disability, as such term is defined in Code Section 37-1-1, or a facility providing child welfare and youth services, as such term is defined in Code Section 49-5-3, who engages in sexual contact with such other

individual who the actor knew or should have known is in the custody of such facility.

(c) A person who is an actual or purported practitioner of psychotherapy commits sexual assault when he or she engages in sexual contact with another individual who the actor knew or should have known is the subject of the actor's actual or purported treatment or counseling or the actor uses the treatment or counseling relationship to facilitate sexual contact between the actor and such individual.

(d) A person who is an employee, agent, or volunteer at any facility licensed or required to be licensed under Code Section 31-7-3, 31-7-12, or 31-7-12.2 or who is required to be licensed pursuant to Code Section 31-7-151 or 31-7-173 commits sexual assault when he or she engages in sexual contact with another individual who the actor knew or should have known had been admitted to or is receiving services from such facility or the actor.

(e) Consent of the victim shall not be a defense to a prosecution under this Code section.

(f) A person convicted of sexual assault shall be punished by imprisonment for not less than one nor more than 25 years or by a fine not to exceed \$100,000.00, or both; provided, however, that:

(1) Except as provided in paragraph (2) of this subsection, any person convicted of the offense of sexual assault of a child under the age of 16 years shall be punished by imprisonment for not less than 25 nor more than 50 years and shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2; and

(2) If at the time of the offense the victim of the offense is at least 14 years of age but less than 16 years of age and the actor is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor and shall not be subject to the sentencing and punishment provisions of Code Section 17-10-6.2. (Code 1981, § 16-6-5.1, enacted by Ga. L. 1983, p. 721, § 1; Ga. L. 1990, p. 1003, § 1; Ga. L. 1991, p. 1108, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1992, p. 1940, § 1; Ga. L. 1999, p. 562, § 5; Ga. L. 2006, p. 379, § 13/HB 1059; Ga. L. 2010, p. 168, § 2/HB 571; Ga. L. 2011, p. 227, § 5/SB 178.)

**The 2010 amendment**, effective May 20, 2010, added paragraph (a)(5); rewrote subsections (b) through (d); and added subsections (e) and (f).

**The 2011 amendment**, effective July 1, 2011, substituted "Code Section 31-7-3, 31-7-12, or 31-7-12.2" for "Code Section 31-7-3 or 31-7-12" near the beginning of subsection (d).

**Cross references.** — Assault and battery generally, § 16-5-20 et seq. Visitation with minors by convicted sexual offenders while imprisoned, § 42-5-56.

**Editor's notes.** — Ga. L. 1999, p. 562, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Crimes Against Elderly Act of 1999'."

Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

**Law reviews.** — For article, "The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws," see 20 Georgia St. U.L. Rev. 565 (2004). For annual survey of criminal law, see 57 Mercer L. Rev. 113 (2005). For annual survey of law on criminal law, see 62 Mercer L. Rev. 87 (2010).

For note on 1990 amendment of this Code section, see 7 Georgia St. U.L. Rev. 258 (1990). For note on 1992 amendment of this Code section, see 9 Georgia St. U.L. Rev. 227 (1992).

## JUDICIAL DECISIONS

**"In custody" construed.** — When a probationer was free to go about the probationer's normal activities subject to a court imposed curfew and the probation-

er's refraining from any illegal acts, the probationer was not a person "in custody" or "in the custody of the law," as contemplated by O.C.G.A. § 16-6-5.1. Palmer v.

State, 260 Ga. 330, 393 S.E.2d 251 (1990) (decided prior to 1991 amendment).

**"Probation officer" defined.** — Indictment stating that defendant was a "Surveillance Officer working for a county probation office" who had "supervisory and disciplinary authority" over a probationer is sufficient to allege that defendant was a "probation officer" within the meaning of O.C.G.A. § 16-6-5.1. Belvin v. State, 221 Ga. App. 114, 470 S.E.2d 497 (1996).

**"In school."** — The 1990 Act amending subsection (b) to include a person "who is enrolled in a school" in the class of victims did not violate O.C.G.A. § 16-6-5.1. Randolph v. State, 269 Ga. 147, 496 S.E.2d 258 (1998).

**Conduct of school officials.** — O.C.G.A. § 16-6-5.1 was not void for vagueness as applied to an assistant principal of a high school charged with engaging in sexual contact with a student. Randolph v. State, 269 Ga. 147, 496 S.E.2d 258 (1998).

**Trial court erred by denying petition for release from conduct of clergyman in Texas and requirement to register in Georgia.** — Trial court erred by denying a defendant's petition for release from the requirement that the defendant register as a sexual offender, pursuant to O.C.G.A. § 42-1-12, since the defendant's Texas conviction involving the use of the defendant's position as a clergyman to sexually assault two victims was not similar enough to any Georgia criminal statute that would have found the defendant to have been convicted of committing a dangerous sexual offense as that term was defined in § 42-1-12(a)(10)(A). Sharma v. State, 294 Ga. App. 783, 670 S.E.2d 494 (2008).

**Coerced statement.** — In a prosecution under both O.C.G.A. §§ 16-6-5.1 and 16-10-1, the trial court properly suppressed the oral and written statements made by the defendant, a public employee, during an internal investigation interview conducted by the Georgia Department of Corrections, and after the defendant was forbidden to seek the advice of counsel, as the defendant had an objective belief that a failure to cooperate with the investigation by taking part in the interview and signing a written document entitled "No-

tice of Interfering with On-Going Internal Investigation" would result in a loss of employment; thus, the defendant's right against self-incrimination was violated. State v. Aiken, 281 Ga. App. 415, 636 S.E.2d 156 (2006).

**Evidence sufficient for conviction.** — Defendant's conviction of sexual assault against a person in custody, O.C.G.A. § 16-6-5.1(c)(1)(A), was supported by sufficient evidence, because the evidence showed that defendant used defendant's position as a police officer to induce the victim to have sex with the defendant, and consent of the victim was not a defense to prosecution, O.C.G.A. § 16-6-5.1(c)(3). Furthermore, although the trial court erred in admitting hearsay evidence pursuant to O.C.G.A. § 24-3-1 to explain a detective's conduct in investigating the case, it was highly probable that the testimony did not contribute to the verdict. Krauss v. State, 263 Ga. App. 488, 588 S.E.2d 239 (2003).

**Assault of counseling client.** — When defendant appealed defendant's conviction on multiple counts of violating O.C.G.A. §§ 16-6-3, 16-6-4, 16-6-5, and 16-6-5.1, defendant unsuccessfully argued that the trial court erred in admitting two similar transactions. As to the first similar transaction, defendant induced any alleged error in that defendant's own counsel was the first to elicit the testimony of that transaction, and as to the second transaction, the trial court did not clearly err in finding that, because it involved a sexual act by defendant in defendant's counseling office with a female whom defendant was counseling, it was sufficiently similar to one of the crimes at issue which alleged a sexual act by defendant in defendant's counseling office with a female. Evans v. State, 300 Ga. App. 180, 684 S.E.2d 311 (2009), cert. denied, No. S10C0215, 2010 Ga. LEXIS 304 (Ga. 2010).

**Consent of victim a defense when victim has reached the age of consent.** — Because a student had reached the age of consent, the trial court erred in preventing defendant from presenting a consent defense at trial to a charge of sexual assault of a person enrolled in school under O.C.G.A. § 16-6-5.1(b).

Chase v. State, 285 Ga. 693, 681 S.E.2d 116 (2009).  
App. 822, 535 S.E.2d 246 (2000);  
Hammond v. Gordon County, 316 F. Supp. 2d 1262 (N.D. Ga. 2002).

### 16-6-6. Bestiality.

(a) A person commits the offense of bestiality when he performs or submits to any sexual act with an animal involving the sex organs of the one and the mouth, anus, penis, or vagina of the other.

(b) A person convicted of the offense of bestiality shall be punished by imprisonment for not less than one nor more than five years. (Laws 1833, Cobb's 1851 Digest, p. 787; Code 1863, §§ 4253, 4254; Code 1868, §§ 4288, 4289; Code 1873, §§ 4354, 4355; Ga. L. 1880-81, p. 74, § 1; Code 1882, §§ 4354, 4355; Penal Code 1895, §§ 384, 385; Penal Code 1910, §§ 375, 376; Code 1933, §§ 26-5903, 26-5904; Code 1933, § 26-2004, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — Performance of actual or simulated sexual acts, § 3-3-41.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 70C Am. Jur. 2d, Sodomy, § 30.  
**C.J.S.** — 81A C.J.S., Sodomy, § 1 et seq.

### 16-6-7. Necrophilia.

(a) A person commits the offense of necrophilia when he performs any sexual act with a dead human body involving the sex organs of the one and the mouth, anus, penis, or vagina of the other.

(b) A person convicted of the offense of necrophilia shall be punished by imprisonment for not less than one nor more than ten years. (Code 1933, § 26-2022, enacted by Ga. L. 1977, p. 315, § 1.)

### JUDICIAL DECISIONS

**Cited** in Lipham v. State, 257 Ga. 808, 364 S.E.2d 840 (1988).

### RESEARCH REFERENCES

**ALR.** — Fact that murder-rape victim was dead at time of penetration as affecting conviction for rape, 76 ALR4th 1147.

### 16-6-8. Public indecency.

(a) A person commits the offense of public indecency when he or she performs any of the following acts in a public place:

(1) An act of sexual intercourse;

(2) A lewd exposure of the sexual organs;

(3) A lewd appearance in a state of partial or complete nudity; or

(4) A lewd caress or indecent fondling of the body of another person.

(b) A person convicted of the offense of public indecency as provided in subsection (a) of this Code section shall be punished as for a misdemeanor except as provided in subsection (c) of this Code section.

(c) Upon a third or subsequent conviction for public indecency for the violation of paragraph (2), (3), or (4) of subsection (a) of this Code section, a person shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.

(d) For the purposes of this Code section only, "public place" shall include jails and penal and correctional institutions of the state and its political subdivisions.

(e) This Code section shall be cumulative to and shall not prohibit the enactment of any other general and local laws, rules, and regulations of state and local authorities or agencies and local ordinances prohibiting such activities which are more restrictive than this Code section. (Laws 1833, Cobb's 1851 Digest, p. 815; Code 1863, § 4420; Ga. L. 1865-66, p. 233, § 2; Code 1868, § 4461; Code 1873, § 4535; Code 1882, § 4535; Penal Code 1895, § 390; Penal Code 1910, § 381; Code 1933, § 26-6101; Code 1933, § 26-2011, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1991, p. 966, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1996, p. 312, § 1; Ga. L. 1996, p. 354, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, subsection (d) which was added by Ga. L. 1996, p. 354, § 1, was redesignated as subsection (e).

**Cross references.** — Computer pornography and child exploitation prevention, § 16-12-100.2.

**Law reviews.** — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

For note, "Pedophilia, Exhibitionism, and Voyeurism: Legal Problems in the Deviant Society," see 4 Ga. L. Rev. 149 (1969).

For comment on *Byous v. State*, 121 Ga. App. 654, 175 S.E.2d 106 (1970), see 21 Mercer L. Rev. 695 (1970). For comment on *Jenkins v. State*, 230 Ga. 726, 199 S.E.2d 183 (1973), see 8 Ga. L. Rev. 225 (1973). For comment on *Slaton v. Paris Adult Theatre I*, 231 Ga. 312, 201 S.E.2d 456 (1973), see 8 Ga. L. Rev. 225 (1973).

## JUDICIAL DECISIONS

**Offense of lewdness at common law** was indecency referable especially to sexual matters, and it included any gross indecency which was sufficiently open and notorious as to tend to corrupt the morals of the community. *United States ex rel. Huguley v. Martin*, 325 F. Supp. 489 (N.D. Ga. 1971).

**Motion to sever.** — Defendant's motion to sever a public indecency charge from sexual battery charges was properly denied as there was sufficient evidence that the charges constituted a single scheme or plan to prey upon young victims and to satisfy the defendant's prurient desires since: (1) the sexual batteries and the public indecency all took place within a month's period of time and within a five-mile radius; (2) the three victims were between the ages of 20 and 29; (3) the defendant approached each victim in a public place and, after attempting to engage them in conversation of a sexual nature, behaved in a sexually aggressive manner; and (4) in one instance of sexual battery and in the public indecency incident, the defendant offered the victims money and fondled the defendant's person. *Harmon v. State*, 281 Ga. App. 35, 635 S.E.2d 348 (2006), cert. dismissed, 2007 Ga. LEXIS 137 (Ga. 2007).

**Nudity emphasizing theatrical theme was not lewd** and did not violate former Code 1933, § 26-2011. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971) (see O.C.G.A. § 16-6-8).

**Little difference in effect between lewd conduct in public areas and that in motion pictures.** — There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for viewing by the public. *Evans Theatre Corp. v. Slaton*, 227 Ga. 377, 180 S.E.2d 712, cert. denied, 404 U.S. 950, 92 S. Ct. 281, 30 L. Ed. 2d 267 (1971).

**Elements of lewd conduct.** — When a little girl, playing in her backyard with her rabbit, hears a "thumping" or "tapping" and then turns to see the private genitals of her nude next-door neighbor,

the test of "lewd" under O.C.G.A. § 16-6-8 is met. *Collins v. State*, 160 Ga. App. 680, 288 S.E.2d 43 (1981).

**Shopping center parking lot is clearly a "public place" within the meaning of O.C.G.A. § 16-6-8.** *State v. Chrisopoulos*, 198 Ga. App. 876, 403 S.E.2d 460 (1991).

**Exposure in front of window.** — Evidence that the defendant would come home from work, pull off clothes and become exposed in front of the window "[j]ust to get a thrill" was sufficient to support conviction for public indecency although the act was committed in a private residence. *Hester v. State*, 164 Ga. App. 871, 298 S.E.2d 292 (1982).

**Visible from outside apartment.** — In prosecution for public indecency, although an apartment may come within definition of "public place," in such case, state must show that defendant was visible from outside of apartment. *McGee v. State*, 165 Ga. App. 423, 299 S.E.2d 573 (1983).

**Evidence that defendant was observed masturbating** in the television-viewing room in a correctional institution was sufficient to support conviction of public indecency. *Minor v. State*, 232 Ga. App. 246, 501 S.E.2d 576 (1998).

**Masturbating without exposure of sexual organ.** — Evidence that the defendant was observed masturbating with his hands inside his shorts but never exposed his penis to anyone was insufficient to convict him of indecent exposure. *Akin v. State*, 249 Ga. App. 412, 548 S.E.2d 655 (2001).

**Exposure to babysitter in marital bedroom.** — When the defendant appeared nude in the presence of a teenage female babysitter in the marital bedroom and bathroom at his home, the evidence indicated that the defendant by his own behavior converted his bedroom and bath from a private zone to a public place, where his nudity might reasonably be expected to be viewed by people other than members of his family or household, and thereby supports his conviction and sentence for public indecency. *Greene v. State*, 191 Ga. App. 149, 381 S.E.2d 310,

cert. denied, 191 Ga. App. 922, 381 S.E.2d 310 (1989).

**Single lewd act in presence of two witnesses as one crime.** — When the defendant allegedly committed a single lewd act in the presence of two minors, but was charged with two separate counts of public indecency, the trial court correctly ordered that prosecution would proceed as to one count only since the two minors were not the victims of the alleged crime but were merely the witnesses through whom the state was prepared to prove the defendant's guilt of an affront to public decency. *State v. Chrisopoulos*, 198 Ga. App. 876, 403 S.E.2d 460 (1991).

**Evidence of urinating on the ground** in a shopping center parking lot is sufficient to support a conviction of making a lewd appearance in a state of partial nudity in a public place. *Clark v. State*, 169 Ga. App. 535, 313 S.E.2d 748 (1984).

**Admissibility of evidence of previous offense.** — Once identity of defendant as perpetrator of the former crime was proven, testimony concerning that crime was admissible to show identity and criminal bent of mind and to rebut defendant's statement that defendant had never exposed self to anyone before. *Huckeba v. State*, 157 Ga. App. 795, 278 S.E.2d 703 (1981).

Trial court properly admitted similar transaction evidence to show a defendant's course of conduct and intent in the defendant's trial for public indecency and sexual battery as in each of the similar transactions, defendant approached someone previously unknown to the defendant in a public place, attempted to talk to the person, and then engaged in sexually inappropriate behavior; in the sexual battery incidents and one similar transaction, the defendant either bit or licked the victims on their buttocks while the victims were shopping and in the public indecency incident and two of the similar transactions, the defendant exposed the defendant's person. *Harmon v. State*, 281 Ga. App. 35, 635 S.E.2d 348 (2006), cert. dismissed, 2007 Ga. LEXIS 137 (Ga. 2007).

**Two conditions precedent to admission of evidence relating to defendant's prior act of exposing self** are: first, that witness positively identify defendant as perpetrator of crime; secondly, that there be sufficient similarity between former incident and latter incident that proof of former tends to prove latter. *Huckeba v. State*, 157 Ga. App. 795, 278 S.E.2d 703 (1981).

**Evidence sufficient to support conviction.** — See *Collins v. State*, 191 Ga. App. 289, 381 S.E.2d 430 (1989); *Watkins v. State*, 237 Ga. App. 94, 514 S.E.2d 244 (1999).

Witness's testimony that the witness awoke during the night and found that someone had removed a screen from the window of the witness's apartment, that the witness saw someone when the witness looked outside, that the witness was able to see defendant's face and noticed that the defendant was naked when the defendant moved near a neighbor's porch light, and that police apprehended defendant near the witness's residence a short time later and found that the defendant possessed property belonging to another person who had the screen outside that person's window removed was sufficient to sustain defendant's convictions on charges of burglary with the intent to commit theft and public indecency. *Heard v. State*, 268 Ga. App. 718, 603 S.E.2d 69 (2004).

**Guilty plea based on single incident waived challenge to sentence.** — Because defendant pled guilty to four misdemeanor counts of public indecency, O.C.G.A. § 16-6-8, based on one lewd act witnessed by several school children, and willingly and knowingly accepted the specified sentences as to the four counts, the defendant waived any claim before the habeas court that there was in fact only one act and that the resulting sentences were void on double jeopardy grounds. *Turner v. State*, 284 Ga. 494, 668 S.E.2d 692 (2008).

**Jury question.** — Whether the act giving rise to a charge of public indecency was performed in a "public place" within the meaning of O.C.G.A. § 16-6-8 was a question of fact which the trial court properly left for the jury's resolution. *Collins v. State*, 191 Ga. App. 289, 381 S.E.2d 430 (1989).

**Felony sentence.** — Defendant was properly convicted of a felony on a public indecency charge and sentenced to serve five years to serve on that charge as the defendant had two prior public indecency convictions; the trial court was required to sentence the defendant as a felon rather than a misdemeanant. *Harmon v. State*, 281 Ga. App. 35, 635 S.E.2d 348 (2006), cert. dismissed, 2007 Ga. LEXIS 137 (Ga. 2007).

**Probation condition.** — Probation condition stating that “Defendant will remain appropriately clothed when in public and when the potential for public view exists” imposed substantially the same requirements as those imposed by Georgia’s public indecency law, and was sufficiently specific and definite. *Tyler v. State*, 279 Ga. App. 809, 632 S.E.2d 716 (2006), cert. denied, 2006 Ga. LEXIS 810 (Ga. 2006); overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

**Merger of charges.** — Appellant was not entitled to a writ of habeas corpus after serving four 12-month sentences of probation for four counts of public indecency under O.C.G.A. § 16-6-8 related to an incident in which the appellant began to masturbate while alongside a school bus as the appellant failed to show adverse collateral consequences as the appellant only made a bald claim that being sentenced on four counts of public indecency, as opposed to one, created more difficulty in finding employment; based on the plea agreement, the merger of the charges was expressly rejected by the appellant in order to effectuate the negoti-

ated pleas to a misdemeanor. *Turner v. State*, 284 Ga. 494, 668 S.E.2d 692 (2008).

**Registration for public indecency proper.** — Offense of public indecency, O.C.G.A. § 16-6-8, was not a victimless crime and, therefore, a perpetrator thereof may have been required to register under O.C.G.A. § 42-1-12; the trial court did not err in requiring the defendant to register as a condition of the defendant’s sentence for public indecency. *Brown v. State*, 270 Ga. App. 176, 605 S.E.2d 885 (2004).

Cited in *Jordan v. State*, 121 Ga. App. 303, 173 S.E.2d 462 (1970); *Jenkins v. Thomas*, 124 Ga. App. 286, 183 S.E.2d 489 (1971); *Cooley v. Endictor*, 340 F. Supp. 15 (N.D. Ga. 1971); *Jenkins v. State*, 230 Ga. 726, 199 S.E.2d 183 (1973); *Jenkins v. Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974); *Key v. State*, 131 Ga. App. 126, 205 S.E.2d 510 (1974); *Rushing v. State*, 133 Ga. App. 434, 211 S.E.2d 389 (1974); *Prairieland Broadcasters of Ga., Inc. v. Thompson*, 135 Ga. App. 73, 217 S.E.2d 296 (1975); *White v. State*, 138 Ga. App. 470, 226 S.E.2d 296 (1976); *David v. State*, 139 Ga. App. 335, 228 S.E.2d 362 (1976); *Singleton v. State*, 143 Ga. App. 387, 238 S.E.2d 743 (1977); *Singleton v. State*, 146 Ga. App. 72, 245 S.E.2d 473 (1978); *Fluker v. State*, 248 Ga. 290, 282 S.E.2d 112 (1981); *Mackler v. State*, 164 Ga. App. 874, 298 S.E.2d 589 (1982); *Damare v. State*, 257 Ga. App. 508, 571 S.E.2d 507 (2002); *2025 Highway, L.L.C. v. Bibb County*, 377 F. Supp. 2d 1310 (M.D. Ga. 2005); *Selfe v. State*, 290 Ga. App. 857, 660 S.E.2d 727 (2008); *Curves, LLC v. Spalding County, Georgia*, 569 F. Supp. 2d 1305 (N.D. Ga. 2007).

## OPINIONS OF THE ATTORNEY GENERAL

**Nudism per se is prohibited by law in Georgia.** 1950-51 Op. Att’y Gen. p. 262.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity, §§ 1, 2, 16.

**C.J.S.** — 67 C.J.S., Obscenity, § 4.

**ALR.** — What is “infamous” offense within constitutional or statutory provision in relation to presentment or indictment by grand jury, 24 ALR 1002.

Criminal offense predicated upon indecent exposure, 93 ALR 996; 94 ALR2d 1353.

Validity, construction, and application of statutes or ordinances relating to decency as regards wearing apparel or lack of it, 110 ALR 1233.

Criminal offense predicated upon indecent exposure, 94 ALR2d 1353.

Operation of nude-model photographic studio as offense, 48 ALR3d 1313.

Topless or bottomless dancing or similar conduct as offense, 49 ALR3d 1084.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

What constitutes such discriminatory

prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place, 96 ALR3d 692.

Indecent exposure: what is "person", 63 ALR4th 1040.

Regulation of exposure of female, but not male breasts, 67 ALR5th 431.

What constitutes "public place" within meaning of state statute or local ordinance prohibiting indecency or commission of sexual act in public place, 95 ALR5th 229.

## 16-6-9. Prostitution.

A person commits the offense of prostitution when he or she performs or offers or consents to perform a sexual act, including but not limited to sexual intercourse or sodomy, for money or other items of value. (Code 1933, § 26-2012, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2001, p. 92, § 3.)

**Cross references.** — Affirmative defense to certain sexual crimes, § 16-3-6. Abatement of houses of prostitution, C. 3, T. 41.

**Editor's notes.** — Ga. L. 2001, p. 92, §§ 1 and 2, not codified by the General Assembly, provide: "This Act shall be known and may be cited as the 'Child Sexual Commerce Prevention Act of 2001.' The General Assembly acknowledges that children are increasingly induced, coerced, or compelled to perform sexual acts

for the financial benefit of third parties. The General Assembly enacts this law to express its abhorrence for these practices and to better protect children from sexual exploitation."

**Law reviews.** — For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

For note on the 2001 amendment to O.C.G.A. § 16-6-9, see 18 Georgia St. U. L. Rev. 32 (2001).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues involved, decisions under Ga. L. 1943, p. 568 (see O.C.G.A. § 44-7-18) are included in the annotations for this Code section.

**Equal protection.** — Application of section in Atlanta held not to deny equal protection to female prostitutes. State v. Gaither, 236 Ga. 497, 224 S.E.2d 378 (1976).

**Former Code 1933, § 26-2012 was not void for vagueness.** Moore v. State, 231 Ga. 218, 201 S.E.2d 146 (1973) (see O.C.G.A. § 16-6-9).

**Former Code 1933, § 26-2012 was applicable only to "sellers" of sexual intercourse for money.** State v. Gaither, 236 Ga. 497, 224 S.E.2d 378 (1976) (see O.C.G.A. § 16-6-9).

**Former Code 1933, § 26-2012 did not provide that person had to accept money** in order to commit offense, but that the proposed act of sexual intercourse be for a consideration of money. Moore v. State, 231 Ga. 218, 201 S.E.2d 146 (1973) (see O.C.G.A. § 16-6-9).

**Acceptance of money and consummation of transaction not required.** —

Person does not have to accept money to commit the offense of prostitution, nor does a person have to actually consummate the transaction; rather, to commit the crime the person need only offer to perform an act of sexual intercourse for money. *Allen v. State*, 170 Ga. App. 96, 316 S.E.2d 500 (1984).

**Offense is defined in terms of commercialization:** the sale, offer to sell or consent to sell physical intimacies for money. *State v. Gaither*, 236 Ga. 497, 224 S.E.2d 378 (1976).

**When female becomes a prostitute.** — Female becomes a prostitute once she has performed, offered, or consented to perform first act of sexual intercourse for money. *Fluker v. State*, 248 Ga. 290, 282 S.E.2d 112 (1981), appeal dismissed, 455 U.S. 1009, 102 S. Ct. 1699, 72 L. Ed. 2d 127 (1982).

**Indiscriminate illegal intercourse with number of men not necessarily involved.** — “Prostitution” as used in statute relating to solicitation of another for the purpose of prostitution does not necessarily involve indiscriminate illegal intercourse with a number of men. *Price v. State*, 76 Ga. App. 108, 45 S.E.2d 84 (1947) (decided under Ga. L. 1943, p. 568).

**Definition of “sexual intercourse.”** — Since “sexual intercourse” is a necessary element of both adultery and prostitution, it is logical to conclude that the definition of sexual intercourse should be uniform in both instances. *Allen v. State*, 170 Ga. App. 96, 316 S.E.2d 500 (1984).

**Type of sexual intercourse** need not be specified in an accusation for the offense of prostitution. *State v. Kenney*, 233 Ga. App. 298, 503 S.E.2d 585 (1998).

**Solicitation of carnal intercourse in unnatural way.** — Term “prostitution” as defined by the General Assembly does not mean solely sexual intercourse in the natural way, but includes solicitation of carnal intercourse in an unnatural way. *Price v. State*, 76 Ga. App. 108, 45 S.E.2d 84 (1947) (decided under Ga. L. 1943, p. 568).

**Homosexual acts.** — Person may commit the crime of prostitution by offering to engage in homosexual acts for money. *Allen v. State*, 170 Ga. App. 96, 316 S.E.2d 500 (1984).

Consensual sodomy has been merged into the offenses of fornication and adultery. *Allen v. State*, 170 Ga. App. 96, 316 S.E.2d 500 (1984).

**Former Code 1933, § 26-2012 did not require state to allege or prove exact amount of money;** statute required only that the defendant perform or offer to perform sexual intercourse for money. *Anderson v. State*, 149 Ga. App. 460, 254 S.E.2d 459 (1979) (see O.C.G.A. § 16-6-9).

**Specifying who made the offer to perform sexual intercourse** is not required in an accusation for the offense of prostitution. *State v. Kenney*, 233 Ga. App. 298, 503 S.E.2d 585 (1998).

**Former Code 1933, § 26-2012 may be upheld as one to punish for attempt to commit prostitution.** *Moore v. State*, 231 Ga. 218, 201 S.E.2d 146 (1973) (see O.C.G.A. § 16-6-9).

**Conviction for committing or agreeing to commit prostitution.** — Person may be convicted under former Code 1933, § 26-2012 not only if the person actually committed the act of prostitution but also if the person was a party to an agreement to do so. There is no constitutional prohibition against this feature. *Moore v. State*, 231 Ga. 218, 201 S.E.2d 146 (1973) (see O.C.G.A. § 16-6-9).

**When allegation may be disregarded because surplusage.** — When the accusation stated that the accused “did then and there unlawfully, and with force and arms, offer and consent to perform an act of sexual intercourse for money,” since “with force and arms” was not part of former Code 1933, § 26-2012 (see O.C.G.A. § 16-6-9) which makes prostitution a crime and the words are not required in the form prescribed for indictments under former Code 1933, § 27-501 (see O.C.G.A. § 17-7-54), such an allegation is mere surplusage and may be disregarded. *Anderson v. State*, 149 Ga. App. 460, 254 S.E.2d 459 (1979); *Hicks v. State*, 149 Ga. App. 459, 254 S.E.2d 461 (1979).

**Name of particular individual solicited for prostitution is not required** in order to set forth one of the essential elements of the crime, and any variation in the proof of whom was solicited was immaterial. *Shorter v. State*, 155 Ga. App. 609, 271 S.E.2d 741 (1980).

Failure to name the person solicited was not a ground for sustaining a demur-  
rer to the indictment. State v. Kenney, 233 Ga. App. 298, 503 S.E.2d 585 (1998).

**Sufficient evidence to support guilty verdict.** — In a prostitution pros-  
ecution where the arresting police officer testified that the officer began a conversa-  
tion with the defendant and that during this conversation defendant offered to have sexual intercourse with the officer for \$100.00, but the defendant denied hav-  
ing offered to perform sexual intercourse with the arresting officer for any money and presented evidence that defendant was incapable of having sexual inter-  
course at that time due to complications from recent surgery, the evidence was sufficient to support the jury verdict of guilty. Lemon v. State, 151 Ga. App. 709, 261 S.E.2d 447 (1979).

Given the statements made by a codefendant that the codefendant would have sex with an undercover police detective "as well," and evidence that the defendant accepted \$150 after representing that the money constituted payment for straight sex and oral sex, the defendant's conviction for prostitution was upheld on appeal. Ford v. State, 285 Ga. App. 106, 645 S.E.2d 590 (2007).

**Evidence supported defendant's conviction for attempted prostitution,** after the record showed that she worked for "escort services" listed under "massage parlors" in the telephone directory and a witness testified "the lady put a condom on me and put her mouth on my penis" while charging him about \$300 therefor. Renz v. State, 183 Ga. App. 108, 357 S.E.2d 843 (1987).

**When female disrobes and reclines on bed together with nude male,** the reasonable expectation is that the ordinary and normal form of sexual inter-  
course is intended by the parties. Bailess v. State, 168 Ga. App. 56, 308 S.E.2d 61 (1983).

Cited in Snead v. State, 127 Ga. App. 12, 192 S.E.2d 415 (1972); Hicks v. State, 234 Ga. 142, 214 S.E.2d 658 (1975); Pace v. City of Atlanta, 135 Ga. App. 399, 218 S.E.2d 128 (1975); Lambert v. City of Atlanta, 242 Ga. 645, 250 S.E.2d 456 (1978); McGee v. State, 165 Ga. App. 423, 299 S.E.2d 573 (1983); Berman v. State, 191 Ga. App. 231, 381 S.E.2d 316 (1989); Pardue v. State, 214 Ga. App. 690, 448 S.E.2d 768 (1994); Wills v. State, 216 Ga. App. 157, 453 S.E.2d 762 (1995); Pabey v. State, 262 Ga. App. 272, 585 S.E.2d 200 (2003).

## OPINIONS OF THE ATTORNEY GENERAL

**Confidential screening for the HTLV-III/LAV virus in convicted prostitutes** may be required: (1) as a health measure by the Department of Human

Resources, or (2) as a condition of probation by the sentencing court. 1986 Op. Att'y Gen. No. 86-19.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 63C Am. Jur. 2d, Prostitution, § 1 et seq.

**C.J.S.** — 73 C.J.S., Prostitution, § 1 et seq.

**ALR.** — Power to exact license fees or impose a penalty for benefit of private individual or corporation, 13 ALR 828; 19 ALR 205.

Purpose other than indulgence in sexual intercourse as affecting violation of Mann Act, 73 ALR 873.

White Slave Traffic Act (Mann Act) as

affecting constitutionality or application of state statutes dealing with prostitution, 161 ALR 356.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

Laws prohibiting or regulating "escort services," "outcall entertainment," or similar services used to carry on prostitution, 15 ALR5th 900.

## 16-6-10. Keeping a place of prostitution.

A person having or exercising control over the use of any place or conveyance which would offer seclusion or shelter for the practice of prostitution commits the offense of keeping a place of prostitution when he knowingly grants or permits the use of such place for the purpose of prostitution. (Ga. L. 1943, p. 568, § 1; Code 1933, § 26-2014, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1970, p. 236, § 3.)

**Cross references.** — Abatement of houses of prostitution, Ch. 3, T. 41. Inducing female person to enter roadhouse or

similar establishment for purpose of prostitution or debauchery or other immoral purpose, § 43-21-61.

## JUDICIAL DECISIONS

**To sustain indictment under former Code 1933, § 26-2014.** it was necessary to show only that the accused contributed to or aided, directly or indirectly, in maintaining and keeping a lewd house. *Shealy v. State*, 142 Ga. App. 850, 237 S.E.2d 207 (1977) (see O.C.G.A. § 16-6-10).

**Person cannot legally be convicted of maintaining lewd house unless** the proof shows that the general reputation of the house or its inmates, or both, was that it was a lewd house, and also that fornication or adultery was actually committed in the house. *Smith v. State*, 88 Ga. App. 465, 76 S.E.2d 735 (1953) (decided under Ga. L. 1943, p. 568).

**Not error for trial judge to permit state witness to give details of prostitution practiced.** — When the charge is one for receiving another into any house, building, place, etc. for the purpose of prostitution or assignation, it was not error for the trial judge to permit a witness for the state to go into detail as to the type of prostitution and assignation practiced therein over the objection that such evidence unduly tended to inflame and prejudice the jury against the defendant. *Saxe v. State*, 112 Ga. App. 804, 146 S.E.2d 376 (1965) (decided under Ga. L. 1943, p. 568).

**Evidence sufficient for conviction.** — Defendant's conviction of keeping a place of prostitution was supported by sufficient evidence, including evidence that an undercover officer visited the establishment for a massage, that, acting as if in charge, the defendant greeted the officer and turned the officer over to a spa employee, that the employee touched the officer's genitals during the massage and offered masturbation and oral sex services for specified prices, that the defendant hired the employee to be a prostitute at the spa and that the employee had provided repeated prostitution services there, that the defendant was aware of these activities, including, among other things, that the two split the money received for the employee's sexual services, that others worked for the defendant as prostitutes on the premises, and, based on certified copies of documents, that defendant owned the business and its business license. *Ahn v. State*, 279 Ga. App. 501, 631 S.E.2d 711 (2006).

**Cited** in *Snead v. State*, 127 Ga. App. 12, 192 S.E.2d 415 (1972); *Fluker v. State*, 248 Ga. 290, 282 S.E.2d 112 (1981); *Rivais v. State*, 192 Ga. App. 226, 384 S.E.2d 200 (1989); *Singleton v. Eastern Carriers, Inc.*, 192 Ga. App. 227, 384 S.E.2d 202 (1989).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 24 Am. Jur. 2d, Disorderly Houses, § 1 et seq.

**ALR.** — White Slave Traffic Act (Mann

Act) as affecting constitutionality or application of state statutes dealing with prostitution, 161 ALR 356.

### 16-6-11. Pimping.

A person commits the offense of pimping when he or she performs any of the following acts:

- (1) Offers or agrees to procure a prostitute for another;
- (2) Offers or agrees to arrange a meeting of persons for the purpose of prostitution;
- (3) Directs or transports another person to a place when he or she knows or should know that the direction or transportation is for the purpose of prostitution;
- (4) Receives money or other thing of value from a prostitute, without lawful consideration, knowing it was earned in whole or in part from prostitution; or
- (5) Aids or abets, counsels, or commands another in the commission of prostitution or aids or assists in prostitution where the proceeds or profits derived therefrom are to be divided on a pro rata basis. (Ga. L. 1918, p. 267, § 1; Code 1933, § 26-6201; Code 1933, § 26-2013, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1970, p. 236, § 2; Ga. L. 2003, p. 573, § 1.)

**Law reviews.** — For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

For note on the 2003 amendment to this Code section, see 20 Georgia St. U.L. Rev. 84 (2003).

### JUDICIAL DECISIONS

**Specifying the type of prostitution act offered** is not required in accusation for pimping. *State v. Kenney*, 233 Ga. App. 298, 503 S.E.2d 585 (1998).

**There was no error in trial court's denial of motion for directed verdict** of acquittal based upon the assertion that the probata did not conform to the allegata, in that the original accusation charged that the defendant received money from a prostitute without lawful consideration on February 23, 1983, but the evidence at trial showed that the offense occurred on February 2, 1983, because time is not a material element of the offense of pimping and the state proved that the offense occurred within the statute of limitation prior to the return of the indictment. *Angevine v. State*, 171 Ga. App. 658, 320 S.E.2d 578 (1984).

**Sufficient evidence supported conviction.** — In addition to the substantive

evidence of defendant's guilt, provided by the victim's prior inconsistent statements, evidence of women's sexy clothing found in defendant's hotel room, which the victim said that defendant had purchased, and information downloaded from an Internet site detailing the pimping lifestyle, was sufficient evidence to authorize a rational trier of fact to find defendant guilty of aggravated child molestation, statutory rape, and pimping. *Lewis v. State*, 278 Ga. App. 160, 628 S.E.2d 239 (2006).

**Conviction for felony versus misdemeanor appropriate.** — Trial court did not err by sentencing defendant for felony pimping, instead of only a misdemeanor count of pimping, since the defendant was charged with instructing a person to commit the act of prostitution and receiving money therefrom, which was a clear violation of O.C.G.A. § 16-6-11(4), and be-

cause the indictment alleged that the person whom defendant instructed was under the age of 18 years, the crime of pimping was elevated to a felony under O.C.G.A. § 16-6-13(b). *Burroughs v. State*, 292 Ga. App. 580, 665 S.E.2d 4 (2008), cert. denied, 2008 Ga. LEXIS 930 (Ga. 2008).

**Cited** in *Snead v. State*, 127 Ga. App. 12, 192 S.E.2d 415 (1972); *Sutton v. Garmon*, 245 Ga. 685, 266 S.E.2d 497 (1980); *Fluker v. State*, 248 Ga. 290, 282 S.E.2d 112 (1981); *Sellers v. State*, 176 Ga. App. 681, 337 S.E.2d 373 (1985).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 63C Am. Jur. 2d, Prostitution, § 17 et seq.

**C.J.S.** — 73 C.J.S., Prostitution, §§ 11, 14, 15, 28.

**ALR.** — White Slave Traffic Act (Mann Act) as affecting constitutionality or application of state statutes dealing with prostitution, 161 ALR 356.

Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignation — modern cases, 77 ALR3d 519.

Separate acts of taking earnings of or support from prostitute as separate or continuing offenses of pimping, 3 ALR4th 1195.

## 16-6-12. Pandering.

A person commits the offense of pandering when he or she solicits a person to perform an act of prostitution in his or her own behalf or in behalf of a third person or when he or she knowingly assembles persons at a fixed place for the purpose of being solicited by others to perform an act of prostitution. (Code 1933, § 26-2016, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1970, p. 236, § 5; Ga. L. 1988, p. 1797, § 1; Ga. L. 1998, p. 1301, § 1.)

**Cross references.** — Actions for childhood sexual abuse, § 9-3-33.1.

**Law reviews.** — For review of 1998 legislation relating to crimes and offenses,

see 15 Georgia St. U.L. Rev. 69 (1998). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues involved, decisions under Ga. L. 1943, p. 568, (see O.C.G.A. § 44-7-18), are included in the annotations for this Code section.

**Section is substantially related to achievement of important governmental objectives.** — O.C.G.A. § 16-6-12 is one part of a broad statutory scheme that serves important governmental objectives, and is substantially related to achievement of these objectives. *Fluker v. State*, 248 Ga. 290, 282 S.E.2d 112 (1981), appeal dismissed, 455 U.S. 1009, 102 S. Ct. 1699, 72 L. Ed. 2d 127 (1982).

**Equal protection.** — Sex-based dis-

crimatory language of section prior to 1988 amendment did not violate equal protection. *Fluker v. State*, 248 Ga. 290, 282 S.E.2d 112 (1981), appeal dismissed, 455 U.S. 1009, 102 S. Ct. 1699, 72 L. Ed. 2d 127 (1982).

**Prostitution includes solicitation of carnal intercourse in unnatural way.**

— Term "prostitution" as defined by the legislature does not mean solely sexual intercourse in the natural way, but includes solicitation of carnal intercourse in an unnatural way. *Price v. State*, 76 Ga. App. 108, 45 S.E.2d 84 (1947) (decided under Ga. L. 1943, p. 568).

**Indiscriminate illegal intercourse**

**with number of men not necessarily involved.** — "Prostitution" as used in statute relating to solicitation of another for the purpose of prostitution does not necessarily involve indiscriminate illegal intercourse with a number of men. Price v. State, 76 Ga. App. 108, 45 S.E.2d 84 (1947) (decided under Ga. L. 1943, p. 568).

**Evidence sufficient.** — Defendant's solicitation of the victim to perform sexual acts, which did not expressly exclude sexual intercourse, supported conviction of offense of pandering. McGee v. State, 165 Ga. App. 423, 299 S.E.2d 573 (1983).

**Cited** in Blanton v. State, 150 Ga. App. 559, 258 S.E.2d 174 (1979).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 63C Am. Jur. 2d, Prostitution, § 17 et seq.

**C.J.S.** — 73 C.J.S., Prostitution, § 14 et seq.

**ALR.** — Constitutionality and construction of pandering acts, 74 ALR 311.

White Slave Traffic Act (Mann Act) as affecting constitutionality or application of state statutes dealing with prostitution, 161 ALR 356.

Operation of nude-model photographic studio as offense, 48 ALR3d 1313.

Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignation — modern cases, 77 ALR3d 519.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 41 ALR4th 675.

## 16-6-13. Penalties for violating Code Sections 16-6-9 through 16-6-12.

(a) Except as otherwise provided in subsection (b) of this Code section, a person convicted of any of the offenses enumerated in Code Sections 16-6-10 through 16-6-12 shall be punished as for a misdemeanor of a high and aggravated nature. A person convicted of the offense enumerated in Code Section 16-6-9 shall be punished as for a misdemeanor.

(b)(1) A person convicted of any of the offenses enumerated in Code Sections 16-6-10 through 16-6-12 when such offense involves the conduct of a person who is at least 16 but less than 18 years of age shall be guilty of a felony and shall be punished by imprisonment for a period of not less than five nor more than 20 years, a fine of not less than \$2,500.00 nor more than \$10,000.00, or both.

(2) A person convicted of any of the offenses enumerated in Code Sections 16-6-10 through 16-6-12 when such offense involves the conduct of a person under the age of 16 years shall be guilty of a felony and shall be punished by imprisonment for a period of not less than ten nor more than 30 years, a fine of not more than \$100,000.00, or both.

(3) Adjudication of guilt or imposition of a sentence for a conviction of a second or subsequent offense pursuant to this subsection, including a plea of nolo contendere, shall not be suspended, probated, deferred, or withheld.

(c)(1) The clerk of the court in which a person is convicted of pandering shall cause to be published a notice of conviction for each such person convicted. Such notices of conviction shall be published in the manner of legal notices in the legal organ of the county in which such person resides or, in the case of nonresidents, in the legal organ of the county in which the person was convicted. Such notice of conviction shall be one column wide by two inches long and shall contain the photograph taken by the arresting law enforcement agency at the time of arrest, name, and address of the convicted person and the date, time, place of arrest, and disposition of the case and shall be published once in the legal organ of the appropriate county in the second week following such conviction or as soon thereafter as publication may be made.

(2) The convicted person for which a notice of conviction is published pursuant to this subsection shall be assessed the cost of publication of such notice and such assessment shall be imposed at the time of conviction in addition to any other fine imposed pursuant to this Code section.

(3) The clerk of the court, the publisher of any legal organ which publishes a notice of conviction, and any other person involved in the publication of an erroneous notice of conviction shall be immune from civil or criminal liability for such erroneous publication, provided such publication was made in good faith.

(d) In addition to any other penalty authorized under subsections (a) and (b) of this Code section, a person convicted of an offense enumerated in Code Sections 16-6-9 through 16-6-12 shall be fined \$2,500.00 if such offense was committed within 1,000 feet of any school building, school grounds, public place of worship, or playground or recreation center which is used primarily by persons under the age of 17 years. (Code 1933, § 26-2015, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1970, p. 236, § 4; Ga. L. 1988, p. 1797, § 2; Ga. L. 1992, p. 6, § 16; Ga. L. 1998, p. 1301, § 2; Ga. L. 2001, p. 92, § 4; Ga. L. 2003, p. 878, § 1.1; Ga. L. 2011, p. 217, § 2/HB 200.)

**The 2011 amendment**, effective July 1, 2011, redesignated former subsection (b) as present paragraphs (b)(1) and (b)(3); in paragraph (b)(1), substituted "A person convicted of any of the offenses enumerated in Code Sections 16-6-10 through 16-6-12 when such offense involves the conduct of a person who is at least 16 but less than 18 years of age" for "A person convicted of keeping a place of prostitution, pimping, or pandering when such offense involves keeping a place of prostitution for, the pimping for, or the solicita-

tion of a person under the age of 18 years to perform an act of prostitution or the assembly of two or more persons under the age of 18 years at a fixed place for the purpose of being solicited by others to perform an act of prostitution" at the beginning, substituted "20 years, a fine of" for "20 years and such convicted person shall be fined" near the end, and added ", or both" at the end; added paragraph (b)(2); and deleted "when such offense involves keeping a place of prostitution for, the pimping for, or pandering of a

person under the age of 18 years" following "second or subsequent offense" in the middle of paragraph (b)(3).

**Cross references.** — Affirmative defense to certain sexual crimes, § 16-3-6. Registered offenders residing within areas where minors congregate, § 42-1-13.

**Editor's notes.** — Ga. L. 2001, p. 92, §§ 1 and 2, not codified by the General Assembly, provide: "This Act shall be known and may be cited as the 'Child Sexual Commerce Prevention Act of 2001.' The General Assembly acknowledges that

children are increasingly induced, coerced, or compelled to perform sexual acts for the financial benefit of third parties. The General Assembly enacts this law to express its abhorrence for these practices and to better protect children from sexual exploitation."

**Law reviews.** — For review of 1998 legislation relating to crimes and offenses, see 15 Georgia St. U.L. Rev. 69 (1998).

For note on the 2001 amendment to this Code section, see 18 Georgia St. U.L. Rev. 32 (2001).

## JUDICIAL DECISIONS

**Conviction for felony versus misdemeanor appropriate.** — Trial court did not err by sentencing defendant for felony pimping, instead of only a misdemeanor count of pimping, as defendant was charged with instructing a person to commit the act of prostitution and receiving money therefrom, which was a clear violation of O.C.G.A. § 16-6-11(4), and because the indictment alleged that the per-

son whom defendant instructed was under the age of 18 years, the crime of pimping was elevated to a felony under O.C.G.A. § 16-6-13(b). Burroughs v. State, 292 Ga. App. 580, 665 S.E.2d 4 (2008), cert. denied, 2008 Ga. LEXIS 930 (Ga. 2008).

Cited in Sutton v. Garmon, 245 Ga. 685, 266 S.E.2d 497 (1980).

### 16-6-13.1. Testing for sexually transmitted diseases required.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) Upon a verdict or plea of guilty or a plea of nolo contendere to the offense of pandering, the court in which that verdict is returned or plea entered shall as a condition of probation or a suspended sentence require the defendant in such case to submit to testing for sexually transmitted diseases within 45 days following the date of the verdict or plea and to consent to release of the test results to the defendant's spouse if the defendant is married; provided, however, that a defendant who is not a resident of this state shall, upon a verdict or plea of guilty or a plea of nolo contendere, be ordered by the court to undergo immediate testing for sexually transmitted diseases and shall remain in the custody of the court until such testing is completed. The clerk of the court, in the case of a defendant who is a resident of this state, shall mail, within three days following the date of that verdict or plea, a copy of that verdict or plea to the Department of Public Health. The tests for sexually transmitted diseases required under this subsection shall be limited to the eight most common sexually transmitted diseases as determined by the Department of Public Health.

(c) The Department of Public Health, within 30 days following the notification under subsection (b) of this Code section, shall arrange for the tests for the person required to submit thereto. Such person shall bear the costs of such tests.

(d) Any person required under this Code section to submit to testing for sexually transmitted diseases who fails or refuses to submit to the tests arranged pursuant to subsection (c) of this Code section shall be subject to such measures deemed necessary by the court in which the verdict was returned or plea entered to require voluntary submission to the tests. (Code 1981, § 16-6-13.1, enacted by Ga. L. 1998, p. 1301, § 3; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214.)

**The 2009 amendment**, effective July 1, 2009, substituted “Department of Community Health” for “Department of Human Resources” in the last two sentences of subsection (b) and in the first sentence of subsection (c).

**The 2011 amendment**, effective July 1, 2011, substituted “Department of Public Health” for “Department of Community Health” in the last two sentences of subsection (b) and in the first sentence of subsection (c).

## 16-6-13.2. Defined terms; prosecution; forfeiture and seizure of property; in rem action; intervention; court authority; civil proceedings; liberal construction.

(a) As used in this Code section, the term:

(1) “Costs” means, but is not limited to:

(A) All expenses associated with the seizure, towing, storage, maintenance, custody, preservation, operation, or sale of the motor vehicle; and

(B) Satisfaction of any security interest or lien not subject to forfeiture under this Code section.

(2) “Court costs” means, but is not limited to:

(A) All court costs, including the costs of advertisement, transcripts, and court reporter fees; and

(B) Payment of receivers, conservators, appraisers, accountants, or trustees appointed by the court pursuant to this Code section.

(3) “Governmental agency” means any department, office, council, commission, committee, authority, board, bureau, or division of the executive, judicial, or legislative branch of a state, the United States, or any political subdivision thereof.

(4) "Interest holder" means a secured party within the meaning of Code Section 11-9-102 or the beneficiary of a perfected encumbrance pertaining to an interest in a motor vehicle.

(5) "Motor vehicle" or "vehicle" means any motor vehicle as defined in Code Section 40-1-1.

(6) "Owner" means a person, other than an interest holder, who has an interest in a motor vehicle and is in compliance with any statute requiring its recordation or reflection in public records in order to perfect the interest against a bona fide purchaser for value.

(7) "Proceeds" means property derived directly or indirectly from, maintained by, or realized through an act or omission and includes any benefit, interest, or property of any kind without reduction for expenses incurred for acquisition, maintenance, or any other purpose.

(b)(1) An action filed pursuant to this Code section shall be filed in the name of the State of Georgia and may be brought by the prosecuting attorney having jurisdiction over any offense which arose out of the same conduct which made the motor vehicle subject to forfeiture. Such prosecuting attorney may bring an action pursuant to this Code section in the superior court in the county where the motor vehicle was seized or in the county where conduct occurred which made the motor vehicle subject to forfeiture.

(2) Any action brought pursuant to this Code section may be compromised or settled in the same manner as other civil actions.

(c)(1) Any motor vehicle operated by a person to facilitate a violation of Code Section 16-6-11 where the offense involved the pimping of a person under the age of 18 years to perform an act of prostitution and involved a motor vehicle or operated by a person who has been convicted of or pleaded nolo contendere for two previous violations of Code Section 16-6-11 or 16-6-12 involving a motor vehicle within a five-year period and who is convicted or pleads nolo contendere to a third violation of Code Section 16-6-11 or 16-6-12 involving a motor vehicle within the same five-year period is declared to be contraband and subject to forfeiture to the state, as provided in this Code section.

(2) For the purpose of this subsection, a violation of Code Section 16-6-11 or 16-6-12 involving a motor vehicle shall mean a violation of Code Section 16-6-11 or 16-6-12 in which a motor vehicle is used to violate said Code section or in which the violation occurred.

(d) A property interest shall not be subject to forfeiture under this Code section if the owner of such interest or interest holder establishes that such owner or interest holder:

(1) Is not legally accountable for the conduct giving rise to its forfeiture, did not consent to it, and did not know of the conduct;

(2) Holds the motor vehicle jointly or in common with a person whose conduct gave rise to its forfeiture and such owner did not consent to such conduct and did not know of the conduct;

(3) Does not hold the motor vehicle for the benefit of or as nominee for any person whose conduct gave rise to its forfeiture, and, if the owner or interest holder acquired the interest through any such person, the owner or interest holder acquired it as a bona fide purchaser for value without knowingly taking part in an illegal transaction; or

(4) Acquired the interest:

(A) Before the conduct giving rise to its forfeiture, and the person whose conduct gave rise to its forfeiture did not have the authority to convey the interest to a bona fide purchaser for value at the time of the conduct; or

(B) After the completion of the conduct giving rise to its forfeiture:

(i) As a bona fide purchaser for value without knowingly taking part in an illegal transaction; and

(ii) At the time the interest was acquired, was reasonably without cause to believe that the motor vehicle was subject to forfeiture or likely to become subject to forfeiture under this Code section.

(e)(1) Upon learning of the address or phone number of the company which owns any rented or leased vehicle which is present at the scene of an arrest or other action taken pursuant to this Code section, the seizing law enforcement agency shall immediately contact the company to inform it that the vehicle is available for the company to take possession.

(2) In any case where a vehicle which is the only family vehicle is determined to be subject to forfeiture, the court may, if it determines that the financial hardship to the family as a result of the forfeiture and sale outweighs the benefit to the state from such forfeiture, order the title to the vehicle transferred to such other family member who is a duly licensed operator and who requires the use of such vehicle for employment or family transportation purposes. Such transfer shall be subject to any valid liens and shall be granted only once.

(f)(1) A motor vehicle which is subject to forfeiture under this Code section may be seized by any law enforcement officer of this state or of any political subdivision thereof who has power to make arrests or

execute process or a search warrant issued by any court having jurisdiction over the motor vehicle. A search warrant authorizing seizure of a motor vehicle which is subject to forfeiture pursuant to this Code section may be issued on an affidavit demonstrating that probable cause exists for its forfeiture or that the motor vehicle has been the subject of a previous final judgment of forfeiture in the courts of this state. The court may order that the motor vehicle be seized on such terms and conditions as are reasonable.

(2) A motor vehicle which is subject to forfeiture under this Code section may be seized without process if there is probable cause to believe that the motor vehicle is subject to forfeiture under this Code section or the seizure is incident to an arrest or search pursuant to a search warrant or to an inspection under an inspection warrant.

(g)(1) When a motor vehicle is seized pursuant to this Code section, the sheriff or law enforcement officer seizing the same shall report the fact of seizure, in writing, within 20 days thereof to the prosecuting attorney of the county where the seizure was made.

(2) Within 30 days from the date of seizure, a complaint for forfeiture shall be initiated as provided for in subsection (l) or (m) of this Code section.

(3) If the state fails to initiate forfeiture proceedings against a motor vehicle seized for forfeiture by notice of pending forfeiture within the time limits specified in paragraphs (1) and (2) of this subsection, the motor vehicle must be released on the request of an owner or interest holder, pending further proceedings pursuant to this Code section, unless the motor vehicle is being held as evidence.

(h)(1) Seizure of a motor vehicle by a law enforcement officer constitutes notice of such seizure to any person who was present at the time of seizure who may assert an interest in the motor vehicle.

(2) When a motor vehicle is seized pursuant to this Code section, the prosecuting attorney, sheriff, or law enforcement officer seizing the same shall give notice of the seizure to any owner or interest holder who is not present at the time of seizure by personal service, publication, or the mailing of written notice:

(A) If the owner's or interest holder's name and current address are known, by either personal service or mailing a copy of the notice by certified mail or statutory overnight delivery to that address;

(B) If the owner's or interest holder's name and address are required by law to be on record with a government agency to perfect an interest in the motor vehicle but the owner's or interest holder's current address is not known, by mailing a copy of the notice by

certified mail or statutory overnight delivery, return receipt requested, to any address on the record; or

(C) If the owner's or interest holder's address is not known and is not on record as provided in subparagraph (B) of this paragraph or the owner's or interest holder's interest is not known, by publication in two consecutive issues of a newspaper of general circulation in the county in which the seizure occurs.

(3) Notice of seizure must include a description of the motor vehicle, the date and place of seizure, the conduct giving rise to forfeiture, and the violation of law alleged.

(i) A motor vehicle taken or detained under this Code section is not subject to replevin, conveyance, sequestration, or attachment. The seizing law enforcement agency or the prosecuting attorney may authorize the release of the motor vehicle if the forfeiture or retention is unnecessary or may transfer the action to another agency or prosecuting attorney by discontinuing forfeiture proceedings in favor of forfeiture proceedings initiated by the other law enforcement agency or prosecuting attorney. An action under this Code section may be consolidated with any other action or proceeding under this title relating to the same motor vehicle on motion by an interest holder and must be so consolidated on motion by the prosecuting attorney in either proceeding or action. The motor vehicle is deemed to be in the custody of the State of Georgia subject only to the orders and decrees of the superior court having jurisdiction over the forfeiture proceedings.

(j) If a motor vehicle is seized under this Code section, the prosecuting attorney may:

(1) Remove the motor vehicle to a place designated by the superior court having jurisdiction over the forfeiture proceeding;

(2) Remove the motor vehicle to a storage area, within the jurisdiction of the court, for safekeeping;

(3) Provide for another governmental agency, a receiver appointed by the court pursuant to Chapter 8 of Title 9, an owner, or an interest holder to take custody of the motor vehicle and remove it to an appropriate location within the county where the motor vehicle was seized; or

(4) Require the sheriff or chief of police of the political subdivision where the motor vehicle was seized to take custody of the motor vehicle and remove it to an appropriate location for disposition in accordance with law.

(k) As soon as possible, but not more than 30 days after the seizure of a motor vehicle, the seizing law enforcement agency shall estimate the value of the motor vehicle seized.

(1) If the estimated value of the motor vehicle seized is \$25,000.00 or less, the prosecuting attorney may elect to proceed under the provisions of this subsection in the following manner:

(1) Notice of the seizure of such motor vehicle shall be posted in a prominent location in the courthouse of the county in which the motor vehicle was seized. Such notice shall include a description of the motor vehicle, the date and place of seizure, the conduct giving rise to forfeiture, a statement that the owner of such motor vehicle has 30 days within which a claim must be filed, and the violation of law alleged;

(2) A copy of the notice, which shall include a statement that the owner of such motor vehicle has 30 days within which a claim must be filed, shall be served upon an owner, interest holder, or person in possession of the motor vehicle at the time of seizure as provided in subsection (h) of this Code section and shall be published for at least three successive weeks in a newspaper of general circulation in the county where the seizure was made;

(3) The owner or interest holder may file a claim within 30 days after the second publication of the notice of forfeiture by sending the claim to the seizing law enforcement agency and to the prosecuting attorney by certified mail or statutory overnight delivery, return receipt requested;

(4) The claim must be signed by the owner or interest holder under penalty of perjury and must set forth:

(A) The caption of the proceedings as set forth on the notice of pending forfeiture and the name of the claimant;

(B) The address at which the claimant will accept mail;

(C) The nature and extent of the claimant's interest in the motor vehicle;

(D) The date, identity of the transferor, and circumstances of the claimant's acquisition of the interest in the motor vehicle;

(E) The specific provision of this Code section relied on in asserting that the motor vehicle is not subject to forfeiture;

(F) All essential facts supporting each assertion; and

(G) The precise relief sought;

(5) If a claim is filed, the prosecuting attorney shall file a complaint for forfeiture as provided in subsection (m) of this Code section within 30 days of the actual receipt of the claim. A person who files a claim shall be joined as a party; and

(6) If no claim is filed within 30 days after the second publication of the notice of forfeiture, all right, title, and interest in the motor vehicle is forfeited to the state and the prosecuting attorney shall dispose of the motor vehicle as provided in subsection (s) of this Code section.

(m)(1) When a complaint is filed pursuant to this Code section, the motor vehicle which is the subject of the action shall be named as the defendant and the action shall be in rem. The complaint shall be verified on oath or affirmation by a duly authorized agent of the state in a manner required by the laws of this state. Such complaint shall describe the motor vehicle with reasonable particularity; state that it is located within the county or will be located within the county during the pendency of the action; state its present custodian; state the name of the owner or interest holder, if known; allege the essential elements of the violation which is claimed to exist; state the place of seizure, if the motor vehicle was seized; and conclude with a prayer of due process to enforce the forfeiture.

(2) A copy of the complaint and summons shall be served on any person known to be an owner or interest holder and any person who was in possession of the motor vehicle at the time of seizure:

(A) Service of the complaint and summons shall be as provided in subsections (a), (b), (c), and (d) of Code Section 9-11-4;

(B) If the owner, interest holder, or person who was in possession of the motor vehicle at the time of seizure is unknown or resides out of the state or departs the state or cannot after due diligence be found within the state or conceals himself or herself so as to avoid service, notice of the proceeding shall be published once a week for two successive weeks in the newspaper in which the sheriff's advertisements are published. Such publication shall be deemed notice to any and all persons having an interest in or right affected by such proceeding and from any sale of the motor vehicle resulting therefrom, but shall not constitute notice to an interest holder unless that person is unknown or resides out of the state or departs the state or cannot after due diligence be found within the state or conceals himself or herself to avoid service; and

(C) If a motor vehicle which has not been seized is the subject of the action, the court may order the sheriff or another law enforcement officer to take possession of the motor vehicle.

(3) An owner of or interest holder in the motor vehicle may file an answer asserting a claim against the motor vehicle in the action in rem. Any such answer shall be filed within 30 days after the service of the summons and complaint. Where service is made by publication and personal service has not been made, an owner or interest holder

shall file an answer within 30 days of the date of final publication. An answer must be verified by the owner or interest holder under penalty of perjury. In addition to complying with the general rules applicable to an answer in civil actions, the answer must set forth:

- (A) The caption of the proceedings as set forth in the complaint and the name of the claimant;
- (B) The address at which the claimant will accept mail;
- (C) The nature and extent of the claimant's interest in the motor vehicle;
- (D) The date, identity of transferor, and circumstances of the claimant's acquisition of the interest in the motor vehicle;
- (E) The specific provision of this Code section relied on in asserting that the motor vehicle is not subject to forfeiture;
- (F) All essential facts supporting each assertion; and
- (G) The precise relief sought.

(4) If at the expiration of the period set forth in paragraph (3) of this subsection no answer has been filed, the court shall order the disposition of the seized motor vehicle as provided for in this Code section.

(5) If an answer is filed, a hearing must be scheduled by the court to be held within 60 days after service of the complaint unless continued for good cause and must be held by the court without a jury.

(n) No person claiming an interest in a motor vehicle subject to forfeiture under this Code section may intervene in a trial or appeal of a criminal action.

(o) In conjunction with any civil or criminal action brought pursuant to this Code section:

(1) The court, on application of the prosecuting attorney, may enter any restraining order or injunction; require the execution of satisfactory performance bonds; appoint receivers, conservators, appraisers, accountants, or trustees; or take any action to seize, secure, maintain, or preserve the availability of a motor vehicle subject to forfeiture under this Code section, including issuing a warrant for its seizure and writ of attachment, whether before or after the filing of a complaint for forfeiture;

(2) A temporary restraining order under this Code section may be entered on application of the prosecuting attorney, without notice or an opportunity for a hearing, if the prosecuting attorney demonstrates that:

(A) There is probable cause to believe that the motor vehicle with respect to which the order is sought, in the event of final judgment or conviction, would be subject to forfeiture under this Code section; and

(B) Provision of notice would jeopardize the availability of the motor vehicle for forfeiture;

(3) Notice of the entry of a restraining order and an opportunity for a hearing must be afforded to persons known to have an interest in the motor vehicle. The hearing must be held at the earliest possible date consistent with the date set in subsection (b) of Code Section 9-11-65 and is limited to the issues of whether:

(A) There is a probability that the state will prevail on the issue of forfeiture and that failure to enter the order will result in the motor vehicle's being destroyed, conveyed, encumbered, removed from the jurisdiction of the court, concealed, or otherwise made unavailable for forfeiture; and

(B) The need to preserve the availability of the motor vehicle through the entry of the requested order outweighs the hardship on any owner or interest holder against whom the order is to be entered;

(4) If a motor vehicle is seized for forfeiture without a previous judicial determination of probable cause or order of forfeiture or a hearing under paragraph (2) of this subsection, the court, on an application filed by an owner or interest holder in the motor vehicle within 30 days after notice of its seizure or actual knowledge of such seizure, whichever is earlier, and complying with the requirements for an answer to an in rem complaint, and after five days' notice to the prosecuting attorney where the motor vehicle was seized, may issue an order to show cause to the seizing law enforcement agency for a hearing on the sole issue of whether probable cause for forfeiture of the motor vehicle then exists. The hearing must be held within 30 days unless continued for good cause on motion of either party. If the court finds that there is no probable cause for forfeiture of the motor vehicle, the motor vehicle must be released pending the outcome of a judicial proceeding which may be filed pursuant to this Code section; and

(5) The court may order a motor vehicle that has been seized for forfeiture to be sold to satisfy a specified interest of any interest holder, on motion of any party, and after notice and a hearing, on the conditions that:

(A) The interest holder has filed a proper claim and:

(i) Is authorized to do business in this state and is under the jurisdiction of a governmental agency of this state or of the

United States which regulates financial institutions, securities, insurance, or real estate; or

(ii) Has an interest that the prosecuting attorney has stipulated is exempt from forfeiture;

(B) The interest holder must dispose of the motor vehicle by commercially reasonable public sale and apply the proceeds first to its interest and then to its reasonable expenses incurred in connection with the sale or disposal; and

(C) The balance of the proceeds, if any, must be returned to the actual or constructive custody of the court, in an interest-bearing account, subject to further proceedings under this Code section.

(p) A defendant convicted in any criminal proceeding is precluded from later denying the essential allegations of the criminal offense of which the defendant was convicted in any proceeding pursuant to this Code section, regardless of the pendency of an appeal from that conviction; however, evidence of the pendency of an appeal is admissible. For the purposes of this Code section, a conviction results from a verdict or plea of guilty, including a plea of nolo contendere.

(q) In hearings and determinations pursuant to this Code section:

(1) The court may receive and consider, in making any determination of probable cause or reasonable cause, all evidence admissible in determining probable cause at a preliminary hearing together with inferences therefrom;

(2) There is a rebuttable presumption that any motor vehicle of a person is subject to forfeiture under this Code section if the state establishes probable cause to believe that the person has engaged in conduct giving rise to forfeiture while using or operating said motor vehicle;

(3) In any contested proceeding to determine if a motor vehicle should be forfeited as provided in this Code section, the prosecuting attorney on behalf of the state must prove that the vehicle is subject to forfeiture pursuant to subsection (c) of this Code section by a preponderance of the evidence; and

(4) In any contested proceeding to determine if a motor vehicle should be forfeited as provided in this Code section, an owner of a property interest or interest holder must prove that the property is exempted from forfeiture pursuant to subsection (d) of this Code section by a preponderance of the evidence.

(r)(1) Any motor vehicle declared to be forfeited under this Code section vests in this state at the time of commission of the conduct giving rise to forfeiture together with the proceeds of the motor

vehicle after that time. Any motor vehicle or proceeds transferred later to any person remain subject to forfeiture and thereafter must be ordered to be forfeited unless the transferee claims and establishes in a hearing under this Code section that the transferee is a bona fide purchaser for value and the transferee's interest is exempt under subsection (d) of this Code section.

(2) On entry of judgment for a person claiming an interest in the motor vehicle that is subject to proceedings to forfeit a motor vehicle under this Code section, the court shall order that the motor vehicle or interest in the motor vehicle be released or delivered promptly to that person.

(s)(1) When a motor vehicle is forfeited under this Code section, the court may:

(A) Order the motor vehicle to be sold, and the proceeds of such sale shall be used for payment of all expenses of the forfeiture and sale including, but not limited to, the expenses of seizure, towing, maintenance of custody, advertising, and court costs. The remainder of the proceeds of a sale of a forfeited motor vehicle, after payment of the expenses, shall be expended by the local governing authority for drug treatment, rehabilitation, prevention, or education or any other program which responds to problems created by drug or substance abuse; or

(B) Upon application of the seizing law enforcement agency or any other law enforcement agency of state, county, or municipal government permit the agency to retain the motor vehicle for official use in law enforcement work.

(2) Where a motor vehicle is to be sold pursuant to this subsection, the court may direct that such motor vehicle be sold by:

(A) Judicial sale as provided in Article 7 of Chapter 13 of Title 9; provided, however, that the court may establish a minimum acceptable price for such motor vehicle; or

(B) Any commercially feasible means.

(t) An acquittal or dismissal in a criminal proceeding shall preclude civil proceedings under this Code section.

(u) For good cause shown, the court may stay civil forfeiture proceedings during the pendency of a related criminal action resulting from a violation of this chapter.

(v) This Code section must be liberally construed to effectuate its remedial purposes. (Code 1981, § 16-6-13.2, enacted by Ga. L. 1999, p. 472, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2001, p. 94, § 3; Ga. L. 2001, p. 362, § 29.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1999, in subsection (c), capitalization was revised in paragraph (1) and punctuation was revised in paragraph (2).

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the 2000 amendment to this section is applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2001, p. 94, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the '2001 Crime Prevention Act.'"

**Law reviews.** — For note on the 2001 amendment to O.C.G.A. § 16-6-13.2, see 18 Georgia St. U.L. Rev. 47 (2001).

#### RESEARCH REFERENCES

**C.J.S.** — 37 C.J.S. Forfeitures, § 53 et seq.

### 16-6-13.3. Proceeds from pimping; forfeiture; distribution.

(a) Any proceeds or money which is used, intended for use, used in any manner to facilitate, or derived from a violation of Code Section 16-6-11, wherein any of the persons involved in performing an act of prostitution is under the age of 18, is contraband and forfeited to the state and no person shall have a property interest in it. Such proceeds or money may be seized or detained in the same manner as provided in Code Section 16-13-49 and shall not be subject to replevin, conveyance, sequestration, or attachment.

(b) Within 60 days of the date of the seizure of proceeds or money pursuant to this Code section, the district attorney shall initiate forfeiture or other proceedings as provided in Code Section 16-13-49. An owner or interest holder, as defined by subsection (a) of Code Section 16-13-49, may establish as a defense to the forfeiture of proceeds or money which is subject to forfeiture under this Code section the applicable provisions of subsection (e) or (f) of Code Section 16-13-49. Proceeds or money which is forfeited pursuant to this Code section shall be disposed of and distributed as provided in Code Section 16-13-49, provided that no less than 50 percent of the money and proceeds forfeited under this Code section shall be distributed to the local governing authority to be distributed to local or state-wide programs serving the child victims of the crime which are funded or operated by state or local governmental agencies.

(c) If the proceeds or money subject to forfeiture cannot be located; has been transferred or conveyed to, sold to, or deposited with a third party; is beyond the jurisdiction of the court; has been substantially diminished in value while not in the actual physical custody of a receiver or governmental agency directed to maintain custody of the proceeds or money; or has been commingled with other property that cannot be divided without difficulty, the court shall order the forfeiture

of any proceeds or money of a claimant or defendant up to the value of proceeds or money found by the court to be subject to forfeiture under this Code section in accordance with the procedures set forth in subsection (x) of Code Section 16-13-49.

(d) The provisions of paragraphs (3), (4), and (5) of subsection (x) and subsection (z) of Code Section 16-13-49 shall be applicable to any proceedings brought pursuant to this Code section. (Code 1981, § 16-6-13.3, enacted by Ga. L. 2001, p. 94, § 4; Ga. L. 2003, p. 140, § 16.)

**Cross references.** — Children and youth services, Art. 1, Ch. 5, T. 49.

**Editor's notes.** — Ga. L. 2001, p. 94, § 1, not codified by the General Assembly, provides that: "This Act shall be known

and may be cited as the '2001 Crime Prevention Act'."

**Law reviews.** — For note on the 2001 enactment of O.C.G.A. § 16-6-13.3, see 18 Georgia St. U.L. Rev. 47 (2001).

## RESEARCH REFERENCES

**C.J.S.** — 37 C.J.S. Forfeitures, § 53 et seq.

## 16-6-14. Pandering by compulsion.

A person commits the offense of pandering by compulsion when he or she by duress or coercion causes a person to perform an act of prostitution and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten years. (Code 1933, § 26-2017, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2001, p. 92, § 5.)

**Cross references.** — Actions for childhood sexual abuse, § 9-3-33.1.

**Editor's notes.** — Ga. L. 2001, p. 92, §§ 1 and 2, not codified by the General Assembly, provide: "This Act shall be known and may be cited as the 'Child Sexual Commerce Prevention Act of 2001.' The General Assembly acknowledges that children are increasingly induced, co-

erced, or compelled to perform sexual acts for the financial benefit of third parties. The General Assembly enacts this law to express its abhorrence for these practices and to better protect children from sexual exploitation."

**Law reviews.** — For note on the 2001 amendment to O.C.G.A. § 16-6-14, see 18 Georgia St. U.L. Rev. 32 (2001).

## JUDICIAL DECISIONS

**Evidence sufficient for conviction.** — Testimony of a 15-year-old girl that, when she attempted to refuse to act as defendant's prostitute, defendant threatened to kill her, clearly supported defendant's conviction for pandering by compulsion. *Walker v. State*, 245 Ga. App. 693, 538 S.E.2d 563 (2000).

**Cited in** *Fluker v. State*, 248 Ga. 290, 282 S.E.2d 112 (1981).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 63C Am. Jur. 2d, Prostitution, § 17 et seq.

**C.J.S.** — 73 C.J.S., Prostitution, §§ 17, 18.

**ALR.** — Constitutionality and construction of pandering acts, 74 ALR 311.

White Slave Traffic Act (Mann Act) as affecting constitutionality or application

of state statutes dealing with prostitution, 161 ALR 356.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 41 ALR4th 675.

### 16-6-15. Solicitation of sodomy.

(a) A person commits the offense of solicitation of sodomy when he solicits another to perform or submit to an act of sodomy. Except as provided in subsection (b) of this Code section, a person convicted of solicitation of sodomy shall be punished as for a misdemeanor.

(b) A person convicted of solicitation of sodomy when such offense involves the solicitation of a person or persons under the age of 18 years to perform or submit to an act of sodomy for money shall be guilty of a felony and shall be punished by imprisonment for a period of not less than five nor more than 20 years and shall be fined not less than \$2,500.00 nor more than \$10,000.00. (Code 1933, § 26-2003, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1988, p. 1797, § 3; Ga. L. 2001, p. 92, § 6.)

**Cross references.** — Actions for childhood sexual abuse, § 9-3-33.1. Affirmative defense to certain sexual crimes, § 16-3-6.

**Law reviews.** — For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

For note on the 2001 amendment to O.C.G.A. § 16-6-15, see 18 Georgia St. U.L. Rev. 32 (2001).

### JUDICIAL DECISIONS

**Constitutionality.** — Solicitation of sodomy is speech which advocates the commission of a crime and is not protected by the constitution. *Christensen v. State*, 266 Ga. 474, 468 S.E.2d 188 (1996).

*Powell v. State*, 270 Ga. 327, 510 S.E.2d 18 (1998), which struck down O.C.G.A. § 16-6-2, insofar as it applies to private, non-commercial acts between consenting adults, did not impliedly strike O.C.G.A. § 16-6-15. *Howard v. State*, 272 Ga. 242, 527 S.E.2d 194 (2000).

**Instructions did not cause prejudicial error.** — Trial court's jury charge on defendant's charges of enticing a child for indecent purposes and solicitation of sod-

omy for money with a child under 17, in violation of O.C.G.A. §§ 16-6-5 and 16-6-15, respectively, was not prejudicial to defendant, although the indictment against defendant charged defendant with committing acts in the conjunctive and the jury instructions allowed the jury to convict defendant for committing any of the acts, which were stated in the disjunctive, as proof that the crimes were committed in any of the separate ways or methods alleged in the indictment was sufficient to sustain the convictions. *Carolina v. State*, 276 Ga. App. 298, 623 S.E.2d 151 (2005).

**Language used to support conviction.**

**tion.** — Term “blow job” is not too vague and lacking in definition to support a conviction of soliciting for sodomy. *Anderson v. State*, 142 Ga. App. 282, 235 S.E.2d 675 (1977).

**Evidence sufficient for conviction.**

— Defendant's convictions for enticing a child for indecent purposes and solicitation of sodomy for money with a child under 17, in violation of O.C.G.A. §§ 16-6-5 and 16-6-15, respectively, were supported by the evidence, as the defendant invited two young victims to defendant's home, had one of the victims watch a pornographic videotape and propositioned both of the victims by discussing their sexual history and sexual acts; it

was clear that the element of asportation was satisfied when defendant invited the victims to defendant's home in order to entice the victims to engage in sexual acts. *Carolina v. State*, 276 Ga. App. 298, 623 S.E.2d 151 (2005).

Cited in *Byous v. State*, 121 Ga. App. 654, 175 S.E.2d 106 (1970); *Fluker v. State*, 248 Ga. 290, 282 S.E.2d 112 (1981); *McGee v. State*, 165 Ga. App. 423, 299 S.E.2d 573 (1983); *Allen v. State*, 170 Ga. App. 96, 316 S.E.2d 500 (1984); *Verble v. State*, 172 Ga. App. 321, 323 S.E.2d 239 (1984); *Bostic v. State*, 184 Ga. App. 509, 361 S.E.2d 872 (1987); *In re Jackel*, 275 Ga. 568, 569 S.E.2d 835 (2002).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 70C Am. Jur. 2d, Sodomy, § 36.

**C.J.S.** — 81A C.J.S., Sodomy, § 2.

**ALR.** — Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignation — modern cases, 77 ALR3d 519.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

Validity of statute making sodomy a criminal offense, 20 ALR4th 1009.

## 16-6-16. Masturbation for hire.

(a) A person, including a masseur or masseuse, commits the offense of masturbation for hire when he erotically stimulates the genital organs of another, whether resulting in orgasm or not, by manual or other bodily contact exclusive of sexual intercourse or by instrumental manipulation for money or the substantial equivalent thereof.

(b) A person committing the offense of masturbation for hire shall be guilty of a misdemeanor. (Code 1933, § 26-2021, enacted by Ga. L. 1975, p. 402, § 1.)

**Cross references.** — Affirmative defense to certain sexual crimes, § 16-3-6.

tional Criminal Litigation,” see 32 Mercer L. Rev. 993 (1981).

**Law reviews.** — For article, “Constitu-

## JUDICIAL DECISIONS

**Contact or manipulation must be of genital organs and not other parts of the body.** *Harwell v. State*, 237 Ga. 226, 227 S.E.2d 344 (1976).

**Agreement for exact amount of money not required.** — Sexual massage

was performed for money, even though agreement was not reached on exact price. *Pak v. State*, 206 Ga. App. 78, 424 S.E.2d 292 (1992).

**Sufficiency of charge.** — Accusation referring to a “masturbation for hire” and

referencing O.C.G.A. § 16-6-16 sufficiently charged defendant. *Pak v. State*, 206 Ga. App. 78, 424 S.E.2d 292 (1992).

**Cited in** *Pace v. City of Atlanta*, 135 Ga. App. 399, 218 S.E.2d 128 (1975); *Whitehead v. Hasty*, 235 Ga. App. 331, 219

S.E.2d 443 (1975); *Fluker v. State*, 248 Ga. 290, 282 S.E.2d 112 (1981); *Pabey v. State*, 262 Ga. App. 272, 585 S.E.2d 200 (2003); *2025 Highway, L.L.C. v. Bibb County*, 377 F. Supp. 2d 1310 (M.D. Ga. 2005).

#### RESEARCH REFERENCES

**ALR.** — White Slave Traffic Act (Mann Act) as affecting constitutionality or application of state statutes dealing with prostitution, 161 ALR 356.

Regulation of masseurs, 17 ALR2d 1183.

#### **16-6-17. Giving massages in place used for lewdness, prostitution, assignation, or masturbation for hire.**

(a) It shall be unlawful for any masseur or masseuse to massage any person in any building, structure, or place used for the purpose of lewdness, assignation, prostitution, or masturbation for hire.

(b) As used in this Code section, the term:

(1) "Masseur" means a male who practices massage or physiotherapy, or both.

(2) "Masseuse" means a female who practices massage or physiotherapy, or both.

(c) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1975, p. 402, § 3.)

#### RESEARCH REFERENCES

**ALR.** — Regulation of masseurs, 17 ALR2d 1183.

#### **16-6-18. Fornication.**

An unmarried person commits the offense of fornication when he voluntarily has sexual intercourse with another person and, upon conviction thereof, shall be punished as for a misdemeanor. (Laws 1833, Cobb's 1851 Digest, pp. 814, 815; Code 1863, § 4419; Ga. L. 1865-66, p. 233, § 2; Code 1868, § 4460; Code 1873, § 4534, Code 1882, § 4534; Penal Code 1895, § 381; Penal Code 1910, § 372; Code 1933, § 26-5801; Code 1933, § 26-2010, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For article, "Shotgun Marriage by Operation of Law," see 1 Ga. L. Rev. 183 (1967). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga.

St. B.J. 8 (2001). For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004).

For note, "Sharpening the Prongs of the Establishment Clause: Applying Stricter Scrutiny to Majority Religions," see 23 Ga. L. Rev. 1085 (1989).

For comment on *Rehak v. Mathis*, 239 Ga. 541, 238 S.E.2d 81 (1977), see 12 Ga. L. Rev. 361 (1978).

## JUDICIAL DECISIONS

**Constitutionality.** — Charges that 13-year-old defendant violated the fornication statute, O.C.G.A. § 16-6-18, by having sexual intercourse with defendant's 17-year-old step-sibling did not violate Georgia's right to privacy since defendant did not have the legal capacity to decide whether to engage in sexual intercourse. *In the Interest of L.A.N.*, 276 Ga. App. 477, 623 S.E.2d 682 (2005).

**Crime of fornication necessarily involves idea of consent.** While consent in some instances may be procured by force to a certain degree, where the force is used in the inception of the offense it must be at least shown that consent was finally induced thereby. *Nephew v. State*, 5 Ga. App. 841, 63 S.E. 930 (1909).

**Fornication is not included in rape.** *Speer v. State*, 60 Ga. 381 (1878).

**Indictment for seduction will support conviction for fornication.** A plea of not guilty to such an indictment puts in issue both offenses. *Barton v. State*, 53 Ga. App. 207, 185 S.E. 530 (1936).

**Proof of fornication includes act of unmarried persons.** — It is essential to the conviction of a man indicted for fornication for the state to prove that when the alleged offense was committed both he and the woman with whom the criminal intercourse took place were unmarried persons. *Hopgood v. State*, 76 Ga. App. 240, 45 S.E.2d 715 (1947).

**Juvenile could be found delinquent** based on the juvenile's commission of the delinquent act of fornication; the fact that consent is not a defense to statutory rape has no impact on whether a juvenile commits a delinquent act under the separate fornication statute by voluntarily having

sex when unmarried. *In re N.A.*, 246 Ga. App. 204, 539 S.E.2d 899 (2000).

**Consent to sex by children 16 and over.** — Right of privacy under Ga. Const. 1983, Art. I, Sec. I, Para. I prohibited the state from prosecuting defendant for fornication under O.C.G.A. § 16-6-18 since defendant and defendant's love interest, both age 16 and of legal age to consent to sex under O.C.G.A. § 16-6-3(a), engaged in private, unforced, non-commercial sex. *In re J.M.*, 276 Ga. 88, 575 S.E.2d 441 (2003).

**Civil suit for contracting venereal disease not barred.** — An unmarried adult who engages in consensual sex in violation of O.C.G.A. § 16-6-18 is not precluded from recovering in a civil action for injury suffered as a result of that criminal activity. *Long v. Adams*, 175 Ga. App. 538, 333 S.E.2d 852 (1985) (damages for partner's failure to disclose herpes condition).

**Sexual intercourse is an element of the offense** of fornication. *Bridges v. Bridges*, 197 Ga. App. 608, 398 S.E.2d 860 (1990).

**When guilty verdict is contrary to evidence.** — When an indictment charges unlawful sexual intercourse and alleges that both parties to the transaction were single at the time of the alleged act, the accused is charged with the offense of fornication only, and when the evidence under such an indictment shows that one of the parties to the transaction was married at the time of the alleged act, a verdict of guilty is contrary to the evidence. *Hopgood v. State*, 76 Ga. App. 240, 45 S.E.2d 715 (1947).

**Cited in** *Pace v. City of Atlanta*, 135 Ga. App. 399, 218 S.E.2d 128 (1975); *Fluker v. State*, 248 Ga. 290, 282 S.E.2d 112 (1981).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 2 Am. Jur. 2d, Adultery and Fornication, §§ 5, 6.

**ALR.** — Isolated acts of sexual inter-

course as constituting criminal offense of adultery or fornication or illicit cohabitation, 74 ALR 1361.

Validity of statute making adultery and fornication criminal offenses, 41 ALR3d 1338.

What constitutes such discriminatory

prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

## 16-6-19. Adultery.

A married person commits the offense of adultery when he voluntarily has sexual intercourse with a person other than his spouse and, upon conviction thereof, shall be punished as for a misdemeanor. (Laws 1833, Cobb's 1851 Digest, pp. 814, 815; Code 1863, § 4419; Ga. L. 1865-66, p. 233, § 2; Code 1868, § 4460; Code 1873, § 4534; Code 1882, § 4534; Penal Code 1895, § 381; Penal Code 1910, § 372; Code 1933, § 26-5801; Code 1933, § 26-2009, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — Adultery as grounds for divorce, § 19-5-3. Competency of parties to adultery action to testify at trial, § 24-9-2. Abolition of right of action for adultery, alienation of affections, or criminal conversation, § 51-1-17.

**Law reviews.** — For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

## JUDICIAL DECISIONS

**Sexual intercourse is element of offense.** — Since "sexual intercourse" is a necessary element of both adultery and prostitution, it is logical to conclude that the definition of sexual intercourse should be uniform in both instances. Allen v. State, 170 Ga. App. 96, 316 S.E.2d 500 (1984).

Sexual intercourse is an element of the offense of adultery. Bridges v. Bridges, 197 Ga. App. 608, 398 S.E.2d 860 (1990).

**Both extramarital homosexual and heterosexual relations constitute adultery.** — A person commits adultery when he or she has sexual intercourse with a "person" other than his or her spouse. Therefore, both extramarital homosexual as well as heterosexual relations constitute adultery. Owens v. Owens, 247 Ga. 139, 274 S.E.2d 484 (1981).

**Consensual sodomy has been merged into the offenses of fornication and adultery.** Allen v. State, 170 Ga. App. 96, 316 S.E.2d 500 (1984).

**Consequences in alimony suit.** — Husbands have no vested right to commit adultery without suffering adverse civil consequences in alimony suit. Such right could not possibly exist, because in Georgia adultery is a crime. Bryan v. Bryan, 242 Ga. 826, 251 S.E.2d 566 (1979).

**In a prosecution for malice murder,** refusal to give an instruction on provocation caused by the victim's "adulterous conduct" was not error because defendant and the victim were not married and, in order to prove adultery, a marriage must be shown. Somchith v. State, 272 Ga. 261, 527 S.E.2d 546 (2000).

**Cited in** Pace v. City of Atlanta, 135 Ga. App. 399, 218 S.E.2d 128 (1975); Burger v. State, 238 Ga. 171, 231 S.E.2d 769 (1977); Smith v. Price, 616 F.2d 1371 (5th Cir. 1980).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 2 Am. Jur. 2d, Adultery and Fornication, § 3 et seq.

**C.J.S.** — 2 C.J.S., Adultery, § 1 et seq.

**ALR.** — Right of injured spouse to dis-

continue prosecution for adultery, 4 ALR 1340; 61 ALR 973.

Conspiracy to commit adultery or other offense which can only be committed by

the concerted action of the parties to it, 11 ALR 196; 104 ALR 1430.

Isolated acts of sexual intercourse as constituting criminal offense of adultery or fornication or illicit cohabitation, 74 ALR 1361.

Conviction or acquittal on charge which includes element of illicit sexual intercourse as bar to prosecution for adultery, 94 ALR 405.

Relationship with assailant's wife as provocation depriving defendant of right of self-defense, 9 ALR3d 933.

Validity of statute making adultery and fornication criminal offenses, 41 ALR3d 1338.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 ALR3d 925.

## 16-6-20. Bigamy.

(a) A person commits the offense of bigamy when he, being married and knowing that his lawful spouse is living, marries another person or carries on a bigamous cohabitation with another person.

(b) It shall be an affirmative defense that the prior spouse has been continually absent for a period of seven years, during which time the accused did not know the prior spouse to be alive, or that the accused reasonably believed he was eligible to remarry.

(c) A person convicted of the offense of bigamy shall be punished by imprisonment for not less than one nor more than ten years. (Laws 1833, Cobb's 1851 Digest, p. 814; Code 1863, §§ 4415, 4416; Code 1868, §§ 4456, 4457; Code 1873, §§ 4530, 4531; Code 1882, §§ 4530, 4531; Penal Code 1895, §§ 376, 377, 378; Ga. L. 1910, p. 61, § 1; Penal Code 1910, §§ 367, 368, 369; Code 1933, §§ 26-5601, 26-5602, 26-5603; Code 1933, § 26-2007, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — Marriage generally, Ch. 3, T. 19.

Fact and Mistake of Law as Defenses to a Prosecution for Bigamy," see 15 Mercer L. Rev. 275 (1963).

**Law reviews.** — For note, "Mistake of

## JUDICIAL DECISIONS

**Venue.** — Under O.C.G.A. § 16-6-20(a), venue is proper for the offense of bigamy in the county where a person, being married and knowing the lawful spouse is living, carries on a bigamous cohabitation with another person. Edwards v. State, 188 Ga. App. 667, 374 S.E.2d 97 (1988).

**Prima facie case.** — In a prosecution for bigamy the state makes out a prima facie case by proving the first marriage, and that while the first spouse was living the defendant contracted a second marriage, knowing that the first marriage had not been dissolved by death or divorce. The knowledge need not be shown by

direct evidence, but may be inferred from circumstances. Robinson v. State, 6 Ga. App. 696, 65 S.E. 792 (1909); Fanning v. State, 46 Ga. App. 716, 169 S.E. 60 (1933).

In a prosecution for bigamy the state makes out a prima facie case when it proves that the man accused married two different women at different times, and that when he married the second time he knew that his first wife was alive. Reikes v. State, 71 Ga. App. 324, 30 S.E.2d 806 (1944).

**Burden on state to establish proof of first marriage.** — Every essential element of the crime must be established, and, without proof of the first marriage,

the state fails to establish the crime. Stebbins v. State, 78 Ga. App. 534, 51 S.E.2d 592 (1949).

**Knowledge that lawful spouse is alive is essential element** of the crime, and must be charged in the indictment. Herrin v. State, 27 Ga. App. 189, 107 S.E. 779 (1921).

**Cohabitation with second woman not essential to crime.** Nelms v. State, 84 Ga. 466, 10 S.E. 1087, 20 Am. St. R. 377 (1890) (decided under former Code 1882, § 4530); Pitts v. State, 147 Ga. 801, 95 S.E. 706 (1918).

**Crime is completed upon second marriage.** — Going through the form of marriage with knowledge that the former spouse is living constitutes the offense. The offense is completed upon the second marriage. Pitts v. State, 147 Ga. 801, 95 S.E. 706 (1918).

**Where jury could infer there was no criminal intent.** — In a prosecution for bigamy, if it appears to the satisfaction of the jury that the defendant honestly believed that the first marriage had been dissolved by a divorce obtained by the

other spouse, and this belief was induced by reasonable diligence to ascertain the truth, the jury would be authorized to infer that there was no joint operation of act and intent to commit a crime. Robinson v. State, 6 Ga. App. 696, 65 S.E. 792 (1909).

If the defendant honestly believes to have a right to make the second marriage, and it appears this honest belief is the result of reasonable diligence to ascertain the truth, then the jury would have the right to infer that the defendant had no criminal intent, and was therefore not guilty of any crime; and where honest belief founded on reasonable diligence to ascertain the truth appears, the defendant should be acquitted, if the jury has a reasonable doubt as to whether or not there is criminal intent — a necessary ingredient of every crime. Reikes v. State, 71 Ga. App. 324, 30 S.E.2d 806 (1944).

**Cited** in Rogers v. State, 139 Ga. App. 656, 229 S.E.2d 132 (1976); Norris v. State, 230 Ga. App. 492, 496 S.E.2d 781 (1998).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bigamy, § 1 et seq.

**C.J.S.** — 10 C.J.S., Bigamy, § 2 et seq.

**ALR.** — Religious belief as affecting crime of bigamy, 24 ALR 1237.

Presumption and burden of proof in prosecution for bigamy as to dissolution of first marriage, 56 ALR 1273.

Bigamy as affected by place where second or later marriage is celebrated, 70 ALR 1036.

Mistaken belief in existence, validity, or

effect of divorce or separation as defense to prosecution for bigamy or allied offense, 56 ALR2d 915.

Construction of statute making bigamy or prior lawful subsisting marriage to third person a ground for divorce, 3 ALR3d 1108.

Rights in decedent's estate as between lawful and putative spouses, 81 ALR3d 6.

Validity of bigamy and polygamy statutes and constitutional provisions, 22 ALR6th 1.

#### 16-6-21. Marrying a bigamist.

(a) An unmarried man or woman commits the offense of marrying a bigamist when he marries a person whom he knows to be the wife or husband of another.

(b) It shall be an affirmative defense that the prior spouse of the bigamist has been continually absent for a period of seven years, during which time the accused did not know the prior spouse of the bigamist to be alive, or that the accused reasonably believed the bigamist was eligible to remarry.

(c) A person convicted of the offense of marrying a bigamist shall be punished by imprisonment for not less than one nor more than ten years. (Laws 1833, Cobb's 1851 Digest, p. 814; Code 1863, § 4417; Code 1868, § 4458; Code 1873, § 4532; Code 1882, § 4532; Penal Code 1895, § 379; Penal Code 1910, § 370; Code 1933, § 26-5604; Code 1933, § 26-2008, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — Marriage generally, Ch. 3, T. 19.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bigamy, § 4.  
**C.J.S.** — 10 C.J.S., Bigamy, § 2.  
**ALR.** — Mistaken belief in existence,

validity, or effect of divorce or separation as defense to prosecution for bigamy or allied offense, 56 ALR2d 915.

#### 16-6-22. Incest.

(a) A person commits the offense of incest when such person engages in sexual intercourse or sodomy, as such term is defined in Code Section 16-6-2, with a person whom he or she knows he or she is related to either by blood or by marriage as follows:

- (1) Father and child or stepchild;
- (2) Mother and child or stepchild;
- (3) Siblings of the whole blood or of the half blood;
- (4) Grandparent and grandchild;
- (5) Aunt and niece or nephew; or
- (6) Uncle and niece or nephew.

(b) A person convicted of the offense of incest shall be punished by imprisonment for not less than ten nor more than 30 years; provided, however, that any person convicted of the offense of incest under this subsection with a child under the age of 14 years shall be punished by imprisonment for not less than 25 nor more than 50 years. Any person convicted under this Code section of the offense of incest shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2. (Laws 1833, Cobb's 1851 Digest, p. 814; Code 1863, § 4418; Code 1868, § 4459; Code 1873, § 4533; Code 1882, § 4533; Ga. L. 1886, p. 30, § 1; Penal Code 1895, § 380; Penal Code 1910, § 371; Ga. L. 1916, p. 51, § 1; Code 1933, § 26-5701; Code 1933, § 26-2006, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2006, p. 379, § 14/HB 1059; Ga. L. 2010, p. 168, § 3/HB 571.)

**The 2010 amendment**, effective May 20, 2010, in subsection (a), in the introductory language, substituted "such person" for "the person", inserted "or sodomy, as such term is defined in Code Section 16-6-2,", deleted "to" following "a person", and inserted "to" near the end; in paragraph (a)(1), substituted "child or stepchild" for "daughter or stepdaughter"; in paragraph (a)(2), substituted "child or stepchild" for "son or stepson"; in paragraph (a)(3), substituted "Siblings" for "Brother and sister"; in paragraph (a)(5), inserted "niece or"; and, in paragraph (a)(6), inserted "or nephew".

**Cross references.** — Actions for childhood sexual abuse, § 9-3-33.1. Degrees of relationship within which intermarriage prohibited, § 19-3-3. Visitation with minors by convicted sexual offenders while imprisoned, § 42-5-56.

**Editor's notes.** — Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be

maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

**Law reviews.** — For article on 2006 amendment of this Code section, see 23 Georgia St. U.L. Rev. 11 (2006).

## JUDICIAL DECISIONS

## ANALYSIS

## GENERAL CONSIDERATION

## RELATIONSHIPS

## EVIDENCE

## RELATIONSHIP WITH OTHER CRIMES

## SENTENCE

**General Consideration**

**Constitutionality.** — O.C.G.A. § 16-6-22 does not unconstitutionally infringe on the right of privacy because it bars intercourse with a non-blood-related, consenting adult. *Benton v. State*, 265 Ga. 648, 461 S.E.2d 202 (1995).

Because the class of individuals subject to punishment is not arbitrarily drawn, O.C.G.A. § 16-6-22 does not violate equal protection. *Benton v. State*, 265 Ga. 648, 461 S.E.2d 202 (1995).

Classification on the basis of step-parent and step-child bears a rational relationship to the governmental interest in protecting children and family unity and does not violate equal protection guarantees. *Benton v. State*, 265 Ga. 648, 461 S.E.2d 202 (1995).

**Nature of the crime.** — The unnatural crime, prohibited in former Code 1933, § 26-5701 is generally the act of a man upon a woman, over whom, by the natural ties of kindred, he has almost complete control, and generally he alone is to blame. There is a force used, which, while it cannot be said to be that violence which constitutes rape, is yet of a character that is almost as overpowering. Indeed, if it were necessary to make out a case of mutual consent as an element of such crime few cases of this crime would be punished. *Mosley v. State*, 65 Ga. App. 800, 16 S.E.2d 504 (1941) (see O.C.G.A. § 16-6-22).

Because children do not have the capacity to give consent to or resist a sexual act directed at them, acts such as incest, sodomy, and aggravated sodomy are, in law, forcible and against the will of the child. *House v. State*, 236 Ga. App. 405, 512 S.E.2d 287 (1999).

**Incest not serious violent felony under O.C.G.A. § 17-10-6.1(a).** — Trial court did not abuse the court's discretion

in denying a defendant's post-conviction motion for deoxyribonucleic acid (DNA) testing because the defendant was barred from requesting DNA testing under O.C.G.A. § 5-5-41(c)(3) since the defendant's conviction for the crime of incest in violation of O.C.G.A. § 16-6-22(a)(3) was not defined as a serious violent felony under O.C.G.A. § 17-10-6.1(a). *Hunter v. State*, 294 Ga. App. 583, 669 S.E.2d 533 (2008).

**Slight penetration**, including entry of the anterior of the organ, is sufficient to meet the intercourse element of incest. *Raymond v. State*, 232 Ga. App. 228, 501 S.E.2d 568 (1998); *Alford v. State*, 243 Ga. App. 212, 534 S.E.2d 81 (2000).

**Variance between indictment and evidence not fatal.** — Variance between the indictment, which stated that the victim was the defendant's daughter, and the evidence, which showed she was his step-daughter, was not fatal. *Nichols v. State*, 221 Ga. App. 600, 473 S.E.2d 491 (1996).

**Cited in** *Cobb v. State*, 125 Ga. App. 556, 188 S.E.2d 260 (1972); *Rogers v. State*, 139 Ga. App. 656, 229 S.E.2d 132 (1976); *Andrews v. State*, 144 Ga. App. 243, 240 S.E.2d 744 (1977); *Ramsey v. State*, 145 Ga. App. 60, 243 S.E.2d 555 (1978); *Johnson v. State*, 149 Ga. App. 544, 254 S.E.2d 757 (1979); *Royals v. State*, 155 Ga. App. 378, 270 S.E.2d 906 (1980); *Love v. State*, 190 Ga. App. 264, 378 S.E.2d 893 (1989); *Richardson v. State*, 194 Ga. App. 358, 390 S.E.2d 442 (1990); *Adcock v. State*, 194 Ga. App. 627, 391 S.E.2d 438 (1990); *Loyd v. State*, 202 Ga. App. 1, 413 S.E.2d 222 (1991); *Smith v. State*, 206 Ga. App. 557, 426 S.E.2d 23 (1992); *Wiser v. State*, 242 Ga. App. 593, 530 S.E.2d 278 (2000); *Burk v. State*, 253 Ga. App. 272, 558 S.E.2d 726 (2001).

**Relationships**

**Uncle and niece.** — Evidence that a defendant had sexual intercourse with his

**Relationships (Cont'd)**

niece from age 14 to 17, touched her breasts and vagina with his mouth, touched her with sex toys, showed her pornography, and placed her mouth on his penis was sufficient to convict him of child molestation and incest in violation of O.C.G.A. §§ 16-6-4(a) and 16-6-22(a)(6). Stott v. State, 304 Ga. App. 560, 697 S.E.2d 257 (2010).

**Stepgrandfather-stepgranddaughter relationship not included in statutory definition.** — O.C.G.A. § 16-6-22, while prohibiting sexual relations between certain persons related only by affinity, does not include the stepgrandfather-stepgranddaughter relationship in its definition of incest. Glisson v. State, 188 Ga. App. 152, 372 S.E.2d 462, cert. denied, 188 Ga. App. 911, 372 S.E.2d 462 (1988).

**Stepfather and stepdaughter.** — The jury was authorized to conclude beyond a reasonable doubt that defendant and the victim were related by marriage as stepfather and stepdaughter, where there had been voluntary consent to and ratification of a de facto marriage relationship between defendant and the victim's mother for over seven years following a prior undissolved marriage with another woman. Argo v. State, 188 Ga. App. 102, 371 S.E.2d 922, cert. denied, 188 Ga. App. 911, 371 S.E.2d 922 (1988).

Although the defendant denied it on the witness stand, his stepdaughter testified that he had sexual intercourse with her while he was married to her mother; the evidence was sufficient for a trier of fact to have rationally found proof of guilt beyond a reasonable doubt. Johnson v. State, 195 Ga. App. 385, 393 S.E.2d 712 (1990).

Evidence was sufficient to support a conviction for incest notwithstanding defendant's contention that his stepdaughter was an accomplice; since most, if not all, of the sexual encounters took place when the victim was between 10 and 14 years old, she could not be treated as an accomplice. Walker v. State, 234 Ga. App. 40, 506 S.E.2d 179 (1998).

Since it was undisputed that the victim was defendant's stepchild, and since the state established that defendant had sex-

ual intercourse with the victim, the jury was authorized to find defendant guilty of incest. Reynolds v. State, 269 Ga. App. 268, 603 S.E.2d 779 (2004).

Evidence was sufficient to support the defendant's conviction for incest because the victim testified that the defendant had sexual intercourse with the victim while the defendant was married to the victim's mother. Stephens v. State, 305 Ga. App. 339, 699 S.E.2d 558 (2010).

**Brother and step-sister not included in statutory definition.** — Trial court erred in convicting defendant of incest, O.C.G.A. § 16-6-22. At a guilty plea hearing, the prosecutor alleged that defendant had sexual intercourse with the defendant's step-sibling; however, sexual intercourse between step-siblings was not included in the crime of incest under O.C.G.A. § 16-6-22(a)(3). Further, defendant received ineffective assistance of counsel at the plea hearing pursuant to U.S. Const., amend. 6, because if counsel had informed defendant that the state could not as a matter of law prove the offense of incest because defendant's relationship to the victim was not included within the statutory scheme for such offense, defendant would not have pled guilty and would have insisted on going to trial. Shabazz v. State, 259 Ga. App. 339, 577 S.E.2d 45 (2003).

**Incestuous conduct with stepdaughter after death of natural mother.** — Defendant could be convicted of incestuous conduct with his stepdaughter after the death of the natural mother, where the victim's status as stepdaughter created by marriage had been perpetuated and confirmed by a court order granting defendant custody of his stepdaughter after the death of the girl's mother. Gish v. State, 181 Ga. App. 478, 352 S.E.2d 800 (1987).

**Adopted child.** — Although the state did not introduce documentary evidence of adoption, unrefuted testimony of the adoption by defendant, his wife, and the victim was sufficient to establish the relationship. Edmonson v. State, 219 Ga. App. 323, 464 S.E.2d 839 (1995), overruled on other grounds, Collins v. State, 229 Ga. App. 658, 495 S.E.2d 59 (1997).

Because adopted individuals "enjoy ev-

ery right and privilege of a biological child," they are statutorily protected from incest. *Edmonson v. State*, 219 Ga. App. 323, 464 S.E.2d 839 (1995), overruled on other grounds, *Collins v. State*, 229 Ga. App. 658, 495 S.E.2d 59 (1997).

### Evidence

**Corroboration of incestuous acts is not required** under the plain language of former Code 1933, § 26-2006. *Baker v. State*, 245 Ga. 657, 266 S.E.2d 477 (1980).

Corroboration is not required to warrant a conviction for the offenses of incest, sodomy, and child molestation, and trial court's failure to charge the jury that corroboration was required was not error. *Scales v. State*, 171 Ga. App. 924, 321 S.E.2d 764 (1984).

**Absence of corroboration.** — Absence of any corroborative evidence is not a ground for reversing a conviction for incest. *Hall v. State*, 186 Ga. App. 830, 368 S.E.2d 787 (1988).

**Recanting of child victim's testimony.** — Witnesses testified pursuant to O.C.G.A. § 24-3-16 that the defendant's stepchild, then 12, told the witnesses about being repeatedly raped and molested by the defendant. That the stepchild recanted these statements at trial did not render the hearsay inadmissible under § 24-3-16, and as the stepchild's credibility was for the jury to decide, the evidence was sufficient to support the defendant's convictions for rape, incest, and child molestation. *Harvey v. State*, 295 Ga. App. 458, 671 S.E.2d 924 (2009).

**Pattern of sexual exploitation shown.** — When the evidence showed that the defendant first began having sexual relations with his stepdaughter when she was about 12 years of age and continued having sexual relations with her until she was in her seventeenth year, the pattern of sexual exploitation presented was, as a matter of law, forcible and against the will, because of the stepdaughter's age at onset, and because of her familial relationship with defendant, and the assertion that consensual sexual activity is protected by a right of privacy was inapplicable, as no consent was possible. *Richardson v. State*, 256 Ga. 746, 353 S.E.2d 342 (1987); *Benton v. State*, 265

Ga. 648, 461 S.E.2d 202 (1995).

**Victim's prior inconsistent statement admissible.** — State was allowed to use a victim's prior inconsistent statement as substantive evidence of the events, as it was the jury's role to determine what evidence to believe; the evidence presented to the jury, including the victim's prior statement that defendant placed the defendant's genitals on the victim's breast, was sufficient to sustain defendant's conviction for sexual battery. *Brewster v. State*, 261 Ga. App. 795, 584 S.E.2d 66 (2003).

**Victim's testimony sufficient.** — Evidence was sufficient to support the defendant's conviction for incest in violation of O.C.G.A. § 16-6-22 because the victim testified that the defendant had sexual intercourse with the victim while the defendant was married to the victim's mother. *Stephens v. State*, 305 Ga. App. 339, 699 S.E.2d 558 (2010).

**Testimony of prior incidents.** — In a trial for rape and incest, the trial court did not err in permitting the victim to testify as to two prior incidents in which defendant, her father, made sexual advances toward her. *Hall v. State*, 186 Ga. App. 830, 368 S.E.2d 787 (1988).

**Similar transaction testimony properly admitted.** — In a prosecution for incest with a stepdaughter, similar transaction testimony given by the defendant's two daughters from his former marriage, in relation to repeated sexual assaults under the same circumstances some 25 years previously, was properly admitted. *Nichols v. State*, 221 Ga. App. 600, 473 S.E.2d 491 (1996).

**Evidence of victim's sexual activity admissible.** — Given that the defendant was not charged with rape, evidence of the victim's sexual activity, and the fact that the victim was involved with someone, with whom the victim allegedly had sexual intercourse during the time of the alleged sexual abuse, should not have been excluded under either the 2004 or 2005 version of the Rape Shield statute, as: (1) said evidence acted as a possible explanation for the victim's physical trauma, placing the victim's credibility and the defendant's guilt into question; (2) the jury's split verdict supported the de-

**Evidence (Cont'd)**

defendant's argument that even without the excluded testimony, the State's case was far less than overwhelming; and, (3) the appeals court could not determine what role the excluded evidence would have played in the jury's deliberations; hence, a new trial as to the charges of child molestation and incest was ordered. *Gresham v. State*, 281 Ga. App. 116, 635 S.E.2d 316 (2006).

**Evidence held sufficient to convict.** — When the victim, the defendant's 14-year-old child testified that the defendant had sexual intercourse with the victim, and the defendant denied doing so, but the testimony of the victim was corroborated by the victim's sibling and a medical doctor, the evidence was sufficient to meet the requisite standard of proof. *Womble v. State*, 183 Ga. App. 727, 360 S.E.2d 271 (1987).

When the defendant's niece testified that the defendant climbed on top of the victim and forced the defendant's genitals into the victim's genitals and the defendant admitted that the defendant had sexual intercourse with the defendant's niece, the evidence supported the defendant's conviction. *Backey v. State*, 234 Ga. App. 265, 506 S.E.2d 435 (1998).

Victim's testimony that the victim had sexual intercourse with defendant, that the defendant placed the defendant's finger in the victim's genitals, placed the defendant's hand on the victim's genitals, placed the defendant's mouth on the victim's breast, and placed the defendant's mouth on the victim's mouth, established the offenses of aggravated sexual battery pursuant to O.C.G.A. § 16-6-22.2, incest pursuant to O.C.G.A. § 16-6-22, and child molestation. *Falak v. State*, 261 Ga. App. 404, 583 S.E.2d 146 (2003).

Evidence was sufficient to support defendant's conviction for incest, as the evidence presented, including the victim's admission that the victim had sexual intercourse with defendant, was enough to allow a rational trier of fact to find the essential element of "sexual intercourse" so as to support defendant's conviction for incest. Furthermore, defendant's argument that the evidence introduced was

not sufficient to support the defendant's conviction for incest had to be rejected, as defendant's reliance on rape cases to argue the defendant's point was in error; the rape statute required proof that penetration had occurred, whereas the incest statute, by contrast, only required proof that sexual intercourse had taken place and the state introduced such proof. *Little v. State*, 262 Ga. App. 377, 585 S.E.2d 677 (2003).

Victim's testimony, which was supported by statements the victim made to family, friends, and investigators regarding sexual acts the defendant committed upon the victim, together with the medical findings of the pediatrician who examined the victim were completely consistent with the victim's allegation of abuse by sexual intercourse; therefore, the evidence was more than sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of incest. *Wilkins v. State*, 264 Ga. App. 524, 591 S.E.2d 445 (2003).

Victim's testimony alone was sufficient to support defendant's convictions for incest and child molestation, and the evidence was sufficient to support defendant's statutory rape conviction as it was corroborated where the victim testified that defendant, the victim's stepparent, began to ask the victim to masturbate and use sex toys, including vibrators, dildos, and other objects, and would use them on the defendant and on the victim when the victim was eight or nine years old; defendant began having sexual intercourse with the victim when the victim was about 12, even though the victim told the defendant that it was not right and that the victim did not like it; after one of the final acts of intercourse with defendant, the victim wiped the victim with a sock and kept the sock until the day the victim ran away to a friend's home and told the victim's friend about defendant's conduct, the semen stains on the sock were consistent with defendant's semen, and the state's expert's opinion was that epithelial cells present on the sock came from the victim's genitals; and when the victim was in the ninth grade, the victim told a friend about defendant's behavior but made the friend promise not to tell anyone. *Eley v.*

State, 266 Ga. App. 45, 596 S.E.2d 660 (2004).

There was sufficient evidence to support defendant's convictions for child molestation, aggravated child molestation, statutory rape, and incest, in violation of O.C.G.A. §§ 16-6-4, 16-6-4(c), 16-6-3, and 16-6-22, respectively, because defendant's step-child gave detailed testimony as to the continuing sexual conduct that defendant inflicted on the child over a period of years, as the testimony from just that witness was sufficient to support the convictions, pursuant to O.C.G.A. § 24-4-8; further, there was corroborative testimony from a friend of the step-child who witnessed at least one incident, and from an aunt who testified that the older step-child had sat in defendant's lap and that the defendant rubbed the older step-child's legs, which was properly admitted for purposes of corroboration, bent of mind, lustful disposition toward children, and motive. Lewis v. State, 275 Ga. App. 41, 619 S.E.2d 699 (2005).

Testimony that the victim physically resisted the defendant's sexual advances to no avail was sufficient to support the defendant's rape and aggravated sodomy convictions; moreover, because sufficient evidence was presented that the defendant was the victim's biological and/or legal father, sufficient evidence supported the defendant's incest conviction as well. Williams v. State, 284 Ga. App. 255, 643 S.E.2d 749 (2007).

Rape, incest, child molestation, aggravated child molestation, and aggravated sodomy convictions were all upheld on appeal, given that: (1) the elements of child molestation and aggravated child molestation, including venue, were supported by the female victim's testimony; and (2) the trial court's charge on the mandatory presumption of consent was proper. Forbes v. State, 284 Ga. App. 520, 644 S.E.2d 345 (2007).

There was sufficient evidence to support a defendant's convictions for rape, incest, statutory rape, and child molestation against one of the defendant's children and a stepchild based on the defendant's repeated engagement in sexual intercourse with the children at various times while one was 12 to 16 years old and the

other was 16 to 19 years old, and evidence of a letter threatening suicide on the defendant's part and apologizing for the actions against the children was also introduced against the defendant. However, the conviction on the charge of aggravated sexual battery against the stepchild was in error and required reversal since the state failed to introduce direct or circumstantial evidence sufficient to prove beyond a reasonable doubt that the defendant violated O.C.G.A. § 16-6-22.2 by penetrating that child's sexual organ with a replica penis. Connelly v. State, 295 Ga. App. 765, 673 S.E.2d 274 (2009), cert. denied, No. S09C0892, 2009 Ga. LEXIS 260 (Ga. 2009).

Sufficient evidence existed to support a defendant's convictions for incest and child molestation with regard to actions the defendant took toward the defendant's own children based on the children's recorded police interviews that were played for the jury; the testimony from a licensed clinical social worker who was admitted as an expert in child sexual abuse and abuse's effect on children; and the testimony of the pediatric nurse practitioner who examined the victims and stated that, although the victims' physical exams were normal, the results were consistent with their reports of sexual abuse. The victims' testimony, standing alone, would have been sufficient to support the convictions; therefore, the trial court did not err by denying the defendant's motion for a directed verdict. Hubert v. State, 297 Ga. App. 71, 676 S.E.2d 436 (2009).

Evidence was sufficient to convict defendant of incest under O.C.G.A. § 16-6-22(a) because the mother testified that she informed defendant that the victim was his daughter, DNA tests confirmed his parentage of the victim, and defendant legally adopted the victim, with whom he fathered five children. Pyburn v. State, 301 Ga. App. 372, 687 S.E.2d 909 (2009).

**Evidence sufficient for conviction of rape and incest.** — See Woodford v. State, 240 Ga. App. 875, 525 S.E.2d 408 (1999); McMillian v. State, 263 Ga. App. 782, 589 S.E.2d 335 (2003).

**Failure to preserve lab sample evidence did not warrant dismissal.** —

**Evidence (Cont'd)**

Trial court's order dismissing an indictment charging the defendant with rape, incest, aggravated child molestation, and child molestation on grounds that the state improperly failed to preserve lab samples taken from the victim was reversed because the defendant failed to show that the failure was the result of bad faith on the part of the state or the police, and the value of the sample to the defendant was only potentially exculpatory. *State v. Brady*, 287 Ga. App. 626, 653 S.E.2d 72 (2007).

**Relationship With Other Crimes**

**Neither rape nor incest** is included in the other as a matter of law. *Kirby v. State*, 187 Ga. App. 88, 369 S.E.2d 274 (1988).

**Neither rape nor incestuous adultery includes the other.** — Rape and incestuous adultery are different in the nature of the wrong done and in the facts which constitute them. Neither includes the other, and the defendant may be convicted of either, with or without allegation or proof of some fact essential to the other. *Mosley v. State*, 65 Ga. App. 800, 16 S.E.2d 504 (1941).

Carnal knowledge of the female is a fact common to both rape and incestuous adultery. If it is with force and against her will the crime is rape, whether the female be under or over the age of consent and whether she be the defendant's daughter or not. The fact that she is his daughter is immaterial. If she is his daughter and under the age of consent, and the force, if any, used by the defendant was mere authority or influence, the crime is incestuous adultery; and the fact that the force used cannot be said to be that violence which constitutes rape is immaterial. *Mosley v. State*, 65 Ga. App. 800, 16 S.E.2d 504 (1941).

**On facts, incest is included offense of statutory rape.** *McCrannie v. State*, 157 Ga. App. 110, 276 S.E.2d 263 (1981), overruled on other grounds by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006).

**Conviction for multiple offenses.** — Evidence authorized the jury to find that

more than one instance of sexual intercourse with the victim occurred, permitting conviction for each offense (rape and incest) based on separate occasions. *Kirby v. State*, 187 Ga. App. 88, 369 S.E.2d 274 (1988).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 in failing to argue at trial and on appeal that the inmate's statutory rape and incest convictions should have merged into the inmate's rape conviction as a matter of fact since all of the crimes arose out of the same incident as the crimes of statutory rape and incest were not established by proof of the same or less than all the facts required to establish the crime of rape; the inmate's convictions of statutory rape under O.C.G.A. § 16-6-3 and incest under O.C.G.A. § 16-6-22 were not included pursuant to O.C.G.A. § 16-1-6(1) in the rape conviction under O.C.G.A. § 16-6-1, as statutory rape, which required evidence as to the victim's age and that the victim was not the inmate's spouse, and incest, which required proof of the victim's relation to the inmate, had elements not required for rape. *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006).

**No merger with child molestation.** — Defendant's child molestation in violation of O.C.G.A. § 16-6-4, rape in violation of O.C.G.A. § 16-6-1, and incest in violation of O.C.G.A. § 16-6-22 charges did not merge as a matter of law or fact because they were separate legal offenses and because the victim's testimony and other evidence showed that the victim suffered well over two separate acts of sexual intercourse and additional instances involving oral and anal sex with the defendant. *Allen v. State*, 281 Ga. App. 294, 635 S.E.2d 884 (2006).

**No merger with rape.** — Contrary to the defendant's argument, the trial court did not err in failing to merge a conviction for incest, O.C.G.A. § 16-6-22, in one count into a conviction for rape, O.C.G.A. § 16-6-1, in another count, despite the fact that both counts were based on the same act of sexual intercourse because the defendant's conduct established the commission of more than one crime; to establish the crime of rape, the state proved

that the defendant had carnal knowledge of the victim, forcibly and against the victim's will, but to establish incest, it was also necessary to prove that the victim had a certain relation to the defendant. Thus, incest was not established by proof of the same or less than all the facts required to establish proof of rape. *Dew v. State*, 292 Ga. App. 631, 665 S.E.2d 715 (2008).

### Sentence

**Sentence excessive.** — Sentences of 25 years each imposed by the trial court on the crimes of incest under former O.C.G.A. § 16-6-22(b) and aggravated sexual battery under former O.C.G.A. § 16-6-22.2(c) were void; the maximum sentence for each crime was 20 years at the time the crimes were committed.

*Howard v. State*, 281 Ga. App. 797, 637 S.E.2d 448 (2006).

**Registration as sex offender properly required.** — Because the addendum to the defendant's sentence purported to impose restrictions upon the defendant's future parole, if granted, the sentence was a nullity; however, in light of the testimony and the nature of the offense of which the defendant was convicted, incest, the conditions of probation imposed were reasonable and were not vague or overly broad because several of the conditions imposed were specifically mandated by O.C.G.A. § 42-1-12, and even if the trial court had not specifically imposed sex offender registration as a condition of probation, the defendant was nonetheless required by statute to so register. *Stephens v. State*, 305 Ga. App. 339, 699 S.E.2d 558 (2010).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 41 Am. Jur. 2d, Incest, § 1 et seq.

**C.J.S.** — 42 C.J.S., Incest, § 1 et seq.

**ALR.** — Relationship created by adoption as within statute prohibiting marriage between parties in specified relationships, or statute regarding incest, 151 ALR 1146.

Consent as element of incest, 36 ALR2d 1299.

Prosecutrix in incest case as accomplice or victim, 74 ALR2d 705.

Incest as included within charge of rape, 76 ALR2d 484.

Admissibility, in incest prosecution, of evidence of alleged victim's prior sexual acts with persons other than the accused, 97 ALR3d 967.

Sexual intercourse between persons related by half blood as incest, 34 ALR5th 723.

### 16-6-22.1. Sexual battery.

(a) For the purposes of this Code section, the term "intimate parts" means the primary genital area, anus, groin, inner thighs, or buttocks of a male or female and the breasts of a female.

(b) A person commits the offense of sexual battery when he or she intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person.

(c) Except as otherwise provided in this Code section, a person convicted of the offense of sexual battery shall be punished as for a misdemeanor of a high and aggravated nature.

(d) A person convicted of the offense of sexual battery against any child under the age of 16 years shall be guilty of a felony and, upon

conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

(e) Upon a second or subsequent conviction under subsection (b) of this Code section, a person shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years and, in addition, shall be subject to the sentencing and punishment provisions of Code Section 17-10-6.2. (Code 1981, § 16-6-22.1, enacted by Ga. L. 1990, p. 1003, § 2; Ga. L. 2003, p. 573, § 1.1; Ga. L. 2006, p. 379, § 15/HB 1059.)

**Cross references.** — Actions for childhood sexual abuse, § 9-3-33.1.

**Editor's notes.** — Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

**Law reviews.** — For article, “The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws,” see 20 Georgia St. U.L. Rev. 565 (2004).

For note on 1990 enactment of this Code section, see 7 Georgia St. U.L. Rev. 258 (1990). For note on the 2003 amendment to this Code section, see 20 Georgia St. U.L. Rev. 84 (2003).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### APPLICATION

#### JURY INSTRUCTIONS

#### SENTENCE

### General Consideration

**Validity of accusation.** — Although recitation of the statute may, in certain cases, be a sufficient, though not desirable, method of apprising a defendant of the charges against him, an accusation which did nothing more than reference the statute alleged to have been violated and recite some, but not all, of the elements of the crime of sexual battery was insufficient to constitute a valid accusation. *D'Auria v. State*, 270 Ga. 499, 512 S.E.2d 266 (1999).

Defendant waived any valid exception to the form of an indictment for sexual battery by failing to urge it in a timely written special demurrer. *Haska v. State*, 240 Ga. App. 527, 523 S.E.2d 589 (1999).

**Skin to skin contact not required.** — Evidence of skin-to-skin contact was not required to prove that a defendant touched a victim’s vagina or made physical contact with the victim’s genital area as alleged in the indictment charging child molestation in violation of O.C.G.A. § 16-6-4 and sexual battery in violation of O.C.G.A. § 16-6-22.1(b). Evidence of contact with the victim’s genital area through her panties was sufficient. *Gunn v. State*, 300 Ga. App. 229, 684 S.E.2d 380 (2009).

**Cited in** *In re Jackel*, 275 Ga. 568, 569 S.E.2d 835 (2002); *Thompson v. State*, 277 Ga. 102, 586 S.E.2d 231 (2003); *Williams v. State*, 290 Ga. App. 841, 660 S.E.2d 740 (2008); *Whitaker v. State*, 293 Ga. App. 427, 667 S.E.2d 202 (2008); *Floyd v. State*, 293 Ga. App. 235, 666 S.E.2d 611 (2008); *Sharma v. State*, 294 Ga. App. 783, 670 S.E.2d 494 (2008).

### Application

**Child molestation and sexual battery.** — Even though the facts in an indictment for child molestation were sufficient to charge the lesser offense of sexual battery, when the evidence presented demanded a finding of child molestation or nothing, the trial court did not err by refusing to charge on sexual battery. *Strickland v. State*, 223 Ga. App. 772, 479 S.E.2d 125 (1996).

Sexual battery can be a lesser included offense of child molestation in particular cases where the facts alleged in the indictment for child molestation also include all of the elements of sexual battery. *Strickland v. State*, 223 Ga. App. 772, 479 S.E.2d 125 (1996).

When the jury by its verdict finds the defendant guilty of multiple offenses arising from the same conduct, the court does not err in convicting and sentencing the defendant for the greater offense after merging the lesser offenses into it. Conviction of both sexual battery and child molestation justified the merger of the battery offense into the molestation offense because the molestation offense was the greater offense; a defendant was properly sentenced as defendant’s sentence was within the maximum prescribed for a first offense of child molestation. *Dorsey v. State*, 265 Ga. App. 597, 595 S.E.2d 106 (2004).

Because the evidence was sufficient to convict defendant of either sexual battery, in violation of O.C.G.A. § 16-6-22.1(b), or child molestation, in violation of O.C.G.A. § 16-6-4, the trial court was authorized to

**Application (Cont'd)**

merge the lesser offense of sexual battery into the greater offense of child molestation. *Webb v. State*, 270 Ga. App. 817, 608 S.E.2d 241 (2004).

In a trial on a charge of child molestation, O.C.G.A. § 16-6-4(a), the trial court did not err by refusing to instruct the jury on sexual battery, O.C.G.A. § 16-6-22.1(b), as a lesser included offense, because under the facts of the case, which alleged that the defendant sexually abused a six-year-old child, the evidence presented to the jury offered the choice between the completed crime of child molestation or no crime. *Howell v. State*, 278 Ga. App. 634, 629 S.E.2d 398 (2006).

Since the question whether defendant committed sexual battery was not posed by the evidence presented, the trial court did not err when it refused to charge the jury on sexual battery as a lesser included offense of child molestation. *Walker v. State*, 279 Ga. App. 749, 632 S.E.2d 482 (2006).

There was no evidence warranting a charge of sexual battery in the defendant's sexual molestation case, and the defendant's strategy was to attack the credibility of the victim; because the evidence did not authorize a charge on sexual battery as a lesser included offense, the defendant was not prejudiced by counsel's failure to request a charge on the same. *McGruder v. State*, 279 Ga. App. 851, 632 S.E.2d 730 (2006).

Defendant's motion to sever a public indecency charge from sexual battery charges was properly denied as there was sufficient evidence that the charges constituted a single scheme or plan to prey upon young victims and to satisfy the defendant's prurient desires since: (1) the sexual batteries and the public indecency all took place within a month's period of time and within a five-mile radius; (2) the three victims were between the ages of 20 and 29; (3) the defendant approached each victim in a public place and, after attempting to engage them in conversation of a sexual nature, behaved in a sexually aggressive manner; and (4) in one instance of sexual battery and in the public indecency incident, the defendant offered

the victim's money and fondled the defendant. *Harmon v. State*, 281 Ga. App. 35, 635 S.E.2d 348 (2006), cert. dismissed, 2007 Ga. LEXIS 137 (Ga. 2007).

Because the defendant denied any contact with the victim, the trial court did not err in not charging on sexual battery as a lesser included offense of child molestation. *Hilliard v. State*, 298 Ga. App. 473, 680 S.E.2d 541 (2009).

Defendant's conviction for sexual battery by touching the victim's genital area merged with the defendant's conviction for child molestation by touching the victim's vagina, and defendant's conviction for sexual battery by touching the victim's breast merged with defendant's conviction for child molestation by touching the victim's breast. Therefore, the trial court erred in imposing a separate sentence on the jury's verdicts on these sexual battery counts. *Gunn v. State*, 300 Ga. App. 229, 684 S.E.2d 380 (2009).

Trial court properly declined to merge a sexual battery offense, O.C.G.A. § 16-6-22.1(b), into a child molestation offense under O.C.G.A. § 16-6-4. The sexual battery was established by evidence that the defendant touched the 15-year-old victim's breasts, and the child molestation proof included evidence of the separate act of touching the victim's stomach. *Haynes v. State*, 302 Ga. App. 296, 690 S.E.2d 925 (2010).

**Lesser included offenses.** — Sexual battery was not a lesser included offense of statutory rape as a matter of law, and because the indictment charging defendant with statutory rape was narrowly drawn and the evidence did not support instructions allowing the jury to find defendant guilty of sexual battery or simple battery, the trial court did not err when it denied defendant's request to instruct the jury that sexual battery and simple battery were lesser included offenses of statutory rape. *Neal v. State*, 264 Ga. App. 311, 590 S.E.2d 168 (2003).

As the defendant agreed at the charge conference, under the facts of the case, no evidence supported a charge on sexual battery as a lesser included offense of rape; the evidence concerning the rape was obviously conflicting as the first victim testified that the defendant raped the

victim but the defendant testified that the defendant did nothing wrong, thus, a lesser included offense charge was not warranted. *Quenga v. State*, 270 Ga. App. 141, 605 S.E.2d 860 (2004).

When the defendant was charged with sexual battery under O.C.G.A. § 16-6-22.1, the trial court properly refused to instruct on simple battery under O.C.G.A. § 16-5-23(a) as a lesser included offense. The defendant claimed that the victim had placed the defendant's hand on the outside of her clothing over her vagina, and simple battery required intentional contact. *Engle v. State*, 290 Ga. App. 396, 659 S.E.2d 795 (2008).

Defendant was charged with child molestation and aggravated child molestation under O.C.G.A. § 16-6-4; the defendant denied having any sexual contact with the child and defense counsel argued that the charges were fabricated by the child's parent. As the evidence showed either the commission of the indicted crimes or no crimes at all, the defendant was not entitled to a charge on the lesser included offense of sexual battery under O.C.G.A. § 16-6-22.1(b). *Linto v. State*, 292 Ga. App. 482, 664 S.E.2d 856 (2008).

**No merger with rape.** — Since the evidence established that both sexual battery and rape occurred, and evidence of neither offense was necessary to prove the other, there was no merger, and the trial court did not err in sentencing defendant for both convictions. *Trotter v. State*, 248 Ga. App. 156, 546 S.E.2d 286 (2001).

**Similar transactions evidence properly admitted.** — In a child molestation and aggravated sexual battery prosecution, evidence that before assaulting certain victims, defendant grabbed the victim by the back of the victim's hair or held the victim's neck, was properly admitted as "other transactions" evidence, since defendant used a similar method to control the child victim before sexually assaulting the child; this evidence was relevant to show defendant's course of conduct and rebut defendant's defense of fabrication. That the prior acts involved adults did not preclude their admission as similar transactions. *Helton v. State*, 268 Ga. App. 430, 602 S.E.2d 198 (2004).

Trial court properly admitted similar

transaction evidence to show a defendant's course of conduct and intent in the defendant's trial for public indecency and sexual battery as in each of the similar transactions, defendant approached someone previously unknown to the defendant in a public place, attempted to talk to the person, and then engaged in sexually inappropriate behavior; in the sexual battery incidents and one similar transaction, the defendant either bit or licked the victims on their buttocks while the victims were shopping and in the public indecency incident and two of the similar transactions, the defendant exposed the defendant's person. *Harmon v. State*, 281 Ga. App. 35, 635 S.E.2d 348 (2006), cert. dismissed, 2007 Ga. LEXIS 137 (Ga. 2007).

In a sexual battery case involving a 13-year-old victim, the trial court properly admitted evidence of a similar transaction regarding a 12-year-old girl. The trial court found that both incidents involved girls of a similar age who developed some sort of romantic relationship with the defendant and that the incidents occurred at the same residence and at about the same time. *Engle v. State*, 290 Ga. App. 396, 659 S.E.2d 795 (2008).

**Anatomically correct description not required.** — When the three-year-old victim stated to outcry witnesses that defendant touched the victim's private with defendant's finger, that defendant's finger "went in the hole thing," and that it hurt, this was evidence of penetration sufficient to cause pain and was sufficient to support defendant's conviction of aggravated sexual battery. The child victim's inability to anatomically describe the sexual acts would not inure to the benefit of the abuser. *Helton v. State*, 268 Ga. App. 430, 602 S.E.2d 198 (2004).

#### **Evidence sufficient for conviction.**

-- See *Touchton v. State*, 210 Ga. App. 700, 437 S.E.2d 370 (1993); *Ouzts v. State*, 216 Ga. App. 194, 453 S.E.2d 801 (1995); *Green v. State*, 218 Ga. App. 648, 463 S.E.2d 133 (1995); *Lumsden v. State*, 222 Ga. App. 635, 475 S.E.2d 681 (1996); *McGriff v. State*, 232 Ga. App. 546, 502 S.E.2d 482 (1998), overruled on other grounds, *Wallace v. State*, 275 Ga. 879, 572 S.E.2d 579 (2002); *Thompson v. State*, 245 Ga. App. 396, 537 S.E.2d 807 (2000).

**Application** (Cont'd)

Evidence was sufficient to support the defendant's convictions of sexual battery and child molestation after the child victim indicated that the defendant had placed his mouth or tongue on her vagina, that the defendant had placed his penis in her mouth, and that the little girl had complained of physical pain and suffered apparent emotional distress. *Clark v. State*, 234 Ga. App. 503, 507 S.E.2d 241 (1998).

Evidence was sufficient to convict defendant of sexual battery and child molestation, even though the defendant was acquitted of rape, where the 13-year old victim testified that the defendant pulled off the victim's shorts and forced the defendant's genitals into the victim's genitals despite the victim's protests. The jury was entitled to believe the victim's testimony in whole or in part, and it could have concluded that the defendant placed the defendant's genitals on the victim's genitals (as alleged in the child molestation indictment), but that no penetration occurred, so there was no rape. *Dorsey v. State*, 265 Ga. App. 597, 595 S.E.2d 106 (2004).

Evidence in an initial trial that defendant fondled the victim's breasts and placed a finger inside the victim's genitals, both without the victim's consent, was sufficient to sustain the defendant's convictions for sexual battery pursuant to O.C.G.A. § 16-6-22.1, and aggravated sexual battery pursuant to O.C.G.A. § 16-6-22.2(b); thus, double jeopardy did not prohibit a retrial granted on the ground that defendant received ineffective assistance of counsel. *Weldon v. State*, 270 Ga. App. 574, 607 S.E.2d 175 (2004).

Evidence supported defendant's conviction for rape and sexual battery as the victim testified that the victim was raped by someone who entered the victim's home while a friend was visiting and the friend identified defendant as the person who entered the home when the friend was visiting. *Powell v. State*, 272 Ga. App. 628, 612 S.E.2d 916 (2005).

Evidence sufficed to support a finding of delinquency for an act which would have been sexual battery had the act been com-

mitted by an adult, O.C.G.A. § 16-6-22.1(b), since the victim's grandparent saw the victim, age 4, straddling the juvenile, age 12, and sweating as the juvenile held the victim and moved back and forth under the victim, despite the juvenile's claim that the victim voluntarily jumped into the juvenile's lap. In the Interest of Z.H., 278 Ga. App. 490, 629 S.E.2d 486 (2006).

Juvenile adjudication of sexual battery was supported by sufficient evidence that the victim was walking near the victim's home when the victim saw two young persons riding bicycles, that one of the youths ran up behind the victim, grabbed the victim's breasts, crotch, and buttocks, and tried to push the victim down, that the victim turned around and looked at the young person, whom the victim later identified as appellant, that the victim then screamed and ran home, that the victim immediately drove around the neighborhood with the victim's love interest looking for the attacker, that within two or three minutes of the attack, the victim saw the attacker riding a bicycle, that the victim yelled at the person, then followed the young person home, that the victim then contacted the police, who took the victim to the young person's home, where the victim identified appellant as the attacker. In the Interest of J.L.B., 280 Ga. App. 556, 634 S.E.2d 514 (2006).

Convictions for kidnapping, aggravated sexual battery, sexual battery, and attempted rape were all upheld on appeal as a photo lineup was not impermissibly suggestive, similar transaction evidence was properly admitted, the defendant had notice of the evidence, and the jury was authorized to find the victim credible and to accept the victim's testimony; hence, a rational trier of fact could have found from the evidence presented that the defendant committed the charged crimes beyond a reasonable doubt. *Watley v. State*, 281 Ga. App. 244, 635 S.E.2d 857 (2006).

There was sufficient evidence, including testimony by the victim and similar transaction evidence involving incidents that took place years before, to support a defendant's convictions of sexual battery, child molestation, and aggravated child molestation; the victim, who testified to

various acts the defendant performed upon the victim, stated when confronted with inconsistencies in the victim's testimony that the victim had been on drugs during that period because the victim was trying to forget everything, and any inconsistencies in the victim's testimony were for the jury to resolve. Boynton v. State, 287 Ga. App. 778, 653 S.E.2d 110 (2007).

There was sufficient evidence to support a defendant's convictions for rape, aggravated sodomy, kidnapping, burglary, and misdemeanor sexual battery based on the similar transaction evidence produced by the state, the fact that the defendant's DNA was found in the victims' beds, and that the defendant's identity was established, all of which sufficiently linked the defendant to the crimes beyond a reasonable doubt. Goolsby v. State, 299 Ga. App. 330, 682 S.E.2d 671 (2009).

Based on the facts, the jury was authorized to find the defendant guilty of sexual battery in violation of O.C.G.A. § 16-6-22.1 because the victim, who was the defendant's nine-year-old neighbor, testified that the defendant touched the victim on the private part; the testimony of one witness was sufficient to sustain a verdict, and the victim's testimony was sufficient. Hamrick v. State, 304 Ga. App. 378, 696 S.E.2d 403 (2010).

Defendant was properly convicted of armed robbery, burglary, aggravated assault, and sexual battery because two co-defendants testified that the defendant participated in a home invasion and robbery, and that testimony was sufficient to convict the defendant. Martinez v. State, 306 Ga. App. 512, 702 S.E.2d 747 (2010).

Evidence was sufficient to support the defendant's convictions for armed robbery, burglary, aggravated assault, criminal attempt to commit armed robbery, criminal attempt to commit burglary, and sexual battery because two defendant's testified that the defendant participated in the home invasion, and that testimony was sufficient to sustain the defendant's conviction for the crimes committed at the home. Martinez v. State, 306 Ga. App. 512, 702 S.E.2d 747 (2010).

Trial court did not err in convicting the defendant of rape, O.C.G.A. § 16-6-1(a)(1), sexual battery, O.C.G.A.

§ 16-6-22.1(b), aggravated battery, O.C.G.A. § 16-5-24(a), and assault, O.C.G.A. § 16-5-20(a)(1), because the victim's testimony that the defendant raped, sodomized, punched, burned, and threatened to kill the victim was sufficient to authorize the defendant's convictions. Harris v. State, 308 Ga. App. 523, 707 S.E.2d 908 (2011).

**Right to privacy not violated.** — Because the 13-year-old victim in a sexual battery case was under the age when the victim could legally consent to sexual conduct, prosecution of the defendant did not violate the defendant's right to privacy for consensual touching within the context of their boyfriend/girlfriend relationship. Engle v. State, 290 Ga. App. 396, 659 S.E.2d 795 (2008).

**Evidence of victim's sexual activity admissible.** — Defendant's convictions for child molestation in violation of O.C.G.A. § 16-6-4(a) and sexual battery in violation of O.C.G.A. § 16-6-22.1(b) were vacated because the trial court erred by applying O.C.G.A. § 24-2-3(a) to the case and striking the testimony regarding the victim's previous alleged sexual conduct with the victim's brother based on the court's conclusion that the rape shield statute prohibited the defendant from presenting evidence regarding the victim's prior sexual history, and the error in excluding the evidence of the victim's prior sexual history could have contributed to the jury's verdict since the only direct evidence of the defendant's guilt was the victim's testimony that the defendant sexually abused the victim; O.C.G.A. § 24-2-3, as the statute is currently written, does not apply to prosecutions for child molestation or sexual battery. Robinson v. State, 308 Ga. App. 562, 708 S.E.2d 303 (2011).

**Counsel not ineffective for failure to call wife as witness.** — On appeal from convictions on one count of aggravated sexual battery and two counts of sexual assault, the trial court did not err in denying the defendant's motion for a new trial as the defendant failed to show that any prejudice resulted from counsel's failure to call the defendant's wife to testify for the defense, and the appeals court refused to speculate that the testimony

**Application (Cont'd)**

would have led to an acquittal. Lee v. State, 286 Ga. App. 368, 650 S.E.2d 320 (2007).

**Ineffective assistance of counsel warrants new trial.** — Trial court did not abuse the court's discretion in granting the defendant a new trial based on the ineffective assistance of trial counsel as: (1) counsel's pretrial investigation was deficient; (2) counsel made no effort to investigate or to obtain the criminal records of the state's similar transaction witness before trial, and did not ask for more time or a continuance upon learning that the defendant did not have the records; (3) the defendant pointed out that the jury had doubts about the victim's testimony based on their verdict of guilt to sexual battery, as a lesser-included offense of child molestation, the crime the defendant was charged with committing; (4) there was evidence that the victim had reason to lie; (5) the charged incident was not reported until after the defendant's wife hired a divorce lawyer, who then arranged the first interview between the victim and investigators; and (6) given that the evidence against the defendant was not overwhelming, this impeachment evidence was particularly crucial. State v. Lamb, 287 Ga. App. 389, 651 S.E.2d 504 (2007), overruled on other grounds, O'Neal v. State, 285 Ga. 361, 677 S.E.2d 90 (2009).

**Jury Instructions**

**Erroneous charge on punitive consequences.** — Trial court erred in instructing the jury of the misdemeanor rating of sexual battery as this introduced the impermissible factor of the potential severity of punishment into the deliberations. Green v. State, 206 Ga. App. 539, 426 S.E.2d 65 (1992).

**Charge as to state's burden of proof.** — Trial court correctly charged the jury as to the rape count of the indictment and its lesser included offenses of statutory rape and sexual battery and properly instructed the jury as to the state's burden to prove the defendant's guilt beyond a reasonable doubt, substantially in accordance with the pattern charge because there was no objectionable summary of

the reasonable doubt standard as an honest belief, and while the best practice would not have been to employ the word "believe" in the court's charge, the trial court did not improperly summarize the burden of proof or otherwise confuse the jury in doing so; the trial court made no attempt to summarize the court's reasonable doubt charge as an honestly held belief or to otherwise explain it, and twice after giving the charge, the trial court made reference to the court's reasonable doubt charge as initially given by instructing the jury that the jury could convict the defendant of rape and child molestation if the jury believed beyond a reasonable doubt that the defendant was guilty thereof. Alexander v. State, 308 Ga. App. 245, 707 S.E.2d 156 (2011).

**Instruction as to consent by person under 16.** — In a sexual battery case involving a 13-year-old victim, the trial court properly instructed the jury that a person under the age of 16 years lacked the legal capacity to consent to sexual conduct. Engle v. State, 290 Ga. App. 396, 659 S.E.2d 795 (2008).

In a sexual battery case involving a 13-year-old victim, the defendant's sufficiency of the evidence argument failed as the argument was premised on the erroneous argument that the victim had the legal capacity to consent to the touching. Engle v. State, 290 Ga. App. 396, 659 S.E.2d 795 (2008).

State was not required to prove a lack of consent by a 15-year-old victim to prove sexual battery in violation of O.C.G.A. § 16-6-22.1(b) because a person under 16 could not legally consent to a sexual act. Haynes v. State, 302 Ga. App. 296, 690 S.E.2d 925 (2010).

**Sentence**

**Sentence was proper.** — Defendant's sentence to 10 years for false imprisonment, 12 months for sexual battery, and 12 months for simple battery, to run concurrently, provided that upon service of four years in custody, defendant could serve the remaining six years on probation, was not void as it fell within the allowable sentencing ranges of no less than one nor more than 10 years for false imprisonment, and up to 12 months each

for sexual battery and simple battery. Rehberger v. State, 267 Ga. App. 778, 600 S.E.2d 635 (2004).

Defendant was properly sentenced for felony sexual battery under O.C.G.A. § 16-6-22.2(d) because any error from a lack of a specific factual finding as to the victim's age was harmless since the mother testified without challenge as to the victim's age and the jury viewed a videotaped interview of the five year old victim, which showed that the victim was younger than 16 years old. Hernandez v. State, 300 Ga. App. 792, 686 S.E.2d 373 (2009).

**Probation condition overbroad and vague.** — Upon convicting the defendant of sexual battery under O.C.G.A. § 16-6-22.1, special probation conditions 4, 5, and 6 were erroneously imposed as those conditions lacked reasonable specificity and encompassed groups and locations not rationally related to the sentencing objectives and failed to give the

defendant notice of either the conduct or the groups the defendant must avoid. Grovenstein v. State, 282 Ga. App. 109, 637 S.E.2d 821 (2006).

**Sentence improper when wrong version of section cited.** — Defendant's sentence to five years imprisonment pursuant to the amended version of O.C.G.A. § 16-6-22.1, with regard to defendant's conviction for sexual battery against a child under the age of 16 years, without specific jury finding that conduct for which defendant was convicted occurred after the amendment, was erroneous and required defendant's sentence to be vacated and remanded to the trial court for resentencing; the trial court should have required the special verdict form that addressed both defendant's pre-amendment and post-amendment conduct to avoid a potential ex post facto violation. Forde v. State, 289 Ga. App. 805, 658 S.E.2d 410 (2008).

#### OPINIONS OF THE ATTORNEY GENERAL

**Fingerprinting required for violation of Code section.** — Violation of the offense defined by O.C.G.A. § 16-6-22.1 is

designated as an offense for which those charged with a violation are to be fingerprinted. 1990 Op. Att'y Gen. No. 90-22.

#### 16-6-22.2. Aggravated sexual battery.

(a) For the purposes of this Code section, the term "foreign object" means any article or instrument other than the sexual organ of a person.

(b) A person commits the offense of aggravated sexual battery when he or she intentionally penetrates with a foreign object the sexual organ or anus of another person without the consent of that person.

(c) A person convicted of the offense of aggravated sexual battery shall be punished by imprisonment for life or by a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by probation for life, and shall be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7. (Code 1981, § 16-6-22.2, enacted by Ga. L. 1990, p. 1003, § 2; Ga. L. 1994, p. 1959, § 8; Ga. L. 2006, p. 379, § 16/HB 1059.)

**Cross references.** — Actions for childhood sexual abuse, § 9-3-33.1. Visitation with minors by convicted sexual offenders while imprisoned, § 42-5-56.

**Editor's notes.** — Ga. L. 1994, p. 1959, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Sentence Reform Act

of 1994'."

Ga. L. 1994, p. 1959, § 2, not codified by the General Assembly, provides: "The General Assembly declares and finds:

"(1) That persons who are convicted of certain serious violent felonies shall serve minimum terms of imprisonment which shall not be suspended, probated, stayed, deferred, or otherwise withheld by the sentencing judge; and

"(2) That sentences ordered by courts in cases of certain serious violent felonies shall be served in their entirety and shall not be reduced by parole or by any earned time, early release, work release, or other such sentence-reducing measures administered by the Department of Corrections."

Ga. L. 1994, p. 1959, § 16, not codified by the General Assembly, provides: "The provisions of this Act shall apply only to those offenses committed on or after the effective date of this Act; provided, however, that any conviction occurring prior to, on, or after the effective date of this Act shall be deemed a 'conviction' for the purposes of this Act and shall be counted in determining the appropriate sentence to be imposed for any offense committed on or after the effective date of this Act."

Ga. L. 1994, p. 1959, § 17, not codified by the General Assembly, provides: "In the event any section, subsection, sentence, clause, or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses, or phrases of this Act, which shall remain of full force and effect as if the section, subsection, sentence, clause, or phrase so declared or adjudged invalid or unconstitutional were not originally a part hereof. The General Assembly declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional."

Ga. L. 1994, p. 1959, § 18, not codified by the General Assembly, provides: "This Act shall become effective on January 1, 1995, upon ratification by the voters of this state at the 1994 November general election of that proposed amendment to Article IV, Section II, Paragraph II of the Constitution authorizing the General As-

sembly to provide for mandatory minimum sentences and sentences of life without possibility of parole in certain cases and providing restrictions on the authority of the State Board of Pardons and Paroles to grant paroles...." That amendment was ratified by the voters on November 8, 1994, so the amendment to this Code section by this Act became effective on January 1, 1995.

Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: "The General Assembly declares and finds:

"(1) That the 'Sentence Reform Act of 1994,' approved April 20, 1994 (Ga. L. 1994, p. 1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated, deferred, or withheld by the sentencing court;

"(2) That in *State v. Allmond*, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the 'Sentence Reform Act of 1994,' that the provisions of the First Offender Act would still be available to the sentencing court, which would mean that a person who committed a serious violent felony could be sentenced to less than the minimum mandatory ten-year sentence; and

"(3) That, contrary to the decision in *State v. Allmond*, it is the expressed intent of the General Assembly that persons who commit a serious violent felony specified in the 'Sentence Reform Act of 1994' shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment."

Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General

Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offend-

ers and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

**Law reviews.** — For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

For note on 1990 enactment of this Code section, see 7 Georgia St. U.L. Rev. 258 (1990).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### APPLICATION

#### JURY INSTRUCTIONS

#### SENTENCE

### General Consideration

**Proof of lack of consent not required for child under 16.** — In a prosecution for sexual battery under O.C.G.A. § 16-6-22.2(b), the state was not required to prove the victim's lack of consent to the incidents because the victim was 12 years old at the time, and the age

of consent was 16. The defendant's knowledge of the victim's age was not a legal element of child molestation. *Disabato v. State*, 303 Ga. App. 68, 692 S.E.2d 701 (2010).

**Finger as "foreign object."** — Legislature clearly intended to include penetration by a finger in the conduct proscribed

**General Consideration (Cont'd)**

by O.C.G.A. § 16-6-22.2; to limit the definition of "foreign object" to inanimate articles or instruments, and exclude therefrom a human appendage such as a finger, would apply the statute illogically. *Burke v. State*, 208 Ga. App. 446, 430 S.E.2d 816 (1993).

Term "foreign object" includes not only inanimate instruments, but also a person's body parts, such as a finger. *Hardeman v. State*, 247 Ga. App. 503, 544 S.E.2d 481 (2001).

**Element of "penetration."** — Penetration, however slight, will suffice to satisfy the "penetration" element of O.C.G.A. § 16-6-22.2. *Hendrix v. State*, 230 Ga. App. 604, 497 S.E.2d 236 (1998).

**Digital penetration sufficient.** — Evidence was sufficient to convict defendant of aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), where the victim's testimony, the victim's mother's testimony, and the doctor's testimony all established that defendant digitally penetrated the victim, causing physical injury. *Gearin v. State*, 255 Ga. App. 329, 565 S.E.2d 540 (2002).

Defendant's two convictions for aggravated sexual battery were upheld, as evidence supplied by the victim's testimony, that defendant penetrated the victim's genitals and the victim's anus with a foreign object, specifically, the defendant's finger, was sufficient to support the convictions. *Cheek v. State*, 265 Ga. App. 15, 593 S.E.2d 55 (2003).

An admission by the defendant, the testimony of a child, and the testimony of a witness as to the child's outcry established that the defendant's finger penetrated the child's sexual organ. As the defendant's finger was a "foreign object" for purposes of O.C.G.A. § 16-6-22.2, the evidence was sufficient to convict the defendant of aggravated sexual battery. *Inman v. State*, 295 Ga. App. 461, 671 S.E.2d 921 (2009).

Victim's testimony that defendant penetrated her sexual organ with his finger was alone sufficient to prove defendant guilty of child molestation (O.C.G.A. § 16-6-4(a)) and aggravated child molestation (O.C.G.A. § 16-6-22.2(b)), pursuant

to O.C.G.A. § 24-4-8. The testimony of the victim's cousin, two school friends, and the interviewing detective was admissible as substantive evidence under the Child Hearsay Statute, O.C.G.A. § 24-3-16. *Vaughn v. State*, 301 Ga. App. 391, 687 S.E.2d 651 (2009).

**Insufficient evidence of venue.** — Absent sufficient proof establishing venue, the defendant's aggravated sexual battery and aggravated sodomy convictions were reversed; but, given that sufficient evidence otherwise existed to support the former charge, retrial on the charge would not violate the defendant's double jeopardy rights. *Melton v. State*, 282 Ga. App. 685, 639 S.E.2d 411 (2006).

**Constitutional challenge held untimely.** — Trial court did not err in denying the defendant's motion for a directed verdict of acquittal as to the aggravated sexual battery charge, which specifically alleged that O.C.G.A. § 16-6-22.2 (b) violated the Equal Protection Clause of both the Georgia and U.S. Constitutions as the defendant did not move for the same until filing a second motion for a new trial, which was considered untimely. *Phillips v. State*, 284 Ga. App. 224, 644 S.E.2d 153 (2007).

**Cited in** *Deal v. State*, 241 Ga. App. 879, 528 S.E.2d 289 (2000); *Hardeman v. State*, 272 Ga. 361, 529 S.E.2d 368 (2000); *Greulich v. State*, 263 Ga. App. 552, 588 S.E.2d 450 (2003); *Stroud v. State*, 284 Ga. App. 604, 644 S.E.2d 467 (2007); *Disharoon v. State*, 288 Ga. App. 1, 652 S.E.2d 902 (2007); *Finnan v. State*, 291 Ga. App. 486, 662 S.E.2d 269 (2008); *Dyer v. State*, 295 Ga. App. 495, 672 S.E.2d 462 (2009); *Greene v. State*, 295 Ga. App. 803, 673 S.E.2d 292 (2009).

**Application**

**Admissibility of evidence of similar offenses.** — In a prosecution for aggravated sexual battery and aggravated child molestation involving a 12-year-old child, evidence that the defendant had sexual intercourse with a 15-year-old child shortly before committing the charged crimes was properly admitted as the evidence was relevant to show bent of mind, course of conduct, and to corroborate the victim's testimony; the prejudicial effect of

the evidence did not outweigh the probative value. *Martin v. State*, 294 Ga. App. 117, 668 S.E.2d 549 (2008).

**No evidence that defendant was conducting medical treatment or procedure.** — Trial court did not err in convicting defendant of aggravated sexual battery because the evidence authorized a jury to find that a defendant digitally penetrated the victim's vagina without her consent; the evidence did not demand a finding that defendant touched the victim's genitals as part of a medical treatment or procedure but authorized the jury to find that the defendant penetrated the victim's vagina for some other reason because defendant was not a licensed physician at the time of the act of aggravated sexual battery. *Lee v. State*, 300 Ga. App. 214, 684 S.E.2d 348 (2009).

**Evidence sufficient for conviction** of aggravated sexual battery. *Ouzts v. State*, 216 Ga. App. 194, 453 S.E.2d 801 (1995); *Hardeman v. State*, 247 Ga. App. 503, 544 S.E.2d 481 (2001).

Evidence was sufficient to support an aggravated sexual battery conviction when the defendant's eight year old step-child testified that defendant "put his private in my private," that the defendant moved the defendant's body while inside the victim, that the defendant hurt the victim's "private," when the victim circled the appropriate places on anatomically correct drawings which were admitted into evidence, testified that the defendant put the defendant's "private" in the victim's mouth on more than one occasion, when eventually the victim told the victim's parent, the victim's babysitter, and the victim's doctor about these events, and when a physical examination revealed redness and swelling around the victim's genitals, which, the physician testified, could have been caused by trauma. *Torres v. State*, 262 Ga. App. 309, 585 S.E.2d 228 (2003).

Evidence was sufficient to uphold the defendant's conviction because, while there was evidence that the defendant did "pull" on the victim's private body part and cause the victim injury, those actions were not material to the crime; the state was not required to prove an unnecessary fact alleged in an indictment. *Vanwinkle*

v. *State*, 263 Ga. App. 19, 587 S.E.2d 142 (2003).

Evidence was sufficient to find defendant guilty of aggravated sexual battery even when the evidence consisted primarily of the victim's testimony and the statements of the victim's sister; the testimony of a single witness was generally sufficient to establish a fact, and the jury clearly resolved the conflicts against the defendant. *McGhee v. State*, 263 Ga. App. 762, 589 S.E.2d 333 (2003).

Trial court correctly allowed three adults to testify about out-of-court statements which a four-year-old child made to them even though the child was unresponsive when the child was asked questions in court, and the appellate court found that the child's statements alleging that defendant placed the defendant's finger inside the victim's genitals, when considered with evidence that the child had gonorrhea, and transactional evidence that defendant molested the defendant's own child, was sufficient to sustain the defendant's convictions for child molestation and aggravated sexual battery. *Bell v. State*, 263 Ga. App. 894, 589 S.E.2d 653 (2003).

Evidence of the victim alone was sufficient to authorize a guilty verdict in a child molestation case; there was no requirement that the victim's testimony be corroborated, and defendant's convictions of child molestation, aggravated child molestation, rape, aggravated sexual battery, and cruelty to children were affirmed. *McKinney v. State*, 269 Ga. App. 12, 602 S.E.2d 904 (2004).

Evidence in an initial trial that defendant fondled the victim's breasts and placed the defendant's finger inside the victim's genitals, both without the victim's consent, was sufficient to sustain the defendant's convictions for sexual battery pursuant to O.C.G.A. § 16-6-22.1, and aggravated sexual battery pursuant to O.C.G.A. § 16-6-22.2(b); thus, double jeopardy did not prohibit a retrial granted on the ground that defendant received ineffective assistance of counsel. *Weldon v. State*, 270 Ga. App. 574, 607 S.E.2d 175 (2004).

Motion for a judgment of acquittal on charges of aggravated sexual battery, ag-

**Application (Cont'd)**

gravated child molestation, and child molestation was properly denied as the defendant's testimony that the defendant blacked out during the incident did not demand a finding that the defendant lacked the requisite criminal intent; the victim testified that the defendant began rubbing the victim's legs, touched the victim's "private part" through the victim's clothing, pulled down the defendant's pants as well as the victim's pants, picked the victim up, and began rubbing the victim up and down against the defendant's "private part." *Ward v. State*, 274 Ga. App. 511, 618 S.E.2d 154 (2005).

As the victim testified that defendant entered the victim's bedroom and, without the victim's consent, inserted the defendant's finger and genitals into the victim's genitals, this testimony established forcible penetration; moreover, the examining sexual assault specialist concluded that the victim's wounds were consistent with the victim's story of sexual assault and indicated forced penetration by the finger and the genitals; the evidence was sufficient for the jury to find the defendant guilty of rape and aggravated sexual battery, pursuant to O.C.G.A. §§ 16-6-1(a)(1) and 16-6-22.2(b). *Duran v. State*, 274 Ga. App. 876, 619 S.E.2d 388 (2005).

Evidence presented at defendant's trial was sufficient to sustain defendant's conviction for aggravated sexual battery, as the evidence showed that defendant pulled down the victim's underwear and stuck defendant's fingers in the victim's genitals; accordingly, the evidence showed that defendant penetrated the victim with a foreign object. *Aaron v. State*, 275 Ga. App. 269, 620 S.E.2d 499 (2005).

Evidence supported the defendant's conviction for aggravated child molestation and aggravated sexual battery because: (1) the 11-year-old victim testified that the defendant put the defendant's hand on the victim's private part, put the defendant's finger in the victim's private part, put the defendant's mouth on the victim's private part, and put the victim's mouth on the defendant's private part, and that when the victim put the victim's mouth on the defendant's private part, "he

came, whatever you call it," (2) when the prosecutor asked the victim whether by that the victim meant that "stuff came out of his private part," the victim responded yes, and (3) in a videotaped pretrial interview, the victim explained that the victim was using the term "private part" to mean penis or vagina. *Maddox v. State*, 275 Ga. App. 869, 622 S.E.2d 80 (2005).

Aggravated sexual battery conviction was upheld on appeal as was the trial court's order denying defendant a directed verdict of acquittal because: (1) the victim's testimony sufficiently demonstrated that defendant put defendant's hand inside the victim's genitals; (2) the victim's testimony authorized the jury to conclude that the defendant penetrated the victim's sexual organ with a foreign object; (3) similar transaction evidence was properly admitted to prove the defendant's bent of mind and motive; (4) each similar transaction witness positively identified the defendant as the person who committed the independent act, and the proof of one of the incidents tended to prove the offense at trial, which also involved digital penetration in a hospital setting; and (5) three other similar transaction incidents, while not involving an actual touching, were properly admitted as evidence that defendant offered a female money or clothing in exchange for a sexual favor of some sort; finally, because the defendant failed to object that testimony from these witnesses was cumulative, the defendant waived this claim of error for purposes of appeal. *Enurah v. State*, 279 Ga. App. 883, 633 S.E.2d 52 (2006).

Convictions for kidnapping, aggravated sexual battery, sexual battery, and attempted rape were all upheld on appeal as a photo lineup was not impermissibly suggestive, similar transaction evidence was properly admitted, the defendant had notice of the same, and the jury was authorized to find that the victim was credible and to accept the victim's testimony; hence, a rational trier of fact could have found from the evidence presented that the defendant committed the charged crimes beyond a reasonable doubt. *Watley v. State*, 281 Ga. App. 244, 635 S.E.2d 857 (2006).

Despite the defendant's correct asser-

tion that the trial court erred in charging the jury that one of the factors to be considered in assessing the reliability of identification testimony was the level of certainty shown by the witness about her identification, because there was evidence other than the victim's identification of the defendant which connected the defendant to the offenses of burglary, aggravated sodomy, and aggravated sexual battery, the error was harmless and the convictions for those offenses were upheld. *Bharadia v. State*, 282 Ga. App. 556, 639 S.E.2d 545 (2006), cert. denied, No. S07C0522, 2007 Ga. LEXIS 222 (Ga. 2007).

Sufficient evidence supported the defendant's convictions of child molestation under O.C.G.A. § 16-6-4 and aggravated sexual battery under O.C.G.A. § 16-6-22.2; the testimony of the victim and the defendant conflicted, but the testimony of the victim, alone was sufficient to authorize the jury to find the defendant guilty. *Goldstein v. State*, 283 Ga. App. 1, 640 S.E.2d 599 (2006), cert. denied, 2007 Ga. LEXIS 338 (April 24, 2007).

Because sufficient evidence was supplied via the testimony from the child victim and the witnesses who corroborated that testimony to support the defendant's aggravated sexual battery and child molestation convictions, despite any alleged inconsistencies, the convictions were upheld as was the denial of the defendant's motions for an acquittal and a new trial. *Lilly v. State*, 285 Ga. App. 427, 646 S.E.2d 512 (2007).

Because the state presented sufficient evidence via the victim's testimony describing how the defendant placed a finger in the victim's vagina without the victim's consent, and the trial court did not abuse the court's discretion in admitting a similar transaction in which the defendant also victimized a female jogger, the defendant's aggravated sexual battery conviction was upheld on appeal. *Coleman v. State*, 284 Ga. App. 811, 644 S.E.2d 910 (2007).

Because sufficient direct evidence was presented via the victim's testimony that the defendant improperly touched and digitally penetrated the victim's vagina, convictions upon charges of aggravated

sodomy, aggravated child molestation, and other crimes arising from that contact were upheld on appeal; further, any error related to the admission of the victim's videotaped statement was harmless as such statement would have been admissible as res gestae or to prove the defendant's lustful disposition. *Morrow v. State*, 284 Ga. App. 297, 643 S.E.2d 808 (2007).

Despite the defendant's claim that the victim's testimony was too uncertain to support a conviction for aggravated sexual battery, the conviction was upheld on appeal as: (1) it was not for the appeals court to determine or question how the jury resolved any apparent conflicts or uncertainties in the evidence; (2) in general, the testimony of the victim was sufficient to establish a fact; and (3) corroboration was not required, and if corroboration were, the bite mark on the defendant's shoulder, which was testified to by the victim, provided sufficient corroboration. *Boyt v. State*, 286 Ga. App. 460, 649 S.E.2d 589 (2007).

Victim's testimony and the fact that she had bruises consistent with the rape and battery she described were sufficient to support defendant's conviction for violating O.C.G.A. §§ 16-6-1(a)(1) and 16-6-22.2(b); that no semen was found on the victim did not undercut the conviction, and any discrepancies between the victim's testimony and the testimony of two occupants of defendant's house, who stated that the victim was bruised before the assault, were properly resolved by the jury as the trier of fact. *Duran v. Walker*, No. 06-15758, 2007 U.S. App. LEXIS 7489 (11th Cir. Mar. 29, 2007) (Unpublished).

Evidence was sufficient to support a defendant's convictions of child molestation, aggravated child molestation, and aggravated sexual battery after the five-year-old victim stated that the defendant had made her perform an oral act on his penis, that he had put his mouth on her vagina, and that he had stuck his finger in her vagina and anus; furthermore, the victim's seven-year-old sibling reported that the defendant had been lying on a bed in the same room as the victim, that the defendant had chased the sibling into the sibling's room and told the sibling to stay in bed until that night, and

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that the sibling saw "something bad" happen to the victim. *Herring v. State*, 288 Ga. App. 169, 653 S.E.2d 494 (2007), cert. denied, 2008 Ga. LEXIS 205 (Ga. 2008).

Evidence supported the defendant's convictions of rape under O.C.G.A. § 16-6-1(a)(2), aggravated sexual battery under O.C.G.A. § 16-6-22.2, and two counts of child molestation under O.C.G.A. § 16-6-4(a) with regard to his daughter, who was seven at the time. The victim testified that the defendant touched her vagina with his hand and insisted that she touch his penis with her hand; a detective testified that the victim told him that the defendant touched her on her vagina with his hands, fingers, and penis and that he asked her to touch his penis; another detective, who conducted a videotaped interview with the victim, testified that the victim told her that she had sex with the defendant on multiple occasions; in the interview, the victim stated that the defendant pulled her pants down and put his penis inside her vagina and that he put his hand inside her vagina; and the victim's mother and grandmother testified to similar statements by the victim. *Osborne v. State*, 291 Ga. App. 711, 662 S.E.2d 792 (2008), cert. denied, 2008 Ga. LEXIS 783 (Ga. 2008).

Defendant's own admission that the defendant digitally penetrated a 15-year-old victim's vagina while masturbating was sufficient to sustain the defendant's convictions for aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), and child molestation, O.C.G.A. § 16-6-4(a). *Driggers v. State*, 291 Ga. App. 841, 662 S.E.2d 872 (2008).

Testimony by a victim that the defendant and an accomplice, armed with handguns, forcibly entered the victim's apartment, raped and sodomized the victim, struck the victim with a gun, stole jewelry, bound the victim, and escaped in a car owned by the victim's prospective spouse, and evidence that 24 fingerprints lifted from the apartment and car matched the defendant's fingerprints was sufficient to convict the defendant of aggravated sexual battery. *Crawford v. State*, 292 Ga. App. 463, 664 S.E.2d 820 (2008).

Conviction of the defendant for aggravated sexual battery was supported by sufficient evidence since the victim of the defendant's inappropriate sexual conduct informed her mother and police about the defendant's conduct, and the defendant's answers to polygraph questions appeared deceptive. *Colton v. State*, 297 Ga. App. 795, 678 S.E.2d 521 (2009).

As a 14-year-old's testimony about the defendant's digitally penetrating the victim's genitals was sufficient, standing alone, to support the defendant's conviction of aggravated sexual battery, even assuming that testimony about the content of text messages between the defendant and the victim was improperly admitted hearsay, the defendant was not entitled to a new trial. *Hollie v. State*, 298 Ga. App. 1, 679 S.E.2d 47 (2009), aff'd, 287 Ga. 389, 696 S.E.2d 642 (2010).

Sufficient evidence supported the defendant's convictions of armed robbery, O.C.G.A. § 16-8-41(a), rape, O.C.G.A. § 16-6-1(a)(1), aggravated assault, O.C.G.A. § 16-5-21(a)(2), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), kidnapping, O.C.G.A. § 16-5-40(a), and aggravated sodomy, O.C.G.A. § 16-6-2(a)(2) involving four different victims on three separate dates; both the husband and the wife, the victims in the first criminal incident, identified the defendant in court as the perpetrator of the crimes. Two separate DNA analyses testified to by two forensic biologists showed that the defendant's sperm was present in the vaginas of the other two female victims. *Robins v. State*, 298 Ga. App. 70, 679 S.E.2d 92 (2009).

Trial court's denial of the defendant's motion for directed verdict was proper because there was some evidence establishing the defendant's commission of aggravated sexual battery; the testimony of a nurse practitioner that the victim had disclosed in her medical examination that the defendant had "put his fingers in her private part" during one of the sexual encounters established the offense, and although the victim had recanted her allegations during the initial investigations and testified at trial that she could not recall whether the defendant had penetrated her with his finger, such inconsis-

tencies and conflicting evidence only created a question of credibility for the jury's resolution. Pearce v. State, 300 Ga. App. 777, 686 S.E.2d 392 (2009).

Circumstantial evidence that a defendant chastised the defendant's two-year-old child for soiling a diaper by poking the child's anus with a stick, resulting in perineal lacerations, was sufficient to support a conviction for aggravated sexual battery in violation of O.C.G.A. § 16-6-22.2(b). Viers v. State, 303 Ga. App. 387, 693 S.E.2d 526 (2010).

Evidence was sufficient to convict defendant of child molestation and aggravated child molestation under O.C.G.A. § 16-6-4 and of aggravated sexual battery under O.C.G.A. § 16-6-22.2(b) because the state provided testimony corroborating the victim's statements that when the defendant was supposed to babysit the victim after school, defendant regularly abused the victim at the victim's home, in the defendant's car, in a park, in a vacant house, and two motels by touching the victim, making the victim perform oral sex on the defendant, by sodomizing the victim, by making the victim wear thong underwear, and by taking cellular telephone photographs of the victim naked. Woods v. State, 304 Ga. App. 403, 696 S.E.2d 411 (2010).

Victim, who was age eighteen at the time of trial, testified that between the ages of seven and fourteen, the defendant molested her, putting his hand and his penis into her vagina and touching her all over her body. This evidence supported the defendant's convictions for child molestation, aggravated child molestation, and aggravated sexual battery. Wilson v. State, 304 Ga. App. 623, 697 S.E.2d 275 (2010).

Evidence that, after attempting to talk a 13-year-old babysitter into having sex with the defendant, the defendant threw her on the bed, straddled her, put the defendant's hand inside her underwear and inserted two fingers into her vagina was sufficient to convict the defendant of aggravated sexual battery in violation of O.C.G.A. § 16-2-22.1. A prior similar incident that occurred when the defendant was 12 years old was properly admitted to show the defendant's course of conduct

and bent of mind. Lee v. State, 306 Ga. App. 144, 701 S.E.2d 582 (2010).

**Force is not an element.** — Defendant's argument that there was insufficient evidence of force to convict defendant of aggravated sexual battery in violation of O.C.G.A. § 16-6-22.2(b) failed; force was not an element of aggravated sexual battery, and the daughter's testimony that defendant had placed a vibrator in the daughter's vagina and that it hurt badly was sufficient to sustain the conviction. Zepp v. State, 276 Ga. App. 466, 623 S.E.2d 569 (2005), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007).

**Insufficient evidence for conviction.** — There was sufficient evidence to support a defendant's convictions for rape, incest, statutory rape, and child molestation against one of the defendant's children and a stepchild based on the defendant's repeated engagement in sexual intercourse with the children at various times while one was 12 to 16 years old and the other was 16 to 19 years old, and evidence of a letter threatening suicide on the defendant's part and apologizing for the actions against the children was also introduced against the defendant. However, the conviction on the charge of aggravated sexual battery against the stepchild was in error and required reversal since the state failed to introduce direct or circumstantial evidence sufficient to prove beyond a reasonable doubt that the defendant violated O.C.G.A. § 16-6-22.2 by penetrating that child's sexual organ with a replica penis. Connelly v. State, 295 Ga. App. 765, 673 S.E.2d 274 (2009), cert. denied, No. S09C0892, 2009 Ga. LEXIS 260 (Ga. 2009).

**Resentencing did not violate double jeopardy.** — Because defendant's original sentence upon conviction for aggravated sexual battery was not in compliance with the minimum sentence requirements of O.C.G.A. § 17-10-6.1, resentencing did not violate double jeopardy. Bryant v. State, 229 Ga. App. 534, 494 S.E.2d 353 (1998).

**Sexual battery and kidnapping.** — Jury's verdict finding the defendant not guilty of aggravated sexual battery was not necessarily logically inconsistent with

**Application** (Cont'd)

the verdict finding the defendant guilty of kidnapping with bodily injury, where the evidence was that the victim suffered bodily injury during a kidnapping when one of the persons involved sexually assaulted the victim, but the victim could not identify which of the three persons it was. *Kimble v. State*, 236 Ga. App. 391, 512 S.E.2d 306 (1999).

Victim's testimony that the victim had sexual intercourse with defendant, that the defendant placed the defendant's finger in the victim's genitals, placed the defendant's hand on the victim's genitals, placed the defendant's mouth on the victim's breast, and placed the defendant's mouth on the victim's mouth, established the offenses of aggravated sexual battery pursuant to O.C.G.A. § 16-6-22.2, incest pursuant to O.C.G.A. § 16-6-22, and child molestation. *Falak v. State*, 261 Ga. App. 404, 583 S.E.2d 146 (2003).

**Child molestation and aggravated sexual battery counts did not merge.** — Trial court properly refused to merge, for sentencing purposes, defendant's convictions for aggravated sexual battery and child molestation since the charged offense of aggravated sexual battery required proof of penetration, whereas the charged offense of child molestation did not. As a result, the separate acts were neither factually nor legally contained in the other respective count and, therefore, the offenses did not merge. *Daniel v. State*, 292 Ga. App. 560, 665 S.E.2d 696 (2008), cert. denied, 2008 Ga. LEXIS 891 (Ga. 2008).

**Questions requiring prejudgment of case.** — Trial court abused its discretion by prohibiting defense counsel asking prospective jurors whether they had strong feelings about child molestation, and if those feelings would impair their judgment or make it difficult for them to judge the case; but, this error was harmless given the overwhelming evidence of defendant's guilt regarding the numerous acts of sodomy that defendant engaged in with the defendant's child, the scientific evidence which linked his DNA to the semen found in the victim's mouth, and defendant's attempt to allude the author-

ties until the defendant was apprehended in Tennessee. *Meeks v. State*, 269 Ga. App. 836, 605 S.E.2d 428 (2004).

**No reversible error in admitting character evidence via defendant's drug use.** — Defendant's convictions for various sexual offenses against a child were upheld on appeal because no reversible error occurred by the trial court allowing evidence of defendant's character as relevant via a police detective testifying that when the detective arrested the defendant, the detective pulled from the defendant's pocket a suspected methamphetamine glass pipe containing methamphetamine residue; the reviewing court found that the challenged evidence was cumulative since the victim, the victim's mother, and another witness all testified to the defendant's drug usage. *Quarles v. State*, 285 Ga. App. 758, 647 S.E.2d 415 (2007).

**Ineffective assistance of counsel claim did not warrant new trial.** — On appeal from convictions on two counts of child molestation and one count of aggravated sexual battery, the trial court properly found that the defendant was not entitled to a new trial based on allegations of the ineffective assistance of defense counsel because: (1) the manner in which counsel handled alleged exculpatory evidence pertaining to a similar transaction witness and the cross-examination of that witness was part of counsel's reasonable trial strategy; (2) the defendant's reciprocal discovery or due process rights were not violated; and (3) the existence of the information sought was known to the defendant, which could have been obtained with due diligence. *Ellis v. State*, 289 Ga. App. 452, 657 S.E.2d 562 (2008).

With regard to a defendant's conviction for aggravated sexual battery, the trial court did not err by denying the defendant's motion for a new trial, which was based on the defendant's allegations that the defendant received ineffective assistance of counsel, because the defendant failed to establish any deficient performance on the part of trial counsel and, even if any action was arguably deficient, the defendant failed to establish any prejudice to the defense. Specifically, the state's opening statement that the victims

were coming to court seeking justice, safety, and protection were not improper comments on the defendant's punishment or future dangerousness; thus, it was not ineffectiveness for trial counsel to have failed to object to the comments, and with regard to objecting to certain testimony from a father of one of the victims, the court found that trial counsel did not err by failing to renew a mistrial motion and relying upon the trial court giving a curative instruction to disregard the improper comments instead. *Murray v. State*, 297 Ga. App. 571, 677 S.E.2d 745 (2009).

**Counsel not ineffective for failure to call wife as witness.** — On appeal from convictions on one count of aggravated sexual battery and two counts of sexual assault, the trial court did not err in denying the defendant's motion for a new trial as the defendant failed to show that any prejudice resulted from counsel's failure to call the defendant's wife to testify for the defense, and the appeals court refused to speculate that the testimony would have led to an acquittal. *Lee v. State*, 286 Ga. App. 368, 650 S.E.2d 320 (2007).

**Directed verdict of acquittal unwarranted** as: (1) the credibility of the child victim and any conflicts in the trial testimony were matters solely within the province of the jury to decide; (2) physical findings were not required to corroborate the charges of child molestation, aggravated sexual battery, and aggravated child molestation; and (3) the victim's testimony alone was sufficient to authorize the jury to find the defendant guilty of the crimes charged under the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). *Hutchinson v. State*, 287 Ga. App. 415, 651 S.E.2d 523 (2007).

**Severance of offenses.** — Trial court did not abuse the court's discretion in denying the defendant's motion to sever the offenses of child molestation, O.C.G.A. § 16-6-4(a)(1), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), tattooing the body of a minor, O.C.G.A. § 16-5-71(a), and the defendant's motion for new trial on that basis because all of the sex offenses were similar and showed the defendant's common motive, plan, scheme, or bent of mind to satisfy the defendant's

sexual desires, and the circumstances surrounding the tattooing offenses would have been admissible at the trial of the sex offenses to show the defendant's lustful disposition and bent of mind; the case was not so complex as to impair the jury's ability to distinguish the evidence and apply the law intelligently as to each offense. *Boatright v. State*, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

### Jury Instructions

**Jury charge proper.** — While the trial court did not specify that a hand constituted a foreign object, the jury charge as a whole and as adjusted to the evidence would not have misled a jury of ordinary understanding and thus could not have caused defendant to be convicted of aggravated sexual battery in a manner not alleged by the indictment. *Vanwinkle v. State*, 263 Ga. App. 19, 587 S.E.2d 142 (2003).

When the trial court's jury instructions were viewed as a whole and as adjusted to the evidence in the trial, there was no error in the instructions on a charge of aggravated sexual battery, in violation of O.C.G.A. § 16-6-22.2(b), as the instructions would not have misled a jury of ordinary intelligence and could not have caused the defendant to have been convicted of the crime in a manner not alleged in the indictment; the trial court had omitted the words "or anus" from the statutory definition of the offense. *Lester v. State*, 278 Ga. App. 247, 628 S.E.2d 674 (2006).

**Good character charge erroneous.** — In a prosecution for aggravated sexual battery, a good character charge was erroneous as: 1) the charge failed to inform the jury that the defendant's good character was a substantive fact, and that evidence of good character had to be considered in connection with all other evidence; and 2) the charge failed to instruct the jury that good character in and of itself could be sufficient to create a reasonable doubt as to guilt. *Hobbs v. State*, 299 Ga. App. 521, 682 S.E.2d 697 (2009).

### Sentence

**Sentence excessive.** — Sentences of 25 years each imposed by the trial court

**Sentence (Cont'd)**

on the crimes of incest under former O.C.G.A. § 16-6-22(b) and aggravated sexual battery under former O.C.G.A. § 16-6-22.2(c) were void; the maximum sentence for each crime was 20 years at the time the crimes were committed. *Howard v. State*, 281 Ga. App. 797, 637 S.E.2d 448 (2006).

**Sentence not excessive.** — Claim by the defendant that a sentence pursuant to O.C.G.A. §§ 16-6-22.2(b) and

17-10-6.1(b)(2) constituted cruel and unusual punishment because the sentence was grossly out of proportion to the severity of the crime, and that the sentence was overly severe under the circumstances was within the exclusive jurisdiction of the Georgia Supreme Court when the claim challenged the constitutionality of the statutes themselves as the sentence was legally authorized and within statutory limits; thus, the sentence was upheld. *Colton v. State*, 297 Ga. App. 795, 678 S.E.2d 521 (2009).

### **16-6-23. Publication of name or identity of female raped or assaulted with intent to commit rape.**

(a) It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical, or other publication published in this state or through any radio or television broadcast originating in the state the name or identity of any female who may have been raped or upon whom an assault with intent to commit the offense of rape may have been made.

(b) This Code section does not apply to truthful information disclosed in public court documents open to public inspection.

(c) Any person or corporation violating this Code section shall be guilty of a misdemeanor. (Ga. L. 1911, p. 179, §§ 1, 2; Code 1933, § 26-2105; Code 1933, § 26-9901, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — Constitutional guarantee of free speech and press, Ga. Const. 1983, Art. I, Sec. I, Para. V.

**Law reviews.** — For article, "The Supreme Court on Privacy and the Press," see 12 Ga. L. Rev. 215 (1978).

For comment on Cox Broadcasting

Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), holding a state may not impose sanctions on accurate publication of name of rape victim obtained from official court records, see 24 Emory L.J. 1205 (1975); see 9 Ga. L. Rev. 963 (1975).

### **JUDICIAL DECISIONS**

**Limited application.** — O.C.G.A. § 16-6-23 protects only the name and identity of a victim of rape or sexual assault with intent to rape and it does so only up to the point where the name or identity appears in an open court record. *Doe v. Board of Regents*, 215 Ga. App. 684, 452 S.E.2d 776 (1994).

Publication of an article containing a

rape victim's name, age, and street address, and stating, not that she was raped, but that she was "assaulted and robbed," was not a violation of O.C.G.A. § 16-6-23. *State v. Brannan*, 267 Ga. 315, 477 S.E.2d 575 (1996).

**Right to privacy outweighed by legitimate public interest.** — Victim of a sexual assault could not recover damages a

from a newspaper for invasion of privacy since, when the victim shot and killed the perpetrator of the assault, the victim became the object of legitimate public interest and the newspaper had the right under the United States and Georgia Constitutions to accurately report facts regarding the incident, including the victim's name. Macon Tel. Publishing Co. v. Tatum, 263 Ga. 677, 436 S.E.2d 655 (1993).

**O.C.G.A. § 16-6-23 contravened the First and Fourteenth Amendments of the United States Constitution.** Dye v. Wallace, 274 Ga. 257, 553 S.E.2d 561 (2001).

**Construction of O.C.G.A. § 16-6-23** is not to be rendered meaningless but must be construed so as to achieve the humane and crime-reporting purposes which prompted its passage. Doe v. Board of Regents, 215 Ga. App. 684, 452 S.E.2d 776 (1994).

**Legislative intent.** — By passing the Rape Shield Statute, the legislature has stated as a matter of public policy that, where the crime involved is rape, sexual assault, or attempted sexual assault, the legitimate public interest in the identity of the victim does not outweigh the victim's privacy interest. Macon Tel. Publishing Co. v. Tatum, 208 Ga. App. 111, 430 S.E.2d 18 (1993).

**State has a legitimate interest in protecting the privacy of a sexual assault victim.** Doe v. Board of Regents, 215 Ga. App. 684, 452 S.E.2d 776 (1994).

**Establishment of truth of rape charge not required.** — Since a victim's claim that she was raped was a part of

university police reports concerning the incident, the fact that she had initially misrepresented the circumstances of the attack did not alter the assertion of rape which must be accepted as true for purposes of O.C.G.A. § 16-6-23. It was not required that the matter be established as true in order for the identity of the victim to be protected and she was entitled to an injunction against disclosure of her name and identity. Doe v. Board of Regents, 215 Ga. App. 684, 452 S.E.2d 776 (1994).

**Truthful information in public court documents excepted.** — States may not impose sanctions on publication of truthful information contained in official court records open to public inspection. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), for comment, see 24 Emory L.J. 1205 (1975).

**Applicability of Open Records Act.** — Pursuant to the Open Records Act, a campus newspaper was entitled to university police reports concerning an incident of alleged rape, but, in accordance with the rape victim confidentiality statute, with the victim's name and identifying information redacted. Doe v. Board of Regents, 215 Ga. App. 684, 452 S.E.2d 776 (1994).

**Imposition of civil liability based on a newspaper's publication** of a rape victim's name, in violation of a criminal Rape Shield Statute, was permissible under the holding of Florida Star v. B.J.F., 491 U.S. 524, 109 S. Ct. 2603, 105 L.Ed.2d 443 (1989). Macon Tel. Publishing Co. v. Tatum, 208 Ga. App. 111, 430 S.E.2d 18 (1993).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 62A Am. Jur. 2d, Privacy, § 116.

**C.J.S.** — 77 C.J.S., Right of Privacy and Publicity, §§ 2, 7, 21 et seq.

**ALR.** — Propriety of publishing identity of sexual assault victim, 40 ALR5th 787.

#### 16-6-24. Adoption of ordinances by counties and municipalities which proscribe loitering or related activities.

Nothing contained in this chapter shall prevent any county or municipality from adopting ordinances which proscribe loitering or related activities in public for the purpose of procuring others to engage

in any sexual acts for hire. (Code 1933, § 26-2023, enacted by Ga. L. 1979, p. 131, § 1.)

**Cross references.** — Restriction on registered offenders residing, working, or loitering within certain distance of child care facilities, churches, schools, or areas where minors congregate; penalty for violations; civil causes of action, § 42-1-15.

### JUDICIAL DECISIONS

Cited in City of Atlanta v. McCary, 245 Everett, 155 Ga. App. 162, 270 S.E.2d 345 Ga. 582, 266 S.E.2d 193 (1980); State v. (1980).

### RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of loitering statutes and ordinances, 72 ALR5th 1.

### 16-6-25. Harboring, concealing, or withholding information concerning a sexual offender; penalties.

(a) As used in this Code section, the term "law enforcement unit" means any agency, organ, or department of this state, or a subdivision or municipality thereof, whose primary functions include the enforcement of criminal or traffic laws; the preservation of public order; the protection of life and property; or the prevention, detection, or investigation of crime. Such term shall also include the Department of Corrections and the State Board of Pardons and Paroles.

(b) Any person who knows or reasonably believes that a sexual offender, as defined in Code Section 42-1-12, is not complying, or has not complied, with the requirements of Code Section 42-1-12 and who, with the intent to assist such sexual offender in eluding a law enforcement unit that is seeking such sexual offender to question him or her about, or to arrest him or her for, his or her noncompliance with the requirements of Code Section 42-1-12:

- (1) Harbors, attempts to harbor, or assists another person in harboring or attempting to harbor such sexual offender;
- (2) Conceals, attempts to conceal, or assists another person in concealing or attempting to conceal such sexual offender; or
- (3) Provides information to the law enforcement unit regarding such sexual offender which the person knows to be false information commits a felony and shall be punished by imprisonment for not less than five nor more than 20 years. (Code 1981, § 16-6-25, enacted by Ga. L. 2006, p. 379, § 17/HB 1059; Ga. L. 2007, p. 47, § 16/SB 103.)

**Editor's notes.** — Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear

an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

**Law reviews.** — For article on 2006 enactment of this Code section, see 23 Georgia St. U.L. Rev. 11 (2006).

## JUDICIAL DECISIONS

**Indictment insufficient.** — Because the indictment filed against both the defendants failed to allege that the defendants knew or reasonably believed that the person listed therein was an unregistered sexual offender, the trial court erred

in denying the defendants' demurrer to the indictment as both defendants could admit to every allegation contained therein and still be innocent of the offense charged. *Harris v. State*, 290 Ga. App. 500, 659 S.E.2d 870 (2008).

















